

Competitive enforcement

Comparative analysis of Australian
building regulatory enforcement regimes



Jeroen van der Heijden

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Preface

The private sector and other non-governmental parties are becoming increasingly involved in regulation and regulatory enforcement worldwide – often mutually competing or, as a sector, competing with the public sector. This book provides insight into non-governmental involvement in the regulation and regulatory enforcement of what appears to be a neglected subject in the study of regulation, the built environment.

In this book I introduce a methodical approach for comparative analysis of different policy instruments and different organisational arrangements of responsibilities for building regulation and enforcement; possibly in other fields of policy as well. I furthermore show that different forms of competition have specific repercussions on issues such as effectiveness, efficiency, equity and accountability.

I hope this book will demonstrate the value of building control to scholars studying regulation, and the value of regulation studies to scholars studying the built environment. I hope this book will assist policy-makers to obtain a better understanding of the possible implications of future policy that must be taken to rise to the challenge our built environment offers – for example, reducing the use of fossil fuels and minerals; the use of generic resources; waste generation; and air, water and land pollution. Furthermore, I hope this book will assist all those interested in (building) regulation and regulatory enforcement in further exploration of the study of regulation, grasping opportunities presented by the construction, maintenance and the use of buildings.

The research that was the foundation for this book has been conducted as a part of the OTB Research Institute for Housing, Urban and Mobility Studies' (OTB) research into the field of building regulatory regimes. OTB, an institute within Delft University of Technology, the Netherlands, has explored and researched the field of building regulatory regimes for many years. The building regulatory studies at this institute focus on the content and formulation of requirements, as well as on the methods and procedures that have been developed to ensure that demands are actually met in practice. Through international comparative projects, the effectiveness, efficiency and transparency of various building regulatory systems have been analysed in previous OTB projects.

In carrying out this study and writing this book, I have been supported by many individuals and institutions. My debt to all of them is enormous, as is my gratitude. OTB Research Institute for Housing, Urban and Mobility Studies, together with the Dutch Ministry of Housing, Spatial Planning and the Environment; Bouwend Nederland, a Dutch association of parties in the development industry, Stichting Bouw Research, a knowledge centre for domestic, commercial and industrial building; and Vereniging Eigen Huis, a Dutch consumers organisation for (future) homeowners, supplied a generous budget which made it possible for me to visit Australia and carry out an extensive series of interviews with key individuals in the development industry and the building regulatory enforcement industry.

I wish to thank all these people for agreeing to interviews and providing me with invaluable information and their personal experiences with the various Australian building regulatory regimes. To protect your anonymity I cannot, unfortunately, personally thank you all here. Still, I wish to say that I was truly overwhelmed by your help and support. Special thanks go to Greg du Chateau, associate at Phillip Chun & Associates Pty Ltd and former President of the Australian Institute of Building Surveyors (AIBS). Without his help and ongoing support in finding contacts and information the empirical research I present in this study would have been impossible. Thanks to Lara for taking such good care of me when you and Greg had me staying at your house. I furthermore wish to thank all the organisations that provided me with a desk to work from: Planning SA in Adelaide; Phillip Chun & Associates Pty Ltd in Melbourne; and Queensland University of Technology in Brisbane.

Regarding the theoretical part of this book, I have received invaluable advice from a variety of people. Special thanks go to Johan den Hertog, lecturer in Competition Law and Economics, and Social Competition and Regulation Coordinator of the Economics and Law Master's programme at Utrecht University, the Netherlands. Particular thanks go to Neil Gunningham, Professor at the Australian National University, Canberra, Australia observations have been of great value to me; and to Peter May, Professor at the University of Washington, Seattle, US.

Last, but not least, I wish to thank the team supervising my work at OTB Research Institute: Professor Jitske de Jong, Professor André Thomsen, Professor Henk Visscher and Frits Meijer for their ongoing advice, criticism and moral support.

Jeroen van der Heijden
Delft, the Netherlands
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Part 1

Building the regimes

1 Introduction

The construction and operation of buildings has a major impact on our lives. Most people in modern societies spend much of their time in and around buildings each and every day. Moreover, with increased urbanisation, it is expected that in the future more and more people will live in an urban setting – a built environment. It is assumed that by the middle of the century more than two-thirds of the world's population will be urban (Castells, 2002: 549; UN, 2005). The development industry and related sectors have a large impact on our lives as they form one of the main economic activities in every western nation. They account for about 15 percent of each country's gross domestic product (Seaden and Manseau, 2001: 183) since in our daily lives, much economic activity, the production of goods and services, is performed in or around buildings. The construction, maintenance and use of buildings also have a major impact on the natural environment – and thus on our own environment, but perhaps even more so on future lives as the construction and operation of buildings contribute to the extraction of fossil fuels and minerals; the use of generic resources; waste generation; and air, noise, land and water pollution, both on a local and global level (Liyin *et al.*, 2006: 243-244). Each year, globally, 40 percent of all energy and 16 percent of all water is consumed for the construction and operation of buildings. Furthermore, each year, globally, 25 percent of all raw timber and 40 percent of all raw stone, gravel and sand is used to construct buildings (Roodman and Lenssen, 1995). In Europe¹ 48 percent of all waste originates from the construction and demolition of buildings (EEA, 2007: 279). Considering all of the above, the built environment would appear to be a challenge, but it may also provide opportunities, on a global and local level.

A variety of policies may exist to rise to this challenge and grasp the opportunities presented by the construction, maintenance and use of buildings. This book is about one of these strategies: building regulation. I use regulation in a broad sense and include both black letter regulations and their formal enforcement, but also informal regulation and their enforcement. As such, I will include statutory regulations and building codes, but also informal codes of conduct; regulatory enforcement through governmental building surveying agencies, but also self-regulating manufacturers of prefabricated houses; legally authorised private building certification, but also voluntary certification schemes. The main focus of this book is on regulatory enforcement regimes. In this book, regulatory enforcement regimes are regarded as the distribution of responsibilities in regulation and enforcement between governmental and non-governmental agents and agencies on three levels:

¹ The fifteen 'old' European Union and the European Free Trade Association countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

establishing building regulations; establishing the rules and an overview of the enforcement of building regulations; and the implementation of building regulations.

1.1 Present day building regulations

Present day building regulations in developed economies seem to have their origins in the nineteenth century when changes in society, brought about by the industrial revolution; the urgent need for housing a growing number of immigrants; and the scientific view that there was a link between public health and the built environment, gave governments reasons to increase their involvement in the building industry. Since then, building regulations have constantly been adapted to suit present-day and future needs. However, in terms of implementation, some aspects of building regulations are less subject to change:

- Traditionally a separation is made in planning regulations and technical building regulations; the former focusing on town planning and zoning and thus regulating issues such as volume, connection to public services and sometimes building aesthetics; the latter focusing on the technical aspects of buildings, such as construction, conveniences and fire safety (see, for instance, present day building regulations in Australia, Canada, the United States, and different European countries: ABCB, 2004; CCBFC, 2005; ICC, 2006; Sheridan *et al.*, 2002).
- Separation is made in the assessment of (intended) buildings prior to occupation and assessment of existing buildings (*ibid.*). The former is often separated into the assessment of building plans against the building regulations and the assessment of buildings under construction (*ibid.*);
- Building regulations are traditionally enforced through governmental agencies (Hansen, 1985; Sheridan *et al.*, 2002; PC, 2004).

Change however is in the air. Since roughly the 1990s, these government ‘monopolies’ have opened up and the private sector has entered building regulatory enforcement regimes in countries such as Australia (ABCB, 1999; Captenakis, 2004; Du Chateau, 2000), Canada (BCMh, 2007), New Zealand (Hunn, 2002; Yates, 2003) and parts of Europe (Meijer and Visscher, 2006; Meijer *et al.*, 2003). The private sector is often introduced alongside a traditional public system of development assessment, resulting in a multi-tier system of building regulatory enforcement. In all of these examples, relationships between private sector players, but also between the public sector and the private sector are or will become competitive: clients are or will be given a certain amount of freedom to choose which party to involve in statutory development assessment when planning or constructing a building.

This development of private sector involvement seems to fit into the rise of a 'new regulatory order', which goes by many names, such as the new regulatory state (Braithwaite, 1999, 2000; Mazerolle and Ransley, 2005: Chapter 2; Walby, 1999: 123-125), neo-liberalism (Barry *et al.*, 1993) or regulatory capitalism (Levi-Faur, 2005); and the related 'surge in self-regulatory regimes' and 'rise of new instruments of regulation' in advanced economies world-wide (Levi-Faur, 2005: 22; Gunningham and Rees, 1997a: 363). And following these developments, self-regulation, or private sector involvement in regulatory enforcement regimes, has become an important topic in regulatory literature with a number of authors taking part (e.g. Andrews, 1998; Ayres and Braithwaite, 1992; Boddewyn, 1988; Fairman and Yapp, 2005; Gunningham and Rees, 1997b; Husye and Parmentier, 1990; Núñez, 2007; Ogus, 1995; Price and Verhulst, 2005; Price and Verhulst; 2000, Rees, 1988).

However, the introduction of private sector involvement in building regulatory enforcement regimes appears to be a subject that has been neglected in these studies. Even more notably, building regulation seems generally to be a neglected subject in studies on regulation (May and Burby, 1998: 162; McLean, 2003: 50). A noteworthy absence, as the quality of the built environment does have a strong impact on daily life and studies on social regulation² traditionally do appear to pay much attention to 'environmental' issues that directly or indirectly affect our lives, such as regulation of the natural and occupational environment (e.g. Braithwaite, 1985; Gunningham and Grabosky, 1998; Hawkins, 1984)³.

In these studies on regulation, scholars, policy-makers and administrators are presented with a wide variance of insights on the quality of regulations; enforcement strategies to reach the underlying goals of regulations; and styles that inspectors might use in order to comply with regulations. It might very well be that these insights can be applied to the study of building regulations as well. This will be one of the aims of this book. The main subject of this book, however, is the organisation of enforcement through regulatory enforcement regimes; and in particular, building regulatory enforcement regimes.

² Traditionally, a separation is made between economic and social regulation (Rasmusen (2005) *Economic Regulation and Social Regulation*. American Law and Economics Association Annual Meetings, paper 47).

³ And it is not only in the study of regulation that 'building regulation' appears to be a neglected subject, but also in the study of the built environment. From a survey of a random sample of five leading magazines from journals in 'the Construction and Building Technology category' (Building Research International; Environment and Planning B; Structural Safety; the Journal of Safety Research; and the Journal of Construction Engineering and Management) I learned that out of 2,794 articles published between 1997 and 2007, only 15 were on the topic of building regulations, taking the discussion beyond that of case or 'best-practice' descriptions. In these 15 articles, little to no attention was paid to literature, theories and general assumptions in the study of regulation.

Through this book, I will demonstrate how different organisational arrangements for regulatory enforcement can be classified, analysed and compared. This will contribute to the search for ‘optimal’ regulation (e.g. Gunningham and Grabosky, 1998: 4) in terms of effectiveness, efficiency, equity and accountability and contribute to debates on that ‘new regulatory order’ (e.g. Braithwaite, 2000; Levi-Faur, 2005). The central argument for this undertaking will be that the organisational arrangement of regulatory enforcement might well be of much importance in the search for ‘optimal’ regulation, but has not yet been analysed as such. Furthermore, I will contribute to the understanding of building regulations and the enforcement of these by applying some of the major debates in regulatory literature to the subject of building regulation and by using my research on building regulatory enforcement regimes as a source of empirical data.

As such, this book is intended for scholars interested in regulation, whether they have a general interest in the study of regulation or a specific interest in building regulation or joint fields of social regulation. The book is also intended for government officials who have regulatory enforcement responsibilities; legislators; controllers in both private and public agencies; and all those who have an interest in or are concerned with regulation and enforcement, whether because they care for the quality of the built environment or have a general interest in regulatory change.

In this introductory chapter, I will give initial impetus to the theoretical framework of building regulatory enforcement regimes, which I will introduce in the remainder of Part I, analyse and evaluate in Part II, and compare and discuss in Part III. First of all, I will briefly touch upon previous literature that aimed at optimising regulation. Secondly, I will identify some debates that appear to guide the search for ‘optimal’ regulation in regulatory literature. Thirdly, I will briefly look at the concept of private law enforcement. Fourthly, I will outline the normative basis of my work, the methodology I will use throughout this book, and the various evaluation criteria I will use to measure the outcomes of different regulatory enforcement regimes. Finally, I will describe the remainder of this book.

1.2 The search for ‘optimal’ regulation

My search for regulatory enforcement regimes can be considered to be in line with the work of Ayres and Braithwaite (1992) and Gunningham and Grabosky (1998). The former put into operation the concept of responsive regulation; the latter took the idea of responsive regulation one step further and turned it into smart regulation.

Responsive regulation can be considered to be a reaction to traditional command-and-control regulation. The key of responsive regulation is the notion

that rejecting punitive regulation is naïve, though total commitment to it might lead to employing unnecessary means. The authors claim that ‘The trick of successful regulation is to establish a synergy between punishment and persuasion’ (Ayres and Braithwaite, 1992: 25). It is not so much based on this idea that their work has been groundbreaking – other authors before Ayres and Braithwaite have introduced similar concepts; for instance the Scholz’ (1984) ‘Tit-for-Tat’ strategy; Seidman’s (1984) ‘problem-solving strategy’; and Bardach and Kagan’s (1982: 130-150) ‘Reciprocity’, which combines responsiveness (!), forbearance and the provision of information by an inspector – but their structural approach to this idea. Ayres and Braithwaite introduce two conceptual enforcement-pyramids: a pyramid based upon a hierarchy of sanctions; and a pyramid based upon a hierarchy of enforcement strategies. The least sweeping interventions in enforcement are put at the base of the pyramids; the most drastic interventions at the top. According to the authors, the strength of this approach lies in the possibility that an enforcer has to switch between different strategies (Ayres and Braithwaite, 1992). This idea of an inspector responding to the behaviour of the inspected – I will use the term ‘regulatee’ to refer to the subject of law – has been food for thought for scholars in the studies of regulation for a long time now, and still there is a lot of discussion on how to put the concept of responsive regulation on the regulatory shop-floor (e.g. Decker, 2007; Nielsen, 2006) into operation.

Gunningham and Grabosky (1998) have taken responsive regulation as a point of departure for their highly influential analysis of environmental regulation: *Smart Regulation*. As Ayres and Braithwaite, the authors of *Smart Regulation* focus on the possibilities of different enforcement strategies and different sanctions. To this they add a focus on the possibility of different parties in the enforcement process. According to Gunningham and Grabosky, better regulatory systems involve both a mix of enforcement parties, or actors, and a mix of enforcement instruments. The mix of enforcement actors consists in traditional state controllers, private sector controllers and third party controllers. The mix of instruments consists in different levels of coercive policy instruments, such as different economic incentives (ibid.: Chapter 6). The idea of different enforcement actors has been food for thought for scholars in the studies of regulations as well. But like the discussions on responsive regulation, it still appears to be difficult to put into operation the concept of different enforcement actors and instruments on the regulatory shop-floor (e.g. Baldwin, 2005; Sparrow, 2000).

As mentioned, my search will be in-line with these two major works, but will, however, differ from these as I shall take the organisation of regulatory enforcement as a starting point. I agree with Ayres and Braithwaite and Gunningham and Grabosky that legal pluralism might very well be the key to ‘optimal’ regulation (e.g. Ayres and Braithwaite, 1992; Gunningham and Grabosky, 1998). But what these works on legal pluralism miss (see Chapter 2

for an overview) is a methodical approach to a comparative analysis of this pluralism – the mixes of actors, instruments and interaction.

Furthermore, in practice, policy instruments often get implemented alongside one another resulting in a certain relationship between the instruments (compare with Barnard, 1938: Chapter 8). These relationships might very well have an impact on the actual performance of the instruments. In regulatory literature, little attention has been paid to relationships that might exist when regimes are implemented together. I expect, as I will expound in Chapter 3, that instruments when implemented alongside one another can support, complement, replace or compete with one other (compare with Barnard, 1938: 101-102; Jordan *et al.*, 2005: 481). The competitive relationship, competitive enforcement, is of interest to me for two reasons. Firstly, when public monopolies of statutory building assessment are opened up to non-governmental involvement, this is often done, as has been illustrated, to introduce competition. Competition is expected to lead to more effective and efficient enforcement of building regulations by bringing in competition that might simultaneously result in the decline of equity (Burkey and Harris, 2006) and accountability (May, 2007). Secondly, when introducing a competitive two-tier system of statutory building assessment, not only is competition between governmental and non-governmental parties introduced, but also competition within the participating group of non-governmental parties. More insight into these two essentially different forms of competition might give a better understanding of the concept of competitive enforcement and assist the search for ‘optimal’ regulation.

1.3 Debates in regulatory literature

In this brief introduction to responsive regulation and smart regulation – both models will be discussed in more detail in Chapter 2 – three apparently recurring key-elements from different debates on regulatory literature emerge: enforcement style, enforcement strategy and enforcement parties. A fourth key-element in these debates can be found in the quality of legislation. For now, I will briefly introduce terminology used in the various debates. In Chapter 2, I will discuss the debates more extensively and relate these debates and terms to the regulation of the built environment.

In different debates on regulatory literature, the term enforcement style is often used to describe the relationship between the inspector and inspected (Hutter, 1997; Kagan, 1994) and will be used as such in the remainder of this book. In regulatory literature, a wide variety of possible enforcement styles is being described. Based on the responsive regulation philosophy (Ayres and Braithwaite, 1992), most styles seem to fit on a sliding scale that is defined by a consulting, facilitative approach at one end to a rigid, legalistic approach at

the other end (for an overview, see May and Wood, 2003).

The term enforcement strategy is often used to describe tactical choices made by enforcement agencies and the type of actions these agencies take (e.g. Hawkins, 1984; Kagan, 1994; May and Burby, 1998) and will be used as such in the remainder of this book. Tactical choices mostly refer to issues such as allocating resources, setting targets and monitoring outcomes. Types of action mostly refer to issues such as sanctions and incentives. Sometimes division is made between deterrence-based strategies and compliance-based strategies (e.g. Hawkins, 1984). The first aims at deterring non-compliance prior to law breaking (Reiss, 1984) or aims at sanctioning non-compliance after the law has been broken (Hawkins, 1984); the consequences of non-compliance must be feared (e.g. Ogus, 2002). The second aims at spontaneous obedience of regulations (Hawkins, 1984; Kagan, 1994) and aspires to maximum effectiveness of public means and activities by encouraging those features that bring about spontaneous obedience and weakening those features that give rise to non-compliance (Parker, 2000). Spontaneous obedience is thought to proceed from feelings of moral disapproval with breaking the law (Tyler, 1990).

The focus of the debate on enforcement parties is which parties can be involved in enforcement. Traditionally, the government was considered to regulate and enforce (see above)⁴. As mentioned above, contemporary regulatory literature identifies a wide range of possible parties that can be involved in enforcement, such as corporate organisations, professional bodies and public interest groups (e.g. Gunningham and Grabosky, 1998). Furthermore, these parties can act as self-regulating or co-regulating bodies within an institutional setting (Gunningham and Rees, 1997a).

A topic in the debates on the quality of legislation is whether legislation will lead to compliance (e.g. Bardach and Kagan, 1982; Griffiths, 2003; Seidman, 1984). Characteristics of analysis are adequacy, feasibility, legal certainty and adaptability (van Rooij, 2006: 32-43). Adequacy signifies the extent to which formal goals of the regulations are fulfilled when these are being complied with (Hoogerwerf and Herweijer, 2003). Feasibility signifies the regulatee's ability to comply with the regulations (van Rooij, 2006: 36; Seidman, 1984: 337-338; Scholz, 1984: 391-392). Certainty signifies there is little misunderstanding in what the regulations mean and how these are enforced (van Rooij, 2006: 38-39; Scholz, 1984: 386-387). Adaptability signifies the possibility of adjusting the regulations to specific actual and future circumstances (van Rooij, 2006: 40).

⁴ However, what is traditional? When tracing back the history of regulatory enforcement (Braithwaite, (2006) *Responsive Regulation and Developing Economies*. *World Development*, 34: 884-898), the following stages occur: a period of principally private enforcement, roughly up to the industrial revolution; subsequently, a period of principally public enforcement through governmental agencies, roughly until the mid-1980s; and from then on, a period of mixing private and public involvement in law enforcement, which continues today.

In this book, I will join these debates. I will try to find the key-issues from these debates and illustrate these with examples from the built environment. I will, furthermore, use the key-issues from these debates to draw up a framework that will add to the reliability and validity of a comparative analysis of building regulation and, as such, to a better understanding of building regulation.

1.4 Private enforcement of law

As has already been illustrated, when regulatory enforcement regimes are introduced, co-existing in statutory building assessment, the common choice is a competitive relationship. The choice of a competitive relationship appears to be a general choice in another field of policy as well. As a solution to the crisis in governmental governance, Osborne and Gaebler (1992: 309) advocate a 'market-oriented government' that should do 'more steering and less rowing'. According to Osborne and Gaebler, government should become more 'entrepreneurial' (*ibid.*: 20-22) and the debate on how to solve the issues that are considered to come from traditional public governance should no longer focus on 'public versus private' but on 'monopoly versus competition' (*ibid.*: 79-81). Competition thus rewards innovation – improving quality, keeping down costs – and thus provides an incentive (*ibid.*: 82-92).

Early advocates of 'private law enforcement' (Landes and Posner, 1975) likewise used an argument that assumed that competitive private sector enforcement would lead to greater compliance with public regulation, compared to the same costs for monopolistic or public enforcement – the 'biggest bang for the regulatory buck' modern day regulatory scholars would say (e.g. Gunningham, 2002: 5; Sparrow, 2000: 34). Their argument is as follows (Landes and Posner, 1975): the private sector enforcement industry has to detect breaches of regulations to generate income; but the number of offences declines as the chance of getting caught rises – the authors follow the economic theory of deterrence and look at income as (a part of) the fine issued that goes to the enforcement agent. With a decline in offences, the enforcement industry, seeking income, will adapt its level of enforcement activity to find more offences. In the case of Chapters 5-9 of this book, the enforcement agents, private building certifiers, are not seeking breaches to fine, but clients to serve. I assume, nevertheless, that the process of adapting enforcement activity in order to generate more income, in the case of this paper attracting more clients, will be comparable (see also Garoupa and Klerman, 2002; Polinsky, 1979).

In these two examples, two fundamentally different forms of competitive enforcement can be noted: competition amongst enforcement actors that are involved in a regulatory enforcement regime and competition between different co-existing regimes – multi-tier systems.

1.5 Research basis, method, and evaluation criteria

Normative basis

The questions that I address in this book are: what are the implications of adopting a particular organisational arrangement of regulatory enforcement and not another? What are the implications of adopting different organisational arrangements of regulatory enforcement in a competitive system? To what extent (how) can non-governmental agents and agencies be involved in an organisational arrangement of regulatory enforcement, bearing in mind criteria such as effectiveness, efficiency, equity and accountability? To what extent is government involvement necessary in the organisational arrangement of regulatory enforcement, bearing in mind the same criteria? What are the implications of introducing competition between regulatory enforcement regimes? And what are the implications of introducing competition within regulatory enforcement regimes?

These are normative questions and it is from this standpoint that I approach my analysis. The various regulatory enforcement regimes introduced and analysed in this book may look highly instrumental, though they are only tools for addressing the normative questions. These tools are introduced, as will be exemplified in Chapter 3, because regulatory literature lacks a typology of regulatory regimes that, to me, seems suitable for reliable and valid comparative research of organisational arrangements for regulatory enforcement and regulatory instruments.

Research method

As stated in the first pages of this book: my aims in analysing various building regulatory regimes are two-fold. Firstly, building regulation is a neglected subject in the study of regulation (May and Burby, 1998: 162; McLean, 2003: 50). Through this book, I hope to contribute to a general understanding of building regulation and show its value to the study of regulation. Secondly, the study of regulation lacks, as illustrated, a clear typology to address those normative questions I have just introduced. In order to be able to address these questions, I introduce and apply a typology of regulatory enforcement regimes.

To begin with my first aim, in Chapter 2 I present an overview of classic and contemporary literature on the study of regulation. In examining existing literature, I have needed to be selective. I have tried briefly to introduce general works on regulation, regulatory change, enforcement and compliance. Where possible, I have introduced criticism to these works – either positive, or negative. I have also tried to illustrate the relationship between the works and their outcome by introducing the research that these works gave rise to. I have chosen to introduce these main works following, what I consider to be, four major debates on regulatory literature: the quality of law, enforcement

strategies, enforcement styles, and enforcement agents or agencies. Where possible, I have linked abstract or conceptual ideas from these debates to illustrate examples from research on the built environment.

As the reader will notice, I give particular attention to literature on regulation of the natural environment. I have two reasons for doing so. Firstly, many issues that are important in this field – such as the use of generic resources; waste generation; and air, noise, land and water pollution – are also important issues in the field of building regulation. Secondly, regulatory research in the field of the natural environment is, as I will show in Chapter 2, highly progressive, and often followed in other fields of policy as well.

My second aim is to introduce a typology of regulatory enforcement regimes, and apply it to analyse a competitive relationship between the regimes. In Chapter 3, I built a framework that serves as a basis for the different regulatory enforcement regimes. The framework is built on an overview of the literature, which I present in Chapter 2, and institutional and systems theory. The different regulatory enforcement regimes are illustrated with cases of building regulatory instruments and building regulatory enforcement. I have selected these cases from journal papers, government reports and, where necessary, additional information was sought on the websites of the regulatory agencies mentioned. Again, I have been selective in examining the literature and have restricted myself to cases from North America, Australia and Europe. From this inventory I learned, amongst others, that in the Netherlands, for instance, there is a single public regime, with plans to introduce private sector involvement shortly, whereas, for instance, Australia and Canada have public regimes and regimes based on private sector involvement, introduced in the 1990s. Furthermore, I learned that the regimes in Australia appear to have a competitive relationship, whereas in Canada, regimes appear to have a supportive relationship. This is why I have chosen Australia to analyse the implications of a competitive relationship between different building regulatory enforcement regimes, or competitive enforcement.

In Chapters 4 to 9, I apply the typology introduced to examine building regulatory enforcement regimes in Australia; these chapters are the empirical component of this work. The overall outline of the empirical research in Chapters 4 to 9 is based upon Yin's methodology on case studies (Yin, 2003). According to Yin (*ibid.*: 1), case studies are the preferred strategy for research when 'how' or 'why' questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context⁵. The empirical research furthermore shows

⁵ Compare with other works on case study research, for instance work by Hamel, Dufour & Fortin (1993) *Case study methods*, Newbury Park; Gomm, Hammersly & Foster (2000) *Case study method key issues*, key texts; and Johanson (2003) *On Case Study Methodology*, in: Wilkinson, Hurol & Vestbro (Eds.) *Methodologies in housing research*.

characteristics of monitoring policy outcomes and evaluating policy performance, as described by Dunn (2003: especially Chapters 6 and 7). Monitoring policy outcomes answers the question: How and why did a policy outcome occur? Evaluation answers a related but different question: Of what value is the outcome?

Monitoring is the analytical procedure used to produce information about the causes and consequences of public policies. Monitoring, since it permits analysts to describe relationships between policy-programme operations and their outcomes, is taken as the primary source of knowledge about policy implementation (*ibid.*: 277). Monitoring is about policy outcomes. Dunn divides these into two types of policy outcomes: outputs and impacts (*ibid.*: 280). Policy outputs are the goods, services or resources received by target groups and beneficiaries. Policy impacts are actual changes in behaviour or attitudes that result from policy outputs – sometimes referred to as outcome. Dunn also makes a division between policy inputs and policy processes (*ibid.*: 281). Policy inputs are the resources used to produce outputs and impacts. Policy processes are the administrative, organisational and political activities and attitudes that shape the transformation of policy inputs into policy outputs and impacts. One of the methods Dunn describes to perform monitoring is ‘research and practice synthesis’ (*ibid.*: 297-301). This methodology focuses principally on available information. Dunn describes two primary sources of available information: case studies of policy formulation and implementation and research reports that address relations among policy actions and outcomes.

Case studies however can be an easy subject to criticism on validity and reliability of the research. To tackle this criticism, Yin has developed a methodology on case studies by addressing the case study as a way of investigating an empirical topic following a set of pre-specified procedures (Yin, 2003: 32-38). Within this methodology, Yin distinguishes single- and multiple-case studies (*ibid.*: Chapter 2). Multiple-case studies are perceived as more compelling and robust than single case studies; yet, multiple-case studies might be less rational from a resource point of view (*ibid.*: 46-47). Within this type of research, multiple cases are analysed in order to obtain insight into the phenomenon of study. Cases will be selected so that they predict similar results, a literal replication, or contrasting results, but for predictable reasons, a theoretical replication.

According to Dunn, ‘evaluating policy performances’ has two aspects: the use of various methods to monitor the outcomes of public policies and programmes and the application of some sets of values to determine the value of these outcomes to some person, group or society as a whole (Dunn, 2003: 108, 358-359). By involving different parties that affect and are affected by a policy or programme, the evaluation takes on some characterisations of a so-called decision-theoretic evaluation (*ibid.*: 364). One of the main purpos-

es of decision-theoretic evaluations is to link information about policy outcomes with the values of multiple stakeholders and therefore overcome problems such as underuse and non-use of performance information, the ambiguity of performance goals, and multiple conflicting objectives (ibid.: 363-364). A user survey analysis (ibid.: 367-368) can be used to involve the different parties. User survey analysis is a set of procedures for collecting information about the availability of a policy or programme from intended users and other stakeholders. The primary instrument for collecting information is an interview protocol with a series of open-ended questions (ibid.: 367-368). The secondary instrument is collecting and analysing existing research reports on the subject (ibid.).

Cases of Australian building regulatory enforcement regimes have been selected using Yin's methodology for multiple-case study research (Yin, 2003: 32-47). Based on available information – existing documentation in journals, research reports and on websites – I found that in the states of Victoria, New South Wales, Queensland and South Australia, building regulatory enforcement regimes are in competition with one another and that in the Australian Capital Territory the present building regulatory enforcement regime has replaced a former two-tier competitive system of building regulatory regimes. I have selected these cases for further analysis as I expected they might predict similar results, a literal replication, or contrasting results but for predictable reasons, a theoretical replication (compare with Yin, 2003). In all cases selected, private sector involvement has been in use for at least ten years; and in all cases selected, most participants that joined the interviews have been working in, or were subject to, both the old 'public monopoly' and the new competitive two-tier system.

Then, according to Dunn (2003), the primary instrument for collecting additional case information was a series of interviews. I have chosen to carry out semi-structured interviews with representatives of the building industry – such as architects, engineers, consultants and constructors; and the building regulatory enforcement industry – such as municipal building control officials, private certifiers and state government officials. During the interviews, additional existing research reports have been collected.

Interviewees were selected using so called 'snowball' sampling (Longhurst, 2003). This snowballing was carried out in four phases until it was found that interviewees were cross-referencing. In total, 96 people were approached as representatives of an organisation. A total of 49 interviews were carried out, in which a total of 61 people participated. Interviews were recorded and transcribed in a structured interview report that was sent to the interviewees for validation or comments. Comments on the reports were processed and revised interview reports were sent to interviewees for validation. The recordings and validated interview reports are the basis for the evaluation of the case's building regulatory enforcement regimes in Chapters 5 to 9. Appendix

G gives an overview of the organisations interviewees are related to and the position(s) the interviewees hold; Appendices A to E give an overview of interview protocols used.

Atlas.ti, qualitative data analysis software, was used for coding and analysing interview data. A list of codes can be found in Appendix H.

Evaluation criteria

In Chapters 5 to 9, evaluation of the different case's building regulatory enforcement regimes is structured based on different evaluation criteria: effectiveness, efficiency, equity and accountability. In policy analysis there is, unfortunately, no general agreement on which evaluation criteria should be used to analyse and evaluate policy or policy instruments successfully, or what criteria should be satisfied in order to rate that policy or those instruments as 'successful' (Bovens *et al.*, 2001: 25-32; Gunningham and Grabosky, 1998: 25-32; Rowe and Frewer, 2000; Runhaar *et al.*, 2006). Generally, effectiveness, efficiency and equity are used (see Gunningham and Grabosky, 1998: 26), to which criteria such as 'democracy', 'integrity', 'legitimacy' (Bovens *et al.*, 2001: 25-32), 'political acceptability', 'accountability' (Gunningham and Grabosky, 1998: 25-32), 'adequacy', 'responsiveness' or 'appropriateness' (Dunn, 2003: 258-268) are added. To some extent, these criteria overlap (*ibid.*) and the evaluation criteria can be divided into two groups: acceptance criteria and process criteria. The former relate 'to the potential public acceptance of a procedure' – criteria such as accountability, democracy, political acceptability and equity; the latter relate 'to the effective construction and implementation of a procedure' (Rowe and Frewer, 2000: 11)⁶ – basically, effectiveness and efficiency.

I have decided to choose a restricted and uncontroversial set of evaluation criteria to prevent too large a set of criteria from resulting in impractical analysis due to all kinds of interactions and permutations between the criteria (compare with Gunningham and Grabosky, 1998: 26). Furthermore, I have chosen those criteria that to me appear to be the primary concern when decisions have to be made on the implementation of policy instruments. As such, I refer to effectiveness to indicate the policy's contribution to compliance with building regulation; efficiency to indicate the policy's contribution to compliance with building regulations at a minimum cost, administrative burden, or loss of time; equity to indicate the extent to which the policy's costs and benefits are distributed equitably among different groups; and accountability to refer to the reliability of the policy's checks and balances.

⁶ Rowe and Frewer (2000) appear to have mixed up terms and definitions on page 11 of their journal article. From the article's abstract and the remainder of their text it is clear they meant to use term and definition as I present it here.

1.6 Structure of this book

This book is divided into three parts. The first part, 'building the regimes' (Chapters 1 to 3), is an introduction and provides the context for the remainder of this study. In order to be able to study different organisational arrangements of regulatory enforcement of the built environment I need to draw up the arrangements that form the main theme of this book.

To do so, I will briefly focus on a broad range of regulatory literature in Chapter 2. In this chapter, the different debates will be looked at and, where possible, will be linked to studies on the construction, maintenance or operation of buildings. Attention will be given to the relation between the quality of the law and compliance. As far as the different enforcement strategies are concerned, styles, actors and different mixes of these strengths and weaknesses will be identified and, where possible, related to building regulation. I also address a broader context; that of a 'new regulatory order' – or, to use an oft cited metaphor (Osborne and Gaebler, 1992): the idea that the government should do less rowing and more steering. Especially since in building regulation and enforcement, there appears a trend for different regulatory enforcement regimes, where responsibilities are arranged between governmental and non-governmental actors, insight into this notion might help to provide a better understanding of the 'surge in self-regulatory regimes' and the 'rise of new instruments of regulation' (Levi-Faur, 2005: 22; Gunningham and Rees, 1997a: 363).

The building regulatory enforcement regimes will be the topic in Chapter 3. Based on the literature reviewed, I will draw up a typology of regulatory enforcement regimes that show a gradual shift from a fully public regime to a fully private one. Various in-between types consist in a certain organisational arrangement of responsibilities for regulation and enforcement between governmental and non-governmental actors. The different regimes will be illustrated with international cases on building regulatory enforcement. The central argument for this undertaking will be that the organisation of regulatory enforcement might well be of much importance to the search for optimal regulation, but has not been analysed as such. With a methodical approach to the typology of regulatory enforcement regimes, the different organisational arrangements can be structurally analysed and mutually compared, along with the relationships between the arrangements – e.g. competition, support or substitution; thus contributing to the search for 'optimal regulation' in terms of effectiveness, efficiency, equity and accountability.

The analysis of the building regulatory enforcement regimes will be put into practice in the second part of this book, 'analysing the regimes' (Chapters 4 to 9). The focus of this part will be on different building regulatory enforcement regimes in Australia. In Chapter four, Australia's building regulations and their enforcement will be introduced. In Australia, the different

state and territory governments are responsible for covering issues such as safety, health and amenity of people in buildings. All states and territories have adapted the national performance-based Australian Building Code – and sometimes adapted it to suit local needs. Enforcement of the building regulations differs from jurisdiction to jurisdiction. Therefore, different building regulatory enforcement regimes are to be found in Australia that all, roughly, have the same point of departure: the Australian Building Code. Most jurisdictions currently have a two-tier system of regulatory enforcement regimes: one in which there is only governmental involvement and one in which there is a certain amount of private involvement. These two regimes stand competitively side-by-side in all jurisdictions analysed.

The regulatory enforcement regimes in five jurisdictions will be the topic in Chapters 5 to 9: the state of Victoria (Chapter 5); the state of New South Wales (Chapter 6); the state of Queensland (Chapter 7); the state of South Australia (Chapter 8) and the Australian Capital Territory (Chapter 9). In all of these chapters, the formal set-up of the regimes will first be described, based on a desk study. Secondly, experiences with the regimes will be described and discussed based on a series of interviews with a series of key-players in the development industry and building regulatory enforcement industries in the various jurisdictions.

The second part of the book will present dense case study material. I have structured the material around the categories effectiveness, efficiency, accountability and equity. As the reader will notice, these categories are not exhaustive and the discussion within the different categorized sections are not fully limited to these categories. The strength and value of case study lies exactly in such in depth discussion of contextual and interpenetrating forces. This value of case studies is lost when findings are summed up (Peattie, 2001).

Finally, in part three of this book, ‘comparing the regimes’ (Chapter 10 and 11), I will compare the different regimes and draw conclusions from the previous chapters. In Chapter 10, I will compare and evaluate the different Australian regimes using the criteria of effectiveness, efficiency, equity and accountability – this chapter can be regarded an overview of key-findings from Chapters 5 to 9. I find justification in such summing up, since I discussed the case material exhaustively in part two. In Chapter 11, I will draw more general conclusions on the different regulatory enforcement regimes introduced in Chapter 3; and I will draw conclusions on the competitive relationship that exists between and within the regimes. My aim will be to identify the strengths and weaknesses of the different regimes and the competitive relationship between them. These insights might add to an understanding of the possible implications of regulatory reform. As such, the exercise that I will undertake in this book might, hopefully, give policymakers a better insight into the potential outcomes of future policy; give an insight into how a methodical

approach might lead to a more valid and more reliable structural analysis of regulation and enforcement; and, last but not least, give a better understanding of building regulation to all those who are interested.

2 Towards a better understanding of building regulation

In ancient Egypt, King Hammurabi (ca. 2000 BC) had a clear vision on rules and rule breaking. His set of 284 laws, known as the Code Hammurabi, is regarded as one of the oldest preserved codes in the world. The code sets, among others, rules regarding a builder's duties and responsibilities towards his client (King, 2004: 21): 'If a builder builds a house for someone, and does not construct it properly, and the house which he built falls down and kills its owner, then that builder shall be put to death.'

Although often referred to when discussing particular cases of building regulation (e.g. Allen, 2004; Baum, 2005; Bondy, 2003), it is questionable if this code should be perceived as a point of departure for present day building regulation in developed countries. It seems more credible that present day building regulation has its origins in the nineteenth century when changes in society, due to the industrial revolution; the urgent need to house a growing number of immigrants; and scientific insight into the link between unsanitary conditions and public health, gave governments reasons to increase their involvement in the building industry – see, for instance, the development of early building regulations in England (Ash and Ash, 1899; Emden, 1885); the United States (Gould, 1895); the Netherlands (Kocken, 2004; Van der Heijden *et al.*, 2007); and France (Risler, 1915). From the nineteenth century on, regulation has been adapted to suit contemporary needs and, worldwide, present day building regulation covers a broad range of topics, such as safety, public health, amenity and sustainability – see, for instance, present day building regulations in the United States (ICC, 2006), Australia (ABCB, 2004), Canada (NRCC, 2005) and different European countries (Sheridan *et al.*, 2002).

Our built environment appears to be highly regulated and therefore everyone 'using' a building seems to be directly or indirectly subject to building regulation. It is therefore notable that the study of building regulation is a neglected subject in the study of regulation (May and Burby, 1998: 162; McLean, 2003: 50). How can that be? Is the regulation of the built environment so different from, for instance, the regulation of the natural or occupational environment?

In this chapter, I will discuss four themes that appear to recur in regulatory and enforcement literature. Themes that I have already briefly introduced in the introduction to this book: the quality of rules, enforcement strategies, enforcement styles, and enforcement actors. In this chapter, I will connect these themes as much as possible to insights from the studies of the built environment. I will start however with a brief discussion on the need for regulation and enforcement as perceived in the field of law, the field of economy, and the field of sociology. By doing so, I hope to come to a better understanding of building regulations, their ongoing transformation and their enforcement.

2.1 The need for regulation and enforcement

The need for regulation and enforcement is a topic of research in many academic fields as is the need for government to steer society. It would be far beyond the scope of this book to deal with these issues exhaustively, but a brief introduction might assist a better understanding of building regulations and as such serves the goal of this chapter.

In general, scholars in the field of law often refer to the writings of John Locke, Charles Montesquieu and Jean-Jacques Rousseau as the basis for modern western states and their governments (van den Heuvel, 1994; Meij *et al.*, 2004). The separation of power between the legislative, the executive and the judiciary; a system of checks and balances and law as a contract between humans are therefore key features of modern states⁷. Different roles and responsibilities are stated and the idea of power is introduced. Power can be defined as ‘the rate of the induction of behaviour in others’ (Jacques, 1976: 39) and authority is needed to execute power (*ibid.*). Authority thus can be perceived as ‘an attribute of a social role which gives the incumbent the right to exercise power within socially established limits, and to apply positive or negative sanctions (rewards or punishments) to others depending upon the quality of their behaviour.’

In general, scholars in the field of economics state that governments exist for three reasons. ‘Firstly, they establish and maintain property rights. Secondly, they provide and maintain mechanisms for allocating scarce resources. Thirdly, they implement arrangements that redistribute income and wealth’ (Parkin *et al.*, 2005: 308; but also, Witztum, 2005). Regulation is divided into ‘social’ and ‘economic’ regulation⁸ (Baldwin and Cave, 1999: 44-48; Crandall, 2003). Regulation is then ‘both a constitutive element of capitalism (as the framework that enables markets) and the tool that moderates and socialises it (the regulation of risk)’ (Levi-Faur, 2005: 14). Again, different roles and responsibilities are stated and the idea of power is introduced: an organisational or administrative system is needed to implement regulations and enforcement

⁷ Locke (1632-1704) advocated government checks and balances and a separation between legislative and executive powers – the so called ‘Civil Society’. The task of the government then is to protect the basic laws of humans. Montesquieu (1689-1755) advocated a separation of powers as well, yet, in a tripartite system: separation of the legislative, the executive and the judiciary – the so called ‘Trias Politica’. Through checks and balances between these ‘authorities’ the concentration of power was to be prevented. Rousseau (1712-1778) advocates a ‘Social Contract’ and considers law as a voluntary contract between human beings in which the general will of the people as a whole, the common or public interest, exceeds the private interests of individuals. This in order to guarantee individuals against subordination to the wills of others. Adam Smith, finally, advocated so called ‘laissez-faire’ or free market economics. Smith believed that governments’ interference hindered industrial expansion and created inefficiency and an ‘Invisible Hand’ would steer the free market.

and the government is authorised to do so. However, the government should not hinder economic growth and a classic consideration in the science of economy is that government does (Smith *et al.*, 1978).

In general, scholars in the field of sociology often refer to the writings of Max Weber as a basis for how modern governments and regulation can be understood (Burns and Flam, 1987; Parsons, 1951). Weber looks upon sociology as a science 'which attempts the interpretive understanding of social action in order thereby to arrive at a causal explanation of its course and effects' (Weber, 1964 [1921]: 88). Social action is considered action 'insofar as, by virtue of the subjective meaning attached to it by the individual (or the individuals) who is acting, takes account of the behaviour of others and is thereby oriented in its course' (*ibid.*). Social action then is considered to be oriented on people's belief in the existence of a 'legitimate order' (*ibid.*: 124). When compliance with such an order is maintained because disobedience might be sanctioned by an authorised body, either physical or psychic, that aims at forced compliance or punishment of non-compliance, such an order is called 'law' (*ibid.*: 127). The government is understood to be the administrative staff of a state, which maintains 'a claim to the monopoly of the legitimate use of physical force in the enforcement of its order' (*ibid.*: 154). In other words, regulations, or a rule regime, are a 'source of expectations', a means of communication and a guideline for social action; regulation 'makes the course of social action and interaction more or less predictable' (Burns and Flam, 1987: 55).

To conclude this brief introduction, in the fields of law, economics and sociology, regulation is regarded as needed both to protect and steer individuals and society. The government is regarded as being needed to draw up regulations that protect the legitimate order and is authorised to enforce these, if necessary by force. Enforcement is needed to make individuals comply with regulations set and thus enforcement is needed to affect the legitimate order. The whole of regulation and enforcement can be regarded as a 'regulatory regime' (Hood *et al.*, 2001; May, 2007):

8 Note that this distinction in economic and social regulation is used in general (Rasmusen, E.B. (2005) *Economic Regulation and Social Regulation*. American Law and Economics Association Annual Meetings, paper 47). Economic regulation concentrates primarily on market regulation, market structures and the individual behaviour of companies, while social regulation concentrates primarily on the collective behaviour of companies, usually with a special focus on public health, public safety and the environment. Social regulation is generally justified by referring to externalities and information asymmetries. Only part of the building regulations can be described in terms of economic regulation. For instance, directives and codes established at European level are primarily intended to facilitate the free trade of building products throughout the member states. The social aspects are the most important component of building regulations. Building and planning regulations have been developed to ensure that buildings meet basic quality standards (Van der Heijden (2007) *New enforcement strategies for Dutch municipal building control*).

'A [regulatory] regime comprises an institutional structure and assignment of responsibilities for carrying out regulatory actions. The institutional structure is made up of rules that prescribe expected behaviors or outcomes, standards that are benchmarks against which compliance can be measured, a mechanism for determining the degree of regulatory compliance, and sanctions for a failure to comply with the rules' (May, 2007: 9).

A regulatory regime can therefore be understood as a means to organise regulatory actions. But what would a good form of organisation be?

Governance

According to Weber, the most (technical) efficient and rational mode of organisation to guarantee the 'legitimate order' is through 'the purely bureaucratic type of administrative organisation' – a bureaucracy (Weber, 1964 [1921]: 337). Weber's bureaucracy is characterised by the idea of the legitimate order from which comes a set of strictly defined impersonal rules⁹ that set administrative organisation. As Merton (1957: 196) puts it: 'the generality of the rules requires the constant use of categorisation, whereby individual problems and cases are classified on the basis of designated criteria and are treated accordingly.' These rules furthermore define the hierarchy of the organisation, the rights and duties of the individuals working in the organisation and their jurisdiction. Furthermore, Weber's bureaucracy is characterised by its authority, which comes from the idea of the legitimate order; a structuring of communication by keeping files; and a continuous fulfilment of the duties, which comes from its impersonal rules (Merton, 1957: 195-197; Mouzelis, 1968: 16-17; Stinchcombe, 1959: 183-187; Weber, 1964 [1921]: 329-341).

The term bureaucracy in our days is, unfortunately, often related with red tape, those who are protecting their 'patch' and gridlocked, non-client-friendly, slow-moving government bodies (Eggers, 2005; Sparrow, 2000). Bureaucracy is sometimes even regarded as a synonym for government (Richards and Smith, 2002: 279). Solutions to solve issues that are considered to arise from bureaucracy are then often expected to be found in deregulation and privatisation. However, following organisation theorists, all modes of organisation are bureaucracies (Williamson, 1996: 17) and 'hierarchy is the basic organising principle for all complex social systems' (ibid.: 38). It thus appears not to be bureaucracy that has to be changed as such, but the origins of the negative outcomes that appear to go hand in hand with public bureaucracies (see also Wilson, 1989). Furthermore, when considering the reasons behind regulation and enforcement – guaranteeing individual and public interests – a legal authority that governs is needed to effect the legitimate order. Or, as Osborne

⁹ Impersonal as they apply to all individuals likewise – class, religion or income is of no importance. Furthermore, rights and duties cannot be sold, bought or inherited.

and Gaebler (1992: 45) state: 'Privatisation is simply the wrong starting point for a discussion on the role of government. Services can be contracted out or turned over to the private sector. But governance cannot'. James Q. Wilson, famous for his analytical work on bureaucracies, also makes queries to the notion that 'the public enterprise is more efficient than public bureaucracies' (Wilson, 1989: Chapter 17), as a government's efficiency cannot be determined as society's expectations of government – realising social goals such as accountability, equity, redistribution of income and wealth, and so on – cannot be measured. Thus, when making the choice between public or private organisation, the issues to bear in mind are which social goals are to be sacrificed when considering standards such as efficiency, equity, accountability and authority (ibid.: Chapter 19).

As a solution to the crisis in governmental governance, Osborne and Gaebler (1992: 309) advocate a 'market-oriented government'. According to the authors, the government should become more 'entrepreneurial' (ibid.: 20-22) and the debate on how to solve the issues that are considered to come from bureaucracy should no longer focus on 'public versus private' but on 'monopoly versus competition' (ibid.: 79-81). This, as competition rewards innovation – improving quality, keeping down costs – and thus provides an incentive for innovation (ibid.: 82-92). Innovation furthermore makes organisations adapt to changing circumstances, which is regarded as the economic problem of society (Williamson, 1996: 119). Osborne and Gaebler introduce their oft-cited idea of a government that should steer instead of row (Osborne and Gaebler, 1992: 28): a government that sets the course of civil society through regulation, but leaves implementation and execution to civil society if possible. Braithwaite (2000) takes the idea one step further and points out that a strong state that serves individual and public interests (the steering), that implements and administers regulation where needed (the rowing that cannot be done by the civil society itself), combined with market-oriented alternatives where possible (the steering and rowing that can be done by markets and communities in civil society).

This idea of a government that does more steering and less rowing fits in a trend of 'governance' (Jordan et al., 2005). Governance is then regarded as 'a new process of governing' (Rhodes, 1996: 653), characterised by, amongst others, a 'changing relationship between government and non-government actors as they interact to steer society using different policy instruments' (Jordan et al., 2005: 494). Governance thus becomes 'an exercise in assessing the efficacy of alternative modes (means) of organisation' (Williamson, 1996: 11). The question, of course, is: which (alternative) mode of organisation is needed? A question many scholars have paid and still pay attention to. I will join this discussion in Chapter 3, but first I will introduce some of the main issues in studies on regulation.

2.2 Quality of rules

A topic in the debates on the quality of rules is whether rules will lead to compliance (e.g. Bardach and Kagan, 1982; Scholz, 1984; Griffiths, 2003; Seidman, 1984)¹⁰. Characteristics analysed are adequacy, feasibility, legal certainty and adaptability (van Rooij, 2006: 32-43). As the reader might notice from further reading, these characteristics overlap the three discussions I will introduce in Sections 2.3, 2.4 and 2.5.

Adequacy signifies the extent to which the formal goals of regulations are fulfilled when these are being complied with (Hoogerwerf and Herweijer, 2003). Adequacy furthermore signifies that sanctions of regulations should be compelling (van Rooij, 2006: 33). Compliance is generally considered to come from the regulatee's fear of the consequences of non-compliance; the regulatee's insight that compliance serves the personal interest; and the regulatee's insight that regulations are legitimate and therefore have to be complied with (Burgstaller, 2005; see also, Kagan and Scholtz, 1984).

Feasibility signifies the regulatee's ability to comply with the regulations (van Rooij, 2006: 36; Seidman, 1984: 337-338; Scholz, 1984: 391-392). The regulatee's ability to comply might be limited due to a physical or economic inability to do so, or due to non-familiarity with the regulations (Greer and Downey, 1981; Prinsen and Vossen, 2003). Also the regulatee's willingness to comply with regulations seems an important aspect (Erp, 2005; May, 2004). Regulatees are sometimes regarded as calculating actors who react or respond to regulations based on issues such as the chance of getting caught when breaking rules, or the chance of being disciplined if caught (LEEC, 2004; Prinsen and Vossen, 2003; Scholz, 1984). Feasibility also signifies that regulations can be enforced (van Rooij, 2006: 37). Enforcement agencies have a limited capacity and therefore not all action can be supervised. Furthermore, some rule breaking is easier to detect than others (Gunningham and Grabosky, 1998; Kagan, 1994), particularly in the case of building regulation, this appears to be a relevant issue as controlling building regulations often demands specific technical knowledge or the right timing for inspections as much construction work is 'covered up' behind walls, ceilings and floors.

Certainty signifies there is little misunderstanding of what the regulations mean and how these are enforced (Bardach and Kagan, 1982: Chapter 3; van Rooij, 2006: 38-39; Scholz, 1984: 386-387), in the light of performance-based building codes, again a relevant issue in building regulation. To increase competition and support innovation, many countries around the world have made

¹⁰ Note that the quality of rules is studied in different fields of science. Scholars in the field of law for example analyse interpretation, formulation, consistency and processes. I discuss literature that analyses the quality from a compliance point of view.

a move from prescriptive building regulations towards performance-based building codes (Meacham *et al.*, 2005). The traditional prescriptive regulations often prescribed how regulations could be complied with. A typical feature of performance-based building regulations is:

‘the explicit statement of goals and objectives that reflect societal expectations and desires, along with functional statements, operative requirements and in some cases performance criteria, which are to be used to demonstrate that goals and objectives have been met’ (Meacham *et al.*, 2005: 92).

The regulatory focus is no longer on how compliance is reached, but that compliance is reached. The danger in this type of regulation might be found in its highly complex nature (Spence, 2004: 401) and a missing link between regulation and methods to test compliance and the overall accountability of the system (Meacham *et al.*, 2005). These findings seem to be underpinned by a comparative study on building safety in New Zealand and fire safety in the US (May, 2007). From this study, it was found that evaluation criteria to assess performance were missing; government agencies responsible for compliance assessment were lacking expertise to carry out enforcement; and accountability of the systems¹¹.

Adaptability signifies the regulations’ ability to be adjusted to specific actual and future circumstances (van Rooij, 2006: 40). It is argued that more open regulations give the regulatee the freedom to find a cost-efficient way of complying with regulations (Bardach and Kagan, 1982). In terms of performance-based building regulations, this has been one of the reasons for introducing this type of regulation in many countries (Meacham *et al.*, 2005). Adaptation also signifies the regulators’ ability to adjust enforcement to specific circumstances (van Rooij, 2006: 42). This issue will be dealt with more extensively in Sections 2.3 and 2.4.

11 From the interviews carried out in the different Australian jurisdictions (see Chapters 5-9) it was learned that these issues also appear to be present regarding the Australian system of performance-based building regulations. Private certifiers and private sector agents who are allowed to carry out assessment tasks also mentioned the difficulties that come with the lack of clear assessment criteria making controlling these performance-based regulations difficult. Other participants of the interviews, mostly public sector employees, were concerned about a potential private certifier’s risk-averseness towards this type of regulation and their preference for solutions that were deemed to satisfy. Experiences with performance-based building codes in other countries have been reported; for instance in the Netherlands, New Zealand, and England and Wales (Ang, Groosman & Scholten (2005) Dutch performance-based approach to building regulations and public procurement. Building Research & Information, 33, 107-119), Duncan (2005) Performance-based building: lessons from implementation in New Zealand. Building Research & Information, 33, 120-127), Imrie (2004) The role of the building regulations in achieving housing quality. Environment and planning B, Planning & Design, 31, 419-437).

2.3 Enforcement strategy

The term enforcement strategy is often used to describe tactical choices made by enforcement agencies and the type of actions these agencies take (e.g. Bardach and Kagan, 1982; Hawkins, 1984; Kagan, 1994; May and Burby, 1998) and will be used as such in the remainder of this book. Tactical choices mostly refer to issues such as allocating resources, setting targets and monitoring outcomes (e.g. Mueller, 2003: Chapter 16). Types of action mostly refer to issues such as sanctions and incentives (e.g. Kagan, 1994).

Tactical choices

Setting targets and monitoring policy outcomes is often regarded as a difficult task in daily practice. Goals underlying regulations often appear to be 'plural, conflicting or vague' (Herweijer, 1987: 181), or are not stated officially at all (e.g. Dunn, 2003: 135-137). Outcomes are often impossible to measure. For building regulation, a policy goal might be structural safety and the prevention of fatal construction-related incidents. Measuring these incidents is, of course, impossible when incidents do not occur. Much policy does not supply a number of units of output, or targets; and therefore efficiency of the agency implementing that policy is difficult, if not impossible, to monitor (Mueller, 2003: Chapter 16).

Types of action

Sometimes, division is made between deterrence-based strategies and compliance-based strategies (e.g. Hawkins, 1984; Scholz, 1984). The deterrence-based strategy aims at deterring non-compliance prior to the law being broken (Reiss, 1984) or aims at sanctioning non-compliance after the law has been broken (Hawkins, 1984); the consequences of non-compliance have to be feared (e.g. Ogus, 2002). A central hypothesis within this strategy forms the notion that the higher the chance of getting caught breaking the law and/or the higher the sanctions if the law is broken, the less willing people are to

12 As seen from the Chicago theory of regulation (Peltzman (1976) Towards a More General Theory of Regulation. *Journal of Law and Economics*, 19, 211-240; Posner (1971) Taxation by Regulation. *Bell Journal of Economics and Management Science*, 2, 22-50; Posner (1974) Theories of Economic Regulation. *Bell Journal of Economics and Management Science*, 5, 335-358; Stigler (1971) The Theory of Economic Regulation. *Bell Journal of Economics and Management Science*, 2, 3-21), regulation can be understood as the result of optimising the behaviour of those involved (e.g. government, industry, interest groups and civilians). Politicians and their voters are believed to be rational individuals that use an institution to serve their own interests best. Capture theorists therefore might suggest that regulatory policies and institutions often become subject to the influence of powerful parties so that regulation serves the 'personal' interests of these parties, rather than those of a wider public (see Baldwin and Cave (1999) *Understanding Regulation. Theory, Strategy and Practice.*).

break it (Coolsma and Wiering, 1999). Critics of this strategy state that it is ineffective and expensive, it brings about problems with enforcement and it aims too much at end-of-pipe solutions (e.g. Fairman and Yapp, 2005: 493) The system is also said to be prone to regulatory capture (Baldwin and Cave, 1999: 36-37)¹².

The compliance-based strategy aims at the spontaneous obedience of regulations (Hawkins, 1984; Kagan, 1994) and aspires to maximum effectiveness of public means and activities by encouraging those features that bring about spontaneous obedience and weakening those features that bring about non-compliance (Parker, 2000). Spontaneous obedience is considered to proceed from feelings of moral disapproval about breaking the law (Tyler, 1990).

Hutter (1997) makes a division between a persuasive and insistent approach in this strategy. The persuasive approach assumes that clarifying the law and regulation makes people more willing to comply (Hutter, 1997). Hutter describes this approach as 'teaching and flattering' to give people an insight into the ideas of the law and indicate how it can be complied with. This approach is characterised by patience and has an open end towards goals that should be reached. The insistent approach is characterised by a far less flexible attitude and sets clear limits to an enforcer's tolerance. Critics of these strategies note that people only obey the law, as long as this is in their self-interest and therefore act as calculating actors (e.g. Parker, 2000: 534). Cason and Gangadharan (2006) found a direct positive link between non-compliance and the costs obedience brings about. Based upon the rational choice model¹³, Cason and Gangadharan assume that firms and individuals respond to regulatory policies by choosing strategies that serve their own interests best. Yet, bounded rationality¹⁴ means that they will not always be able to make the best choices.

Instead of using negative incentives, such as fines and penalties, compliance can also be reached through positive incentives. According to this positive incentive approach, compliance can be influenced by deploying grants or subsidies (Baldwin and Cave, 1999: 41-42). An illustrative example of this strategy is found in literature on natural environmental regulation: taxes are used to penalise polluters, but rewards can be given for reductions in pol-

13 The rational choice model assumes goal-oriented choice behaviour. It is assumed that more or less explicitly formulated goals exist and a player must have the means to reach these goals. Depending on the goal, compliance or violation might be a means to reach the goal (Huisman (2005) *Naleving van regels door bedrijven*, in: Barkhuysen en Den Ouden (Eds.) *Recht realiseren bijdragen rond het thema adequate naleving van rechtsregels*).

14 The concept of bounded rationality is used by Simon: 'It is impossible for the behaviour of a single, isolated individual to reach any high degree of rationality. The number of alternatives he must explore is so great, the information he needs to evaluate so vast that even an approximation to objective rationality is hard to conceive' (Simon (1945) *Administrative behavior. A study of decision-making processes in administrative organization*).

lution or assistance is given to help reduce pollution (*ibid.*). The advantages of this strategy are said to be a low risk of capture; regulatees have a choice between the costs of non-compliance and the benefits of compliance; regulatees are stimulated to reduce harassment as much as possible, down to zero if possible, instead of to a prescribed level. Nevertheless, the model is also said to have disadvantages: regulations based on incentives are often very complex; incentive regimes work indirectly and might therefore react too late; it is difficult to measure the actual effect of the incentive; and public concern may arise as to why some harmful action is nevertheless being accepted.

A special variety of incentive-based regime is the link between insurance premiums to performance records; so-called insurance-based incentives (Baldwin and Cave, 1999: 53-55). In this model, insurance can be obtained if compliance with regulations is proved. This model is said to have the same advantages and disadvantages as the incentive-based regime, yet, Baldwin and Cave stress the question of whether a choice has to be made for public or private actors providing insurance. Private sector regulators might, when viewed from the point of view of self-interest, discriminate between the insured, which could mean certain policy goals are not secured. This variety is sometimes considered to have considerable potential in building regulatory enforcement; especially as insurances can be used in various ways (Comerio, 2004: 411; Spence, 2004: 401). For instance, compliance with regulations might be a precondition to obtaining an insurance policy, or the proof of holding an insurance policy is made a condition for obtaining a building permit.

Mixing strategies

Under a traditional regime, the government sets regulations and enforces these. The most traditional structure is a command-and-control regime based on negative incentives (e.g. Kagan, 1984). This regime has, however, been subject to much criticism as it is considered to be liable to capture and it is likely to result in over-regulation. Compliance standards furthermore are difficult to set and difficult to enforce (Baldwin and Cave, 1999: 36-39). Critics of this regime therefore promote alternative regimes in which different strategies are used; preferably a mix of strategies (e.g. Hawkins, 1984; Hawkins and Thomas, 1984; Parker, 2000; Reiss, 1984; Shapiro and Rabinowitz, 2000; Tyler, 1990). It is furthermore argued that enforcement agencies should use a reactive, or responsive, strategy. Such a strategy allows the enforcement agency to concentrate its efforts on non-complying regulatees. It is also expected to encourage non-compliers to change their behaviour and comply with the law (Scholz, 1984: 388; Sparrow, 2000).

A ground-breaking move away from the traditional command-and-control regime can be found in Ayres and Braithwaite's model of responsive regulation. Ayres and Braithwaite (1992) state that rejecting punitive regulation is naïve, though, total commitment to it might lead to unnecessary employment

of means. Based upon prior empirical research in pharmaceutical companies, coal mining companies by Braithwaite (1984, 1985) and Australian business regulatory agencies by Grabosky and Braithwaite (1986) the authors of the responsive regulation model state that a strategy based upon punishment as first choice is unaffordable, unworkable and counterproductive (Ayres and Braithwaite, 1992: 26). Instead of aiming at compliance through deterrence-based strategies, the authors promote the use of different, less punitive and less restrictive, strategies and preferably mix different strategies: 'the trick of successful regulation is to establish a synergy between punishment and persuasion' (ibid.: 25). Responsive regulation differs from the traditional command-and-control regime in what triggers a regulatory response and what this response will be (ibid.: 4).¹⁵

To explain their ideas, Ayres and Braithwaite introduce two conceptual enforcement-pyramids: a pyramid based upon a hierarchy of sanctions; and a pyramid based upon a hierarchy of enforcement strategies. The least sweeping interventions in enforcement are put at the base of the pyramids, the most drastic interventions at the top. Ayres and Braithwaite state that it is not the content of the enforcement pyramids that are the strengths of responsive regulation, but the possibility that an enforcer has to switch between different strategies (ibid.: 36). From base to top, the hierarchy of sanctions includes persuasion, warning letters, civil penalties, criminal penalties, suspending and revoking licences. The hierarchy of strategies shows self-regulation, enforced self-regulation, command-and-control regulation with discretionary punishment, and command-and-control regulation with non-discretionary punishment (ibid.: Chapter 2).

The strength of the hierarchy of sanctions is considered to lie in the possibility of choosing different types of sanctions within a certain social and political accepted range, therefore making it possible to choose a tactical sanction. By making it possible to choose between sanctions, it becomes unclear for the regulatee which sanction the controller will choose, the controller therefore has an information advantage over the regulatee (ibid.: 35-38). The strength of the hierarchy of strategies is considered to lie in the possibility of choosing between different strategies; and, from the point of view of the regulatee, of

¹⁵ Note that it was not the idea of responsiveness that made Ayres and Braithwaite's work ground-breaking. Other authors have noticed responsive behaviour as well in earlier work. For instance the 'Tit-for-Tat strategy' described by Scholz; the 'problem-solving strategy' described by Seidman (Scholz (1984) *Voluntary Compliance and Regulatory Enforcement. Law & Policy*, 6, 385-404; Seidman (1984) *Research Priorities: The State, Law and Development. Contemporary Crises*, 8, 329-344); and Bardach and Kagan's 'Reciprocity', which combines responsiveness (!), forbearance and the provision of information by an inspector (Bardach & Kagan (1982) *Going by the book: the problem of regulatory unreasonableness*). It has been the structural approach of Ayres and Braithwaite that appears to be the strength of Responsive Regulation.

enforcing obedience of harsher and harsher means (*ibid.*: 38-40). The authors are well aware of the strength of harsh sanctions, even when these are not imposed: 'Paradoxically, the bigger and the more varied the sticks, the greater the success regulators will achieve by speaking softly' (*ibid.*: 19). In follow-up research, Braithwaite (2002: Chapter 4) again pays attention to the strength of informal sanctions. Potential offenders are considered to be more sensitive to informal sanctions than formal sanctions. Braithwaite especially focuses on shaming as an informal sanction and ascribes a special role to social groups (such as civilians and employees) to condemn non-compliance within their own set.

But it is not only the possibility to choose between sanctions that appear to be the only advantage of the responsive regulation model. The relation between controller and subject and the enforcement style used by the controller are of significant importance as well (Ayres and Braithwaite, 1992; Braithwaite, 2002).

Concentrating on risks

Concentrating efforts on non-compliers also fits in a 'risk-based' philosophy. From the 1980s onwards, risk reduction is given a more and more important role in discussions on regulation and a shift towards so-called risk-based regulation can be perceived (Hood *et al.*, 2001; Hutter, 2005). The emergence of this enforcement strategy has been addressed in a number of studies (e.g. Baldwin and Cave, 1999; Baldwin *et al.*, 2000; Braithwaite, 2000; Sparrow, 2000). Risk is often defined as 'the probability that a particular adverse event will occur during a given period of time, or result from a particular challenge' (Baldwin and Cave, 1999: 138). Risk-based regulation aims at setting standards, collecting information, influencing and changing behaviour (Hood *et al.*, 2001), and aiming enforcement resources at those subjects that create greatest risk (Baldwin, 2006). Risk-based regulation differs from traditional regulation, because it is not based upon the input of an activity – prescribing what to do, or which standards to meet – but based upon its output – the risk it causes. Another difference between traditional regulation is its non-deterministic character: traditional regulation aims at reducing non-compliance to zero, whereas risk-based regulation accepts that risks do exist and that some risks are inevitable, but tries to reduce these risks to a minimum (Seiler, 2002).

Risk-based regulation is said to have both advantages and disadvantages. It is often perceived as more effective and efficient, as priority is given to certain enforcement activities; and as more legitimate, as certain choices are more analytically-based (Hutter, 2005). Nevertheless, these choices are particularly viewed as the down-side of risk-based regulation, as it is impossible to determine a risk objectively (Baldwin and Cave, 1999: 142; Baldwin *et al.*, 2000; Hutter, 2005). In addition, the analytical approach of defining risks, by combining chance and effect, may therefore give a false sense of security (Roth-

stein, 2006). Furthermore, a false sense of security may arise when the system is 'too literally and slavishly believed in' (Hutter, 2005: 13) and, once risks are determined, the system might be blind for new risks (Baldwin, 2006). Finally, it is questionable if risk-based regulation has to be experienced as an (other) enforcement strategy or 'a methodical tool into which political judgments may be explicitly incorporated' (Flüeler and Seiler, 2003: 228).

2.4 Enforcement style

The term enforcement style is often used to characterise an inspector's behaviour towards a regulatee (Hutter, 1997; e.g. Bardach and Kagan, 1982: 72) and will be used as such in the remainder of this book. In regulatory literature, a wide variety of possible enforcement styles are described. Based on the responsive regulation philosophy (Ayres and Braithwaite, 1992), these styles seem to fit on a sliding scale that is defined by a consulting, facilitative approach at one end and a rigid, legalistic approach at the other end. A wide-ranging mix of enforcement styles that fit on this scale has been described by different authors (for an overview, see May and Wood, 2003).

Authors appear to have different opinions regarding the actual effect of an inspector's enforcement style on the compliance behaviour of the regulatee (e.g. May and Wood, 2003; Nielsen, 2006). From research by May (2004) on compliance with building regulations by building contractors in the US home building industry, it is concluded that negative compliance motivations are influenced by inspection practices, whereas affirmative motivations are mostly influenced by attitudes and beliefs of law-subjects and by their knowledge of the rules. For example, a facilitative style fostered affirmative motivations while detracting from negative motivations and a formalistic style detracted from affirmative motivations – no effect was found for the influence of a formalistic style on negative motivations. Important conclusions drawn from this research are the insight (and empirical proof) that different motivations can be addressed to get compliance; that the role of the inspector does influence compliance motivations; and that compliance motivations are also being influenced by the possible loss of reputation among peers¹⁶.

These first two conclusions appear partly to underpin the strength of the responsive regulation model. However, from the research in the US home building industry, it was found (May and Wood, 2003: 135) that 'homebuilders

¹⁶ Reputation appears to be a strong incentive for compliance (Ashby, Chuah and Hoffmann (2004) *Industry Self-Regulation: A Game-Theoretic Typology of Strategic Voluntary Compliance*. *International Journal of the Economics of Business*, 11, 91-106; Bardach & Kagan (1982) *Going by the book: the problem of regulatory unreasonableness*; and Scholz (1984) *Voluntary Compliance and Regulatory Enforcement*. *Law & Policy*, 6, 385-404).

learn to roll with the punches and do little to adjust their compliance behaviour when faced with different enforcement styles.' Furthermore, from empirical research in the agricultural sector (May and Winter, 2000; Winter and May, 2001), it is learned that fair and regular controls offer more perspective than varying enforcement styles, thus backing some of the strengths that Ayres and Braithwaite ascribe to their model of responsive regulation. We also learn that sanctioning has a turning-point, after which counter-productive effects are gained: more sanctioning will encounter resistance. This said, an overly informal relationship between controller and subject could bring about negative results when the possibility to sanction is not being used (*ibid.*).

More recent research (Nielsen, 2006) gives more insight into the idea of 'responsiveness'. According to Nielsen, the concept of responsiveness is 'to respond to the gravity of the individual breach: the more grave a breach, the more harsh a reaction' (Nielsen, 2006: 397). Nielsen makes a division in different types of responsiveness: short-memory responsiveness, long-memory responsiveness, attitude-responsiveness, dialogic-responsiveness and subjective performance responsiveness. Differences in these types are based on breaches found by the inspector; the gravity of the breach; the regulatee's willingness to improve; agreements between inspector and regulatee; and the inspector's evaluation of the regulatee's overall standard of compliance. Within the field of environmental and occupational regulation, Nielsen observes responsive behaviour by inspectors, but she does not find behaviour that 'is argued to lead to a cost-effective 'positive-spiral' of actions and relations between the regulator and regulatee' (Nielsen, 2006: 411). This conclusion appears to underpin a notion May and Wood (2003: 129) expressed earlier from studying the US home building industry – inconsistency in enforcement style is considered to restrict the regulatee's ability to comply with regulations.

A study by Imrie (2004) amongst building regulatory inspection officers in the United Kingdom gives notable insight into these officers' daily practices. According to Imrie (*ibid.*: 431), inspection officers use harsh enforcement means and penalties as a last resort. This is due to a competitive system – see also Chapter 3 of this book – contractors can decide to use another building control department or even private sector agencies to carry out the control function. The possibility of losing a client appears to be a strong restriction on the building control department's freedom of choosing a style.

Strategy or style?

It might have been noted that the terms 'enforcement strategy' and 'enforcement style' are closely related. In literature they often seem to overlap or even blend (Kagan, 1994). As stated above, in this book, strategy is used to describe the tactical choices and the type of actions enforcement agencies take; style is used to characterise an inspector's behaviour towards a regulatee.

Advantages and disadvantages are, as illustrated above, ascribed to both different strategies and different styles of enforcement. Enforcement agencies, and especially those allotted with inspection tasks as building regulatory enforcement agencies have, are very similar to ‘craft organisations’ and ‘coping organisations’ (Wilson, 1989: 165-171). For these types of organisations, or agencies, the effectiveness of their efforts relies heavily on their ‘key operators’ – the inspectors; but their outputs – the inspections – or their influence on outcomes – compliance with regulations – is hard to observe, if at all.

What has not been addressed yet is the agency’s or inspector’s background. Implicit enforcement has been ascribed as a task for public agencies and public inspectors. However, in daily practice, many examples of private sector involvement in regulatory enforcement regimes can be found – building regulatory enforcement included, as already illustrated in the introduction to this book. Important differences can be found between private agencies and public agencies (Wilson, 1989: 169). A first is that private agencies must survive by attracting clients and contributors – note that a public agency sometimes ‘must cope with a clientele not of their own choosing’ (ibid.). A second is that private agencies face fewer constraints in using or disposing of capital and labour than public agencies (ibid.: Chapter 7).

Bearing in mind these kinds of differences, it could be argued that the public and private agents and agencies have different strengths and weaknesses, which might make them more or less suitable for carrying out certain enforcement tasks. This brings us to the fourth and final discussion in regulatory literature that I would like to introduce: enforcement actors.

2.5 Enforcement actors

The term enforcement actor is used in this book to indicate the agents and agencies that carry out the actual enforcement tasks. These could be either public agencies or individuals employed within a public agency, private agencies or individuals within a private agency or ‘third parties’.

The term ‘third parties’ does refer to ‘interested actors’, such as public interest groups, community groups and commercial parties, such as banks and insurance companies, which might make an important contribution to enforcement as a ‘complementary’ or ‘surrogate’ regulator (Gunningham and Grabosky, 1998: 408-413). Unfortunately, the term is easy to confuse with the term ‘third sector’. The latter is used by Osborne and Gaebler (1984: 44) to define a ‘sector (...) made up of organisations that are privately owned and controlled, but that exist to meet public or social needs, not to accumulate private wealth.’ To illustrate their definition, Osborne and Gaebler (ibid.) add: ‘According to this definition, large, non-profit firms that exist primarily to accumulate wealth would not qualify. But for-profit institutions that exist

to meet social or public needs (development banks, for instance) would qualify.' Braithwaite simply divides regulators into 'state and non-state actors' (Braithwaite, 2000: 255). I follow the latter by making a division into governmental and non-governmental enforcement actors.

An influential work in which the idea of enforcement actors is addressed was published in 1998 by Gunningham and Grabosky: *Smart Regulation*. Intended as a book that would demonstrate how environmental regulation could be redesigned so that it would perform optimally in terms of effectiveness, efficiency, equity, administrative viability or political acceptability (Gunningham and Grabosky, 1998: 4), the book appears to have become not only a 'guideline' for scholars in the field of the natural environment but also for scholars in other fields of policy, of which occupational regulation (Bloor et al., 2006), tax regulation (Braithwaite and Braithwaite, 2001), human rights protection (Watchirs, 2003) and self-regulation on the internet (Price and Verhulst, 2005) are but a few.

In their work, Gunningham and Grabosky divide the regulatory process into parties, roles and interactions (Gunningham and Grabosky, 1998: Chapter 3). The focus on the possibility of different parties in the process has, in particular, been a move away from the traditional idea on regulatory regimes that, according to Gunningham and Grabosky, considered the regulatory process to be too much of 'a dance between two participants – government and business' (ibid.: 93). Within the smart regulation philosophy, better regulatory systems involve both a mix of enforcement parties, or actors, and a mix of enforcement instruments. The mix of enforcement actors consists in traditional state controllers, private sector controllers and third party controllers. The mix of instruments consists in different levels of coercive policy instruments, such as different economic incentives (ibid.: Chapter 6). By doing so, smart regulation demonstrates common characteristics with Ayres and Braithwaite's (1992) responsive regulation philosophy, but differs from it especially as the traditional idea of actors within regulatory regimes is opened up (Gunningham and Grabosky, 1998: 387 et seq). It also differs from responsive regulation as smart regulation aspires to 'win-win outcomes' (ibid.: 413-422) to make regulatees go beyond compliance as it is in their own interest to move beyond the regulatory bottom line. Voluntary agreements on environmental issues between government and housing associations in the Netherlands can be considered an example of such a win-win outcome (Sunikka and Boon, 2003). In this example, agreements are made with a focus on energy conservation that go beyond the regulatory bottom-line. The government 'wins' as policy

17 Notice that already in 1982 Bardach and Kagan advocated the use of non-government officials – such as private auditors, factory inspectors, consumers and factory employees – in the enforcement of regulations (Bardach and Kagan (1982) *Going by the book: the problem of regulatory unreasonableness*).

goals are obtained with less enforcement; the housing associations 'win' as energy is, and thus costs are, saved; trust is gained; and possibly enforcement is lightened – and the housing associations can use their environmental concerns in all kinds of publicity.

The key to the smart regulation philosophy is to have those actors involved in the regulatory process that are best fit to enforce regulations¹⁷. Sometimes this may be through traditional public agencies; sometimes through self-regulatory or co-regulatory initiatives in which private sector actors enforce their own body; sometimes through third parties, such as consumer interest groups that act as 'surrogate controllers'. However, from extensive empirical research (ibid.: 137-372), it is established that involving 'surrogate controllers' is more efficient when large companies are involved and when non-compliance is easy to notice in these participants and parties. For instance, for an ordinary citizen it might be easy to notice violation of planning regulations when a building is built where it is not supposed to; yet, violation of technical building regulations when the wrong type of glazing is used might be hard or even impossible to notice as that same citizen does not have the necessary technical knowledge or experience to do so. Griffiths' 'theory of the 'social working' of legal rules' underpins the idea that compliance with regulations not only comes from professional bodies enforcing regulations, but that other actors have a strong influence on compliance motivation as well (Griffiths, 2003).

Private sector involvement in regulatory regimes

The notions of 'substitute controllers' and self-regulatory or co-regulatory initiatives in the regulatory process are not unique as such. Ayres and Braithwaite (1992) and Braithwaite (1982, 1984, 1985) already noticed 'public enforcement of privately written rules' and 'publicly mandated and publicly monitored private enforcement of those rules' (Ayres and Braithwaite, 1992: 116). Based on these insights, Ayres and Braithwaite introduce the concept of 'enforced self-regulation'¹⁸ (Ayres and Braithwaite, 1992: Chapter 4;

¹⁸ A similar type was introduced already in 1982 by Bardach and Kagan named 'mandated self-regulation' Ibid.

¹⁹ The concept of enforced self-regulation is based on an influential work by Ronald Coase: The Nature of the Firm. In this paper, Coase argues that firms are able to produce goods cheaper than they can buy on the open market. By producing goods themselves, the firms are able to avoid transaction costs they would encounter by buying on the open market (Coase (1937) The Nature of the Firm. *Economica*, 4, 386-405). Coase's work has been of great influence to so-called New Institutional Economics (NIE). One of the main fields of attention within NIE are so-called 'make or buy' decisions (Williamson (1998) *Transaction Cost Economics: How It Works; Where It is Headed*. *The Economist*, 146, 23-58). With reference to the topic of this book, a make or buy decision could be: should a government carry out enforcement of building regulations itself ('make') or should the government put out enforcement ('buy')? See also Chapter 3 of this book.

Braithwaite, 1982¹⁹. Within this model, a government body is overseeing the process of self-control; and government and individual companies make agreements on compliance. These individual companies have to control if regulations are being complied with and have to set up protocols to deal with the non-compliance.

In regulatory literature, self-regulation is often considered to be the opposite to traditional command and control regimes (Aalders and Wilthagen, 1997; Gunningham and Rees, 1997a) and the two are frequently regarded as the limits of a continuum or sliding scale of regulatory strategies (Price and Verhulst, 2000; Sinclair, 1997). Self-regulation is said to have both advantages and disadvantages in regulatory regimes (Andrews, 1998; Ayres and Braithwaite, 1992: Chapter 4; Baldwin and Cave, 1999: 124-133; Bardach and Kagan, 1982: Chapter 8; Boddewyn, 1988: 330-351; Fairman and Yapp, 2005; Griffiths, 2003: 57; Gunningham and Grabosky, 1998: 52-56; Lenox, 2006; Núñez, 2007; Ogus, 1995). Relevant expertise and knowledge of the 'own' body, and specialist technical expertise are seen as major advantages of self-regulation. It is considered that a self-regulatory organisation knows more about its sector than a public authority ever could. Furthermore, self-regulators are considered to have more easy access to those under control and can get the information they need at a lower cost. Finally, organisations are considered to show a high level of acceptance as they are subject to 'their own' rules.

Conversely, mandate claims are seen as problematic; the introduction of individuals or organisations that have no democratic legitimacy with which to exercise enforcement makes it hard to justify that the public interest is being served. Also, the accountability of self-regulators seems to be questionable: the risk of capture might weaken the model, as do both the potential lack of public belief in the scheme and the possible exclusion of organisations that are not part of the self-regulatory system. Finally, the economic circumstances that might stimulate companies to implement self-regulation and the knowledge and willingness within an organisation to implement self-regulation might be lacking. Nevertheless, in terms of management and efficiency, different authors claim that self-regulation, or a certain type of self-regulation, and formal legal systems work best when they are combined (for an overview, see Doyle, 1997: 35-42).

The concept of self-regulation is, however, comprehensive, and an unambiguous definition seems difficult to make. Self-regulation can, in a broad sense, be considered to be taking place when a group of firms or individuals exercise control over its own membership and their behaviour (Baldwin and Cave, 1999: 125), but often with a certain amount of government concern (Gunningham and Rees, 1997a: 365). But then: what is the amount of control needed to call it self-regulation? This question seems to have been an ongoing debate in regulation literature for some time now, with a number of authors participating (e.g. van den Heuvel, 1994; Husye and Parmentier, 1990; Price and Verhulst,

2005; Price and Verhulst, 2000; Rees, 1988). Some authors draw up a series of sub-models that show a certain degree of private sector involvement. Nevertheless, the range of this 'certain degree' is wide-ranging as it starts straight where command and control ends and continues to the point of no external government involvement at all – a continuum (compare with Andrews, 1998: 189). Furthermore, the different authors do not all cover the same range of private actor involvement in that continuum and sometimes give the same, or similar names to sub-models that have a totally different position on the continuum, thus making the sub-models difficult to compare and contrast. To illustrate these observations, I will briefly introduce the division of self-regulatory models by some authors:

- Based on a study on occupational safety, Rees (Rees, 1988: 10-11) makes a tripartite division into:
 - mandatory partial self-regulation, in which drawing up regulations or enforcing regulations is carried out by private actors, leaving the other tasks to the government;
 - mandated self-regulation, in which drawing up and enforcing regulations is carried out by private actors as well, but done so overseen by the government (a likewise type is described in: DeMarzo et al., 2005); and
 - voluntary or total self-regulation, in which both drawing up and enforcing regulations is carried out by private actors alone.
- Based on a study on consumer affairs in the European Community, Huyse and Parmentier (1990: 295-260) also make a tripartite division:
 - incorporation, to describe the situation in which existing, but non-official norms become part of the legislative order when lawmakers insert them into statutes or when they declare the outcome of private negotiations generally binding for a whole sector;
 - concerted action, to describe the situation in which government sets both formal and substantive conditions for rule-making by one or more parties; and
 - subcontracting, to describe the situation where government limits itself to setting the formal conditions for rule-making, while leaving it entirely up to the parties to shape the content (a likewise type is described in: Schulz and Held, 2004).
- Using different studies, Van den Heuvel (1994: 150-151) has defined four possible types of self-regulation:
 - covenants or contracts, defined by a government that participates in setting rules of conduct;
 - conditioned self-regulation, which leaves the initiative with the interested parties, but the government sets conditions for the results;
 - replacement self-regulation, which leaves initiative with the interested parties, though the government maintains the right to draw up legislation when the public interest is insufficiently served; and

Figure 2.1 A continuum of regulatory regimes

Author(s)	Regulatory regime			
	Strict command and control	Self-regulation/co-regulation		Voluntarism
	Governmental involvement only	More governmental than non-governmental involvement	More non-governmental than governmental involvement	
Rees (1988)		←	mandatory partial SR mandated SR →	voluntary or total SR
Huyse <i>et al.</i> (1990)		incorporating concerted action sub-contracting		
Heuvel (1994)		covenants or contracting	conditioned SR replacement SR	pure SR
Price <i>et al.</i> (2005)		mandated SR	sanctioned SR	coerced SR voluntary SR

- pure self regulation, defined by a government that leaves the initiative totally with the interested parties and adopts a neutral attitude towards the content of agreed rules of conduct as long as these do not go against the law.
- Based on a study of self-regulation on the internet, Price and Verhulst (2005; 2000: 9) also name four possible types of self-regulation:
 - mandated self-regulation, in which the industry is virtually required by the government to formulate and enforce norms within a framework defined by the government;
 - sanctioned self-regulation, in which the collective group itself formulates the regulations, which are then submitted for government approval;
 - coerced self-regulation, in which a collective group formulates and imposes regulation itself in response to governments' threats of statutorily imposed regulations (likewise types are described in: Baldwin and Cave, 1999: 126; Lenox, 2006; Sinclair, 1997: 535); and
 - voluntary self-regulation, where there is no active government involvement at all.

Although covering just a small part of the debate on self-regulation, the overview might give a general idea of the area that is covered by the term self-regulation when used within regulatory enforcement regimes. In Figure 2.1, this overview is illustrated. The different sub-models on self-regulation (SR) of the authors mentioned are placed in the figure. If the amount of government involvement in these models is taken as a criterion, interrelations between sub-models become clear, as demonstrated in Figure 2.1 as well.

From the overview, some key features of self-regulation become clear. First-

ly, it is possible to split the continuum into rough categories making the different sub-models, to a certain degree, comparable. One end of the continuum is, as described above, strict command and control; at the other end there is no government involvement at all. Different authors refer to 'no government involvement' as voluntary self-regulation, pure self-regulation or total self-regulation (Price and Verhulst, 2000: 9; Rees, 1988: 10-11; Van den Heuvel, 1994: 150-151). I propose to drop the term self-regulation in these 'voluntary', 'pure' or 'total' situations, as these appear to me to be pleonasms of terms and concepts (compare with Andrews, 1998: 31). Is a situation in which private actors enter self-regulation without any government involvement not inherently 'voluntary'? I have therefore used the term voluntarism to specify the other end of the continuum in Figure 2.1.²⁰

Secondly, the field in between the two ends of the continuum is filled with a wide variance of sub-models. Self-regulation in these specific sub-models is regarded as either a contract between government and private actors on enforcing the public regulations, or as an agreement between government and private actors on achieving compliance with public regulations; often these distinct types are used interchangeably. It is questionable whether the term self-regulation is accurate to describe these situations as the government engages directly in the self-regulation process. According to Gunningham, these situations may be more properly termed co-regulation (Gunningham and Grabosky, 1998: 55). In Chapter 3, I will use this term to indicate the in-between field on the continuum. Furthermore, by using the term co-regulation, room is not only given to government and private sector engagement in the process, but the idea of 'surrogate controllers' or third parties can also be included within the concept of co-regulation (Gunningham and Grabosky, 1998: 408-413). I will, as already illustrated, make a division between governmental and non-governmental organisations and individuals, or actors.

Thirdly, the shift in the sub-models relates to different levels of responsibility. From the different sub-models, three levels of responsibility become clear: responsibility for setting regulations; responsibility for enforcing regulations

20 Note that the idea of private players voluntarily entering self-regulation is under debate. So-called 'voluntary initiatives' are sometimes criticised as still being influenced by government interference. For instance, private organisations may wish to delay or prevent approaching government regulation, and therefore react to the implementation of this regulation by 'voluntary' initiatives (Baldwin and Cave (1999) *Understanding Regulation. Theory, Strategy and Practice*) and Sinclair (1997) *Self-Regulation Versus Command and Control? Beyond False Dichotomies. Law & Policy*, 19, 529-559). Others claim that private organisations' 'voluntary' choice of self-regulation stems from these organisations' enforcement-minimising or wealth-maximising behaviour (Decker (2007) *Flexible enforcement and fine adjustment. Regulation & Governance*, 1, 312-328). With the exception of wealth-maximising, I would still refer to these situations as, indeed, influenced by government interference and thus co-regulation.

and responsibility for setting rules to and oversight of the enforcement of regulations. Going from left to right in Figure 2.1 more responsibility is given to non-governmental actors. As such, the field of co-regulation can broadly be divided into more governmental than non-governmental involvement; and a field of more non-governmental than governmental involvement.

As stated in the introduction to this book, the private sector is already involved in building regulatory enforcement regimes in countries such as Australia (ABCB, 1999; Capetenakis, 2004; du Chateau, 2000), Canada (BCMh, 2007), New Zealand (Hunn, 2002; Yates, 2003) and parts of Europe (Meijer and Visscher, 2006; Meijer *et al.*, 2003) and it is expected that this private sector involvement will only expand (*ibid.*). Not only does this development appear to fit into a 'surge in self-regulatory regimes' in advanced economies worldwide (Gunningham and Rees, 1997a: 363) and a 'rise of new instruments of regulation' (Levi-Faur, 2005: 22); it appears also to fit into the idea of a government that does more steering than rowing (Osborne and Gaebler, 1992).

2.6 Conclusions and discussion

This chapter bears the ambitious title 'Towards a better understanding of building regulation'. Treating the subject exhaustively would have implied writing a large volume on many regulatory scholars. That was not my goal and others have done it before me (e.g. Baldwin and Cave, 1999). I have made an attempt briefly to introduce some major current discussions on studies of regulation and to introduce some 'grounded' ideas that, to regulatory scholars, have become 'the order of the day' – or paradigms.

In general, it can be concluded that regulations are needed to guaranteeing both individual and public interests. Regulation serves as a guideline for the course of social action and interaction – to make it predictable (Burns and Flam, 1987: 55). From this point of view, building regulations can be understood to be 'manuals' on how to build buildings; manuals that have been drawn up in order to make construction predictable. As such, the oft criticised highly technical contents of building regulations can be understood to be necessary because construction has become a highly technical undertaking. And since construction will become more sophisticated, building regulations might as well become more and more specialised.

In this chapter, we have seen that different discussions take place simultaneously in studies on regulation. I have introduced what I consider to be the most eminent: the quality of the rules, enforcement strategies, enforcement styles and enforcement actors. As we have seen, the attention of regulatory scholars has shifted from questioning how reasonable the regulations' design and enforcement is to issues such as the regulatees' motivations to comply and the enforcers' ability to influence these (see also May, 2004). However, the

search for alternative enforcement strategies, alternative enforcement styles and alternative enforcement regimes is not an isolated academic quest. Alternatives introduced appear to be aligned with what can be described as the rise of a 'new regulatory order' that goes by many names, such as 'the new regulatory state' (Braithwaite, 1999; Braithwaite, 2000; Mazerolle and Ransley, 2005: Chapter 2; Walby, 1999: 123-125), 'neo-liberalism' (Barry *et al.*, 1993) and 'regulatory capitalism' (Levi-Faur, 2005). This rise can, in general terms, be described as 'privatisation combined with new regulatory institutions' (Braithwaite, 2000: 224). The new regulatory order is then characterised by different arrangements of responsibilities between governmental and non-governmental actors regarding setting regulations and enforcing these. Responsibilities regarding setting regulations, the 'direction of regulation and risk management', then requires strong central state control; whereas responsibilities regarding enforcement, the 'operational regulatory and compliance functions', are shifted to the private sector or third sector (Mazerolle and Ransley, 2005: Chapter 2). In the construction sector, this shift in the governments' role can be described as moving 'from public intervention to a 'laissez faire' attitude' (Seaden and Manseau, 2001: 194).

In this chapter, I have tried to illustrate these discussions with building regulation-related examples. My aim in the following chapter is to draw up a method to analyse building regulations and building regulatory enforcement structurally.

3 Building regulatory enforcement regimes

In the previous Chapter we have seen that studies on regulation provide a wide variety of insights into the quality of regulations; enforcement strategies to reach the underlying goals of regulations; styles inspectors might use to achieve compliance with regulations and actors that can carry out enforcement or act as ‘surrogate’ enforcers. In this chapter, I will present a methodical approach to analyse building regulations and their enforcement.

In Chapter 2, we have also seen that different levels of responsibilities come with regulation and enforcement. The methodical approach I present in this chapter is based on these levels of responsibility. A certain arrangement of responsibilities regarding regulation and enforcement between government and non-governmental actors defines what I will refer to as a regulatory enforcement regime. In this chapter, I hope to demonstrate how different organisational arrangements of these responsibilities can be classified, analysed and mutually compared. My aim is to contribute to the search for ‘optimal’ regulation (e.g. Gunningham and Grabosky, 1998: 4) in terms of effectiveness, efficiency, equity and accountability; and to contribute to debates on ‘the new regulatory order’, which as has been shown in the previous chapter applies to contemporary building regulatory regimes worldwide. The central argument for this undertaking will be that the organisational arrangement of the regulatory enforcement organisation might well be of much importance in the search for ‘optimal’ regulation, but has not yet been analysed as such. As illustrated in Chapter 2, the study of regulation lacks a clear typology on (co-)regulatory regimes, I shall therefore introduce a typology of regulatory enforcement regimes.

In this Chapter, I will start with introducing the building blocks and the building structure I use to draw up a framework. This framework will serve as a basis for the various regulatory enforcement regimes that will be introduced in the remainder of this chapter. I will illustrate these regimes with international cases on building regulations. Finally I will discuss the possible implications of these regimes, relations between the regimes and their possible use for further analysis of building regulatory enforcement and the search for ‘optimum regulation’ in general.

3.1 Building blocks and structure

Building blocks

An important notion that will underlie this methodical approach is clarified in the previous chapter. As we have seen in Chapter 2: in order to make rules work, they have to be enforced (see also Giddens, 1984: 18; Weber, 1964 [1921]: 126-153). The enforcement of the rules itself is also generally regulated and enforced (Cohen and Rubin, 1985; DeMarzo et al., 2005; Fairman and Yapp, 2005; May, 2007). To avoid confusion between these two forms of en-

forcement, I will refer to the enforcement of enforcement as ‘oversight’ (Cohen and Rubin, 1985: 76; DeMarzo *et al.*, 2005). From these notions, three levels of responsibility have become clear: responsibility for setting regulations, I will refer to as regulation; responsibility for the enforcement of regulations, I will refer to as execution; and responsibility for setting the rules to and oversight of the enforcement of regulations, I will refer to as enforcement.

Regulation and enforcement as a whole can, as we have seen in Chapter 2, be referred to as a ‘regulatory regime’ (Hood *et al.*, 2001, May, 2007). This term to me however may lay too much emphasis on the aspect of regulation and less on establishing rules to and oversight of enforcement – according to the term ‘regulatory regimes’, this could be referred to as an ‘enforcement regime’. Taking the regulatory and enforcement regime together results in, what I will refer to as, a ‘regulatory enforcement regime’ – the arrangement of responsibilities regarding regulation and enforcement between governmental and non-governmental actors.

As we have seen from analysing the debate on self-regulation, different regulatory enforcement regimes exist. Broadly, these cover command-and-control, different modes of co-regulation and voluntarism. From the discussion of self-regulation, a certain hierarchy in the levels of responsibility follows. When a shift from command-and-control to voluntarism is made, from left to right in Figure 2.1, the levels ‘execution’, ‘enforcement’ and ‘regulation’ are passed. The levels are hierarchical as each non-governmental actor achieves more responsibility in the regulatory regime and the total level of responsibility depends on the level reached. Let me explain this by moving from left to right in Figure 2.1.

Firstly, at the level ‘execution’, the government enters into agreements with non-governmental actors on how compliance is reached, or the government delegates enforcement tasks to non-governmental actors. Yet, the government oversees these agreements, or the execution of these enforcement tasks. Then, at the level ‘enforcement’, non-governmental actors get involved in setting the criteria that have to be met in order to be allowed to carry out enforcement tasks and oversee the implementation of enforcement. This is done in cooperation with, overseen by, or without governmental involvement. Finally, at the level ‘regulation’, non-governmental actors set regulations in cooperation with, overseen by, or without government involvement. Responsibilities regarding the enforcement of these regulations, the setting of enforcement rules, and overseeing this enforcement, lie totally with private actors. Note that a similar hierarchy exists the other way round: if a government wants more involvement in an ‘unregulated’ area, this implies a move from right to left in Figure 1. One moves through the ‘regulation’, ‘enforcement’ and ‘execution’ levels, depending on how much responsibility is taken by the government.

Altogether, the analysis in Chapter 2 of this book gives me different build-

ing blocks to build the framework with: regulations; rules to and oversight of enforcement; the execution of enforcement; and a series of actors – governmental and non-governmental organisations and individuals. These building blocks or elements relate to the various major debates in regulatory literature introduced in Chapter 2. Firstly, the debate on ‘the quality of law’ and the question of whether legislation leads to compliance (e.g. Bardach and Kagan, 1982; Griffiths, 2003; Seidman, 1984) relates to the ‘regulation’ level. Secondly, the debate on different ‘enforcement strategies’ relates to the ‘enforcement’ level. Thirdly, the debate on different ‘enforcement styles’ relates to the ‘execution’ level. Fourthly and finally, the debate on the parties that can be involved in enforcement relates to the actors.

Highly influential works in regulatory literature (Ayres and Braithwaite, 1992: Chapter 2; Gunningham and Grabosky, 1998: Chapter 6) advocate that better regulatory regimes involve a mix of enforcement strategies, enforcement styles and enforcement actors. Which mix to use, as illustrated in Chapter 2, still provides much food for thought (e.g. Baldwin, 2005; Nielsen, 2006; Sparrow, 2000). The elements are clear, but an analytical structure to compare possible mixes is missing.

Building structure

Does this mean real-life structure is lacking? I do not think so; as I will illustrate, system theory provides a structure that, together with the building blocks introduced, gives me all the elements I need to build the framework.

Regulatory regimes can be regarded as institutions (e.g. Gunningham and Grabosky, 1998, Scott, 1987). The classical definition of an institution was provided by Hughes (1939) who looked upon institutions as stable and slow changing social systems²¹. And although institutional theory has developed since and has been embraced and rejected by different fields of social science, modern day institutional theory still has a strong system-based focus (Farashahi et al., 2005; Scott, 1987)²².

²¹ For an overview of ‘classical’ institutional literature see Ganesh (1980) *Institution Building for Social and Organizational Change: An Appreciation*. *Organization Studies*, 1, 209-288). Ganesh makes a division between an ‘evolutionary’ model of institution building and an ‘engineering’ model of institution building. Considered from an evolutionary point of view, institutions are ‘the spontaneous crystallisation of recurring interaction around needs’ (*ibid.*: 211). From an engineering point of view, institutions can be considered as ‘planning, structuring and guidance of new or reconstituted organisations’ (Esman (1972) *The elements of institution building*, in: Eaton (Ed.) *Institution Building and Development; from Concepts to Application*).

²² A contemporary institutionalist’s definition is: ‘Institutions are the rules of the game in a society, or more formally, are the constraints devised by humans that shape human interaction. Consequently, they structure incentives in human exchange, whether political, social or economic’ (North (1990) *Institutions, institutional change, and economic performance*: 3).

Von Bertalanffy, the founding father of general system theory, looks upon systems as a complex of interacting elements (Von Bertalanffy, 1950: 143). Within Von Bertalanffy's system theory, a distinction is made between closed and open systems. Closed systems are characterised by equilibrium – they are isolated from their environment; open systems are characterised by an exchange with their environment (ibid.: 155-157). It seems this interaction between the elements within the system, but also between the system and its environment makes systems theory a strong starting point to analyse regulatory enforcement regimes.

Burns and Flam have integrated general systems theory in institutional theory. These authors look upon institutions as shared rules which categorise social actors, their activities and their relationships (Burns and Flam, 1987: 106). A similar categorisation, as we have seen in Chapter 2, has been made by regulatory scholars, although they do not directly seem to follow system theory. For instance, Gunningham and Grabosky (1998: Chapter 3) make a division into parties, their roles and their interaction; and Midttun (2005) builds his models with actors, their roles and their exchanges. Burns and Flam (1987: 237) stress the influence actors have on the institution they are included in, as actors 'reinterpret, creatively reformulate, and replace or ignore' the rules set. As such, actors are influenced by the institution, but influence the institution as well. This idea has a strong link to what Giddens refers to as 'the duality of structure' (Giddens, 1984: 25-28).

An example: Four levels of social analysis

A well-built institutional framework, that might serve as an example of how institutional and systems theory can be integrated, was introduced by Oliver Williamson (1998). Williamson's framework appears to have a strong relationship with concepts of system theorists (especially Burns and Flam, 1987); institutional theorists (Berger and Luckmann, 1967; Meyer and Rowan, 1977; Selznick, 1957; Zucker, 1993) and organisational theorists (especially Barnard, 1938). And although Williamson, as an economist, has built his framework to analyse 'make or buy' decisions²³, it seems possible to read his framework in more general terms as well.

Williamson (1998: 25-29) defines four levels of social analysis to explore institutions. The top level he names the 'social embeddedness level' in which, amongst others, norms, customs, morals and traditions are located. Within this top level, institutions change very slowly – centuries to millennia in that

²³ 'Make or buy' decisions are typically the domain of neo-institutional economics (Klein (2005) *The Make-or-Buy Decisions: Lessons from Empirical Studies*, in: Menard and Shirley (Eds.) *Handbook of new institutional economics*). With reference to the topic of this book, a make or buy decision could be: should a government carry out enforcement of building regulations itself ('make') or should the government put out enforcement ('buy')?

order of magnitude – and if changes do occur, these are often spontaneous without an obvious goal. The second level Williamson names the ‘institutional environment’. Analysis of this level focuses on the product of politics: polity, the judiciary and the bureaucracy of government. Or, as Williamson puts it, ‘the rules of the game’. The study of property rights and the study of contracts are the principal elements within Williamson’s second level. Property rights are viewed as those rights that individuals derive from using goods/property (North, 1990: 47). In more general terms, this level seems to focus on (basic) rights and the (quality of) law. Then, enforcement of property rights and contracts are needed: institutions of governance are essential (Williamson, 1998: 28). These institutions of governance, or modes of organisation, are located at the third level of Williamson’s scheme: the ‘governance’ level. This level deals, as Williamson puts it, ‘the play of the game’. The focus is on alternative modes of organisation to enforce property rights: ‘get the governance structure – markets, hybrids, firms, bureaus – right’ (ibid.: 29). Finally, Williamson names the fourth level; the ‘resource allocation and employment’ level: ‘get the marginal conditions right’ (ibid.: 29). In this fourth level, the study of principal–agency relationships has a special focus. This level seems to relate to studies on responsive regulation (Ayres and Braithwaite, 1992; Braithwaite, 1984; Braithwaite, 1985; Braithwaite, 2002; Grabosky and Braithwaite, 1986) and smart regulation (Gunningham and Grabosky, 1998) from which it can be learned that these relations between controller and subject are a particularly important aspect when setting up a ‘better’ regulatory system – for a more detailed discussion of these topics see Chapter 2 of this book.

3.2 Building the framework

This brings me to the point where I have all the elements to start building the framework, the building blocks: a hierarchy of arrangements of responsibilities regarding regulation and enforcement; a series of governmental and non-governmental actors; and a structure: the actors’ activities and relationships.

The framework builds on different levels. The element at the top level is the arrangement of responsibilities regarding setting regulations – denominated regulation, with a link to the debate in regulatory literature on ‘the quality of law’. The element at the second level is the arrangement of responsibilities regarding setting up the system of enforcement, setting rules to and oversight of the enforcement of regulations – denominated enforcement, with a link to the debate in regulatory literature on ‘enforcement strategy’. The element at the third level is the arrangement of responsibilities regarding responsibility for enforcing the regulations – denominated execution, with a link to the debate in regulatory literature on ‘enforcement style’. As such, each level consists in a certain arrangement of responsibilities between governmental and

Figure 3.1 Set-up of the basic framework

Level	Actors		Legend
	Government	Non-government	
Regulations (arrangement of responsibilities regarding rule-making)	–	–	X responsible actor
Enforcement (arrangement of responsibilities regarding setting up the system of enforcement)	–	–	I indirect responsible actor
Execution (arrangement of responsibilities regarding carrying out enforcement)	–	–	D direct responsible actor
Regulatee			→ external supervision
			↻ internal supervision

non-governmental actors. The set-up of the framework is represented in Figure 3.1.

Some analogy can be found with Williamson's (1998: 25-29) framework of social analysis. The top level then would relate to what Williamson refers to as 'the rules of the game'; the second level to 'play of the game'; and the third level to 'get the marginal conditions right.'

In the framework, the empty cells can be filled up with the symbols presented in Figure 3.1; the cells will be filled up when I define the different types of regulatory enforcement regimes in the next part of this chapter. But first I will discuss some aspects of the framework.

The actors within the framework are governmental or non-governmental organisations or individuals. Their relationships are based on enforcement and oversight; both supervisory roles. Their activities are related to enforcement tasks – actors therefore have duties and responsibilities. The concept of responsibility is disputed and the term is interpreted differently in different fields of science, and also within the field of public policy analysis itself (e.g. Bakker and Yesilkagit, 2005; Barnard, 1938: Chapter 17; Bardach and Kagan, 1982: Chapter 11; Dubbink, 2003; Dunn, 2003; Johnson and Ioeger, 2001; Zimmerman, 1997). I will therefore briefly introduce and examine the concepts of direct and indirect responsibility – terms used in the disputes mentioned – for these are of importance to the regulatory enforcement regimes.

Within the literature, direct responsibility is seen as an element (actor) in a system's primary responsibility for its actions and the effects resulting from these actions. Indirect responsibility is considered to be purely discretionary responsibility for the system as a whole; meaning, setting the system's conditions. An indirectly responsible actor has had direct responsibility in an earlier point in time and has had this responsibility since passed to another actor and/or has only had responsibility for providing the system as a whole. For example, an actor that had responsibility for implementing enforcement, but has delegated authority to do so to another actor, can still be held responsible for this delegation. This actor, while not required to act, is not entirely released of its duty and, should the need arise, might be called upon to act

at some point in future. A series of failures within the system might also be a reason to call upon these actors to be directly responsible again (comparable, partly, with Barnard, 1938: Chapter 17; Johnson and Ioeger, 2001). Enforcement in the models is then divided into external and internal supervision. External supervision is looked upon as the authority of an actor to supervise another; internal supervision is looked upon as supervision an actor has over its own membership and behaviour. Finally, a particular actor in the model is the 'regulatee', the legal person or body that is subject to the regulations. Nevertheless, in the set-up of the model, this actor is inactive.




As the focus of this book is on building regulatory enforcement regimes, some basic principles underlie, or are embedded within the set-up of the regimes that will be presented below. It will nevertheless be relatively easy, I hope, to follow my methodology for a general purpose or for specific other fields of policy as well. The first basic principle is that a government sets building regulations in order to guarantee public interests, such as the right to a safe, healthy and sustainable built environment. The second is that enforcement is regarded as control in order to reach compliance with regulations. As illustrated in Chapter 2, compliance with regulations can be reached through a variety of enforcement strategies. Yet traditionally, building regulations are enforced through building control, or supervision, as illustrated in the introduction of this book. As we will see from the illustrative examples in this chapter, this traditional form of enforcement of building regulations is still the preferred means.

The types of regulatory enforcement regimes that will be described in the next part of this chapter will be based on this basic framework. The regimes have to be considered to be final normative models; the regimes present an analytical 'final stage' of regulation and enforcement, not a blueprint of how to get there.

3.3 Building regulatory enforcement regimes

Later in this chapter I will work out the basic framework in a typology of regulatory enforcement regimes that show a gradual shift from total public involvement to total private involvement – compare with Figure 2.1. This will be done by starting to lay down all duties and responsibilities of government actors, a traditional public set-up, and then shifting these duties and responsibilities to non-government actors. In total, five regulatory enforcement regimes will be presented: public, prescribed co-regulation, conditioned co-regulation, substitute co-regulation and private. The models will, as far as possible, be exemplified by systems of building control in the United States, Europe, Canada and Australia. Cases presented are selective and illustrative. Cases were selected from journal papers, government reports and where nec-

Figure 3.2 Public regime

Level	Actors		Legend
	Government	Non-government	
Regulations	X	–	X responsible actor
Enforcement	X	–	I indirect responsible actor
Execution	X	–	D direct responsible actor
 Regulatee			 external supervision  internal supervision

essary, additional information was sought on websites of regulatory agencies mentioned.

Public regime

The first model, the public regime, can be compared with a traditional regulatory regime: all responsibilities for setting building regulations; setting rules to and oversight of enforcement; the enforcement framework and the execution of enforcement lie with governmental actors. An enforcement relationship exists between the enforcer and the regulatee and an oversight relationship might exist between or within government bodies. Figure 3.2 represents the public regime.

In the field of building control, systems like these can be found in many European countries (Meijer and Visscher, 1998) and in parts of Australia and Canada (ABCB, 1999; Hansen, 1985) as well. Nevertheless, public building control is often a facet of a two-tiered system in which private sector actors can, to a certain degree, compete with public actors. For instance, in the Australian state Victoria, an applicant for a building permit can choose to have a design checked by a municipal building control authority or a private certifier. In terms of the building permit, both actors have similar duties and responsibilities (BCV, 2003b).

A 'single-tier' public system of building control can be found, for instance, in Denmark and the Netherlands (Meijer *et al.*, 2003). In Denmark, a Building Act regulates the area of construction. Technical building regulations are laid down in two sets of Building Regulations. Local authorities, i.e. city or district Councils, have responsibility for administration of the Building Act.

In the Netherlands, the area of construction is regulated through the Housing Act. As in many other European countries, the Dutch building regulatory framework has a long history: throughout the 100 years or so that the Housing Act has been in force, it has been subject to changes to suit contemporary issues and goals. The goals of the original Housing Act in 1901 were health and safety. As the building regulations developed further in the twentieth century, the list of goals grew. It now includes health, safety, usefulness,

energy-saving and environmental conservation (though the latter has not yet been incorporated in the regulations). From the 1980s onwards, developments in the building regulatory framework were subject to ideas of deregulation and uniformity and a so-called Building Decree was drawn up to regulate technical requirements. According to the Housing Act, all construction work must comply with the Building Decree. The Housing Act places responsibility for enforcing building regulations with local governments. According to the Housing Act, these local governments, municipalities, only have to make provision for a local building control authority, they do not necessarily have to establish one. Yet, almost all municipalities still have their own building control department that carries out enforcement. Finally, a national ministerial agency supervises these local building control authorities (Van der Heijden et al., 2007).

Prescribed co-regulation regime

The prescribed co-regulation regime is characterised by a government that takes full responsibility for setting building regulations; and setting rules for and oversight of enforcement. Enforcement is delegated to non-governmental actors. The regime is opened up for the government to contract out enforcement to non-governmental actors, and to enter into agreements with non-governmental actors – covenants – yet, the non-governmental actors have to meet certain precisely described participation and administration criteria in order to be allowed to enforce the regulations. By doing so, governmental actors have indirect responsibility for executing the enforcement. An enforcement relationship exists between enforcer and regulatee and an oversight relationship might exist between or within government bodies. Extra supervisory relationships, oversight, arise at the execution level: in order to assure its own responsibilities, the governmental actor who is indirectly responsible might want to supervise contracts or covenants with the non-governmental actor, or might want to supervise the fulfilment of participation and administration criteria; and internal supervision might exist within non-governmental actors. Figure 3.3 represents the prescribed co-regulation regime.

Advantages for the public are expected, based on the belief that non-government actors are able to overlook their 'own' body more effectively and efficiently than external government actors. However, disadvantages are expected as well. Advantages and disadvantages ascribed to self-regulation have already been discussed in Chapter 2 of this book. Based on that discussion, I expect there is an advantage as non-governmental actors are considered to overlook their 'own' body more effectively and efficiently than external governmental actors. However, I expect disadvantages as well. Especially when non-governmental actors are only replacing the government's implementation of enforcement, problems usually ascribed to traditional public regimes may be encountered. These problems are, for instance, getting the informa-

Figure 3.3 Prescribed co-regulation regime

Level	Actors		Legend
	Government	Non-government	
Regulations	X	–	X responsible actor
Enforcement	X	–	I indirect responsible actor
Execution	I →	ⓓ	D direct responsible actor
		↓	→ external supervision
		Regulatee	ⓓ internal supervision

tion needed and being regarded as ‘not from [their] own body’ (Baldwin and Cave, 1999: 38-39; Gunningham and Grabosky, 1998: 44-47).

Within building regulatory regimes in developed countries, this mode seems to be widespread. Examples were found in Canada, Australia, the US and Europe; examples of contracting, or outsourcing, are given, followed by examples of covenants, or agreements. Firstly, in the Canadian province of Alberta, the Safety Code Act of Alberta states that only accredited organisations are allowed to enforce building regulations – formally it is called ‘voluntary’ accreditation (SCCA, 2003: 3). Different scopes of accreditation include: buildings, fire-safety, electrical installations, water installations, gas installations and private sewer and plumbing installations. Within the system, local governments, Regional Safety Councils and private sector organisations can be accredited. Nevertheless, only public organisations that are accredited are allowed to supply building permits – local governments and Regional Safety Councils. Accredited private organisations lack this authority, unless they are contracted by a public organisation. Within the system, organisations have to submit a Quality Management Plan to the Safety Codes Counsel, a provincial government agency, when an application for accreditation is made. According to provincial legislation, a Quality Management Plan clearly outlines how building control is carried out within the organisation; statutory formats for this Quality Management Plan are provided. The Safety Codes Council oversees the different types of accreditation and accredited actors, both governmental and non-governmental (SCCA, 2006).

Next, in the Canadian province of Ontario, the 2005 Building Code Act has opened up the possibility to have private actors involved in enforcing public building regulations. Prior to the implementation of the present Building Code Act and its regulations, the Act was enforced by public authorities only. The present Act allows these public bodies to outsource enforcement to qualified third parties, so called Registered Code Agencies (RCAs). Nevertheless, the Act provides that RCAs may only be appointed to perform limited functions: review designs and other materials to determine whether the proposed construction of a building complies with regulation; inspect the construction of

a building for which a permit has been issued under this Act; issue certificates that indicate to the responsible public body that compliance with regulations is demonstrated. RCAs can be qualified for different categories, such as 'house', 'complex buildings' and 'plumbing'. In order to be qualified as an RCA, a private actor must be covered by insurance, have and keep a certain level of knowledge and experience, be registered with the Ministry of Municipal Affairs and Housing and pay fees. Qualification requirements and enforcement administration criteria are set and enforced by the Ministry of Municipal Affairs and Housing (Short, 2005).

A third and final Canadian example can be found in the Canadian city of Vancouver in the province of British Columbia. Within the city of Vancouver, consumers can choose a 'regular' governmental building assessment process, or an alternative process; the so-called Certified Professional (CP) Programme. Under the CP Programme, the City will issue a building permit on the certification of a Certified Professional. All required approvals, such as the development permit, must be in place prior to the building permit being issued. During the design process and execution of construction work, a CP is responsible for contact with and informing local building control officials. A process lays down the amount of meetings between the CP and local officials and lays down the contents of the meetings (CPP, 2003: 5-13). The CP reviews drawings, checks compliance with building regulations and hands in the drawings to the local building control department. When all required information has been produced, it is checked for compliance by the CP. The CP can make an application for a building permit. The City can recognise a professional architect or professional engineer as a CP under the Certification of Professionals By-law. In order to become a CP, the City requires the individual to pass the Certified Professional course. Qualification requirements and administrative requirements are laid down by the City, which also has responsibility for overseeing the work of the Certified Professionals.

An Australian example of a similar regime can be found in the Australian Capital Territory (ACT) where private certifiers have been introduced to carry out statutory building assessment. Before deregulation, the role of the certifier was undertaken by building inspectors employed by the ACT Government. Currently only private sector actors, so-called licensed building surveyors, are appointed as building certifiers to carry out this role. To become a private certifier one has to meet criteria set by the ACT government. These are: to be accredited as a building surveyor with the Australian Institute of Building Surveyors or to be registered with the Institution of Engineers Australia, both non-governmental actors. Registration requirements involve proof of qualification, experience and insurance. Private certifiers are overseen by the ACT Planning and Land Authority, a government actor (see also Chapter 9 of this book).

In Germany a so called *prüfingenieur* (a private check-engineer) may act in the name and on behalf of public authorities and as such is allowed to verify

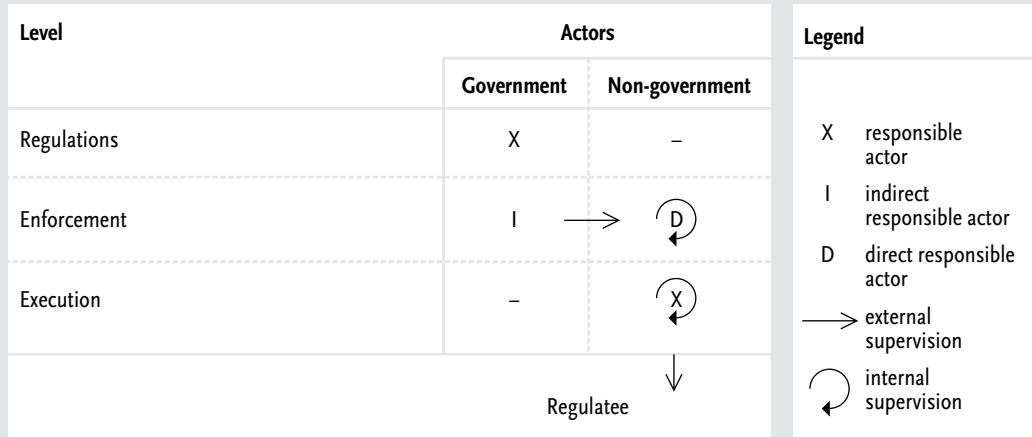
if design and structural work conforms with legal requirements (Meijer et al., 2003: 98). Qualification requirements are laid down in the building regulatory framework as are administration requirements (Zander, 2005). The prüfingenieur is fully responsible and liable for controlled and inspected structures. Prüfingenieurs check the majority of construction work in Germany. Larger municipalities do provide a construction inspection service, but these get mostly involved in small and minor construction work.

The case of John Hopkins University and the building authority of Howard County in the US is an example of a covenant, or agreement, between private and public actors regarding achieving compliance with building regulations at execution level. These actors came to an agreement on the University's ongoing in-house alterations required to meet research goals. In order to overcome issues such as time delays due to traditional permit review processes, the University agreed with the County on compliance with building regulations and a so-called Master Building Permit was drawn up. The agreement relies on a prescribed quality assurance system, including procedures for design and construction approval reviews based on the statutory building regulatory framework, and a prescribed in-house supervision system to certify alterations have been carried out according to approved plans. Occasionally, the County carries out unannounced inspections and audits. This example is said to have benefits both for the University, as time is no longer lost due to traditional plan review and approval processes, and the County, as it saves resources (Loesch and Hammerman, 1998).

Conditioned co-regulation regime

The conditioned co-regulation regime is characterised by a government that takes full responsibility for setting building regulations. Responsibility for setting rules to and oversight of enforcement is delegated to non-governmental actors, yet conditions are placed on setting the to and oversight of enforcement by the government. Thus, the government has indirect responsibility and non-governmental actors, when participating, have direct responsibility for carrying out enforcement. As such, the government gives and leaves it to non-governmental actors to fulfil the conditions that have been set, for example in terms of participation and/or administration criteria. Responsibility for execution of enforcement lies solely with non-governmental actors. An enforcement relationship exists between enforcer and regulatee and an oversight relationship may exist between the indirect responsible governmental actor who is indirectly responsible and the directly responsible non-governmental actor. Furthermore, supervision relationships, overseeing, may exist between or within non-governmental actors. Figure 3.4 represents the conditioned co-regulation regime.

The main difference with the prescribed co-regulation regime is the delegation of responsibilities for setting up the enforcement framework to non-gov-

Figure 3.4 Conditioned co-regulation regime

ernment actors. As with the prescribed co-regulatory regime, advantages are to be expected as non-government actors might be able to enforce regulations more effectively and efficiently. However, the accountability of the regime might raise problems due to conflicts of interest (Gunningham and Grabosky, 1998: 52-53; May, 2007). An additional layer of supervision or oversight might be needed to monitor the private enforcers, which could lessen the advantages (Cohen and Rubin, 1985; Fairman and Yapp, 2005).

Michael Power (1999: 66) notices an ‘audit explosion’ that in his view represents the rise of ‘control of control’. Power finds reasons for this audit explosion in three areas (2000: 111): ‘the rise of ‘new public management’; increased demands for accountability and transparency; the rise of quality assurance models of organizational control.’ The term auditing is a vague one (ibid.: 116) and it is difficult to clarify where audit and inspection overlap (Power, 2003a: 187). Nevertheless, auditing is considered to be a solution to ‘the problem of regulatory compliance [as] it defines a space in which regulatory compliance can be negotiated and constructed’ (Power, 2000: 113). Auditing produces ‘assurance or increased confidence in the subject matter of [the] audit’ (Power, 2003b: 380). According to Power, auditing, or ‘control of control’ has become an institutionalized part of regulation, leading to legitimacy (ibid.).

Within building regulatory regimes, this model seems to be gaining popularity throughout Europe and Australia. The Australian state of Victoria, for example, implemented a system of private certifiers in 1993. This system has opened up the former public monopoly on building control by giving consumers the choice of engaging a private building control surveyor or seeking the same service from a municipal building control surveyor (BCV, 2003b; VCEC, 2005a). Under Victoria’s building regulatory framework, both private and municipal building surveyors have the same responsibilities in relation to design verification, the issuing of building permits, controlling building work under construction and supplying occupation certificates. Private building surveyors need registration in order to be allowed to carry out work as a private certifier. Registration can be obtained from the Building Practitioners Board (BPB) – an independent statutory authority, which is made up solely of

non-governmental stakeholders. The BPB advises on the private certifier's registration criteria – education, experience and insurance; the actual registration criteria are set by the Minister for Planning. The BPB is also authorised to oversee the private certifiers' conduct and ability to practice and the BPB has the authority to discipline private certifiers. The Building Commission, a statutory government organisation funded through a building permit levy, provides administrative support for the BPB and in practice is usually its conduit to the Minister and other parts of government (see Chapter 5 of this book). The Victoria model framework is considered the leading model among Australian States and was held up as an example for introducing private building control in other states as well in the past 10 years. It is expected that in the near future all Australian states will implement a similar system of competitive building control (Capetenakis, 2004).

In the Netherlands, plans are to introduce private actor involvement in enforcing public building regulations in the short term. Within the future set-up, private sector actors can be certified to carry out plan reviews in order to verify if proposed plans show compliance with national building regulations. Within this system, private sector actors have to meet strict qualification criteria, set up by the Dutch Ministry of Housing, Spatial Planning and the Environment in cooperation with the building industry, in order to be certified. Within the set-up, private bodies will be authorised to process certification and enforce certified actors, overseen by the Ministry. Specific enforcement administration criteria are laid down in a so-called national control-directive in order to ensure that different certified actors carry out enforcement tasks in a similar, statutory manner (see also Chapter 5 of this book).

A similar regime has been introduced in England and Wales in the 1980s (Baiche *et al.*, 2006; Imrie, 2004; Meijer and Visscher, 2006). Since the 1980s, private sector actors have been certified as approved inspectors. The system of approved inspectors has been introduced to generate competition with the local government inspection bodies. Currently the non-government approved inspectors are in competition with the local government inspection bodies. Like the government bodies, the approved inspectors have the authority to control building designs and buildings under construction for compliance with building regulations; they are also authorised to issue building permits when compliance is shown. Inspection procedures and administration processes are specified.

A building regulatory enforcement regime that seems to differ when viewed from the outside, but which has a similar set-up, can be found in France. The French building regulatory framework is characterised by the significance of insurance. The French building regulatory framework stipulates compulsory insurance for different actors when a client and a builder enter into a contract; all parties involved, including the owner, vendor and developer must take out this insurance covering the presumed liability in the Civil Code. This

compulsory insurance has a run-off period of ten years and covers issues such as structural elements, electrical and other installations (Baccouche and Elias, 1998; Meijer *et al.*, 2003). Insurers often require technical inspection – building controls – by a private technical inspection body as a condition for issuing insurance policies. Duties and responsibilities regarding technical inspection are laid down in the Spinetta Law. The Centre Scientifique et Technique du Bâtiment (Scientific and Technical Centre for Building), a non-governmental organisation, supervises the work of these technical inspection bodies. Within the French system, local governments have limited enforcement tasks. These are restricted to building plan control, environmental conditions, zoning and town planning issues (Baccouche and Elias, 1998).






In the United States, the insurance industry played an important role in the development of the current building regulatory regime (Listokin and Hattis, 2005: 24-25). Concerned with property risk and conflagration risk, the insurance industry started regulated fire safety in buildings at the beginning of the 19th century. In the field of electrical safety, the insurance industry also took a regulatory lead. The insurance industry is currently concerned with supporting the development of regulation and evaluating building code enforcement programmes in the states and local jurisdictions (*ibid.*). As such, the construction industry appears to be overseeing governmental actors. A particular initiative, such as ‘oversight’ or monitoring by actors, unlike the traditional oversight, is thought to be a government task (e.g. Cohen and Rubin, 1985: 176).

Finally, an example to illustrate a covenant between the government and private sector within the conditioned co-regulation regime is the case of the so-called P-mark in Sweden (Anneling, 1998). The P-mark system is a certification regime developed by a Swedish government body, Statens Planverk (SP), in cooperation with the building industry, insurance companies and other interested parties. Under this regime, manufacturers can be certified for the construction of prefabricated detached houses. The P-mark implies that a product meets requirements stated in laws, standards or established regulations. Performance criteria and certification criteria have been drawn up by the cooperative. Performance criteria relate to the Swedish building code. Certification criteria relate to the quality system of the manufacturer and in-factory compliance assessment; test methods have been drawn up to verify compliance (Horvat and Fazio, 2005). Twice a year SP carries out an unannounced inspection at the factories; and annually five percent of all finished houses are inspected by SP as well.

Substitute co-regulation regime

The substitute co-regulation regime is characterised by a government that takes full responsibility for setting building regulations. Responsibility for setting the rules to and oversight of enforcement; and responsibility for executing enforcement, is left to non-governmental actors. Thus, regulations become

Figure 3.5 Substitute co-regulation regime






Level	Actors		Legend
	Government	Non-government	
Regulations	X	–	X responsible actor
Enforcement	–		I indirect responsible actor
Execution	–		D direct responsible actor
			→ external supervision
			 internal supervision
		Regulatee	

advisory rules that can be referred to when a dispute arises between different actors; yet, disputes are left to be solved either by the actors themselves, or through the judiciary. Regulations are set at the lowest common denominator that, when followed, should guarantee a healthy, safe and sustainable built environment. Enforcement does not exist unless non-governmental actors take responsibility for setting rules to and oversight of enforcement, and executing enforcement. Non-governmental actors might see it in their own interests to enforce regulations, for instance to reduce the risks of free market trade; to distinguish them from other actors; because they expect a government enforcement framework to come into action if they do not take action themselves; or non-governmental actors might take responsibility for enforcement as they feel the need to guarantee particular public rights. If done so, an enforcement relationship might exist between enforcer and regulatee and supervisory relationships, oversight, may exist between and within non-governmental actors. Figure 3.5 represents the substitute co-regulation regime.

Going 'beyond compliance' or win-win situations might be the outcome of this type of regulatory regime (e.g. Ayres and Braithwaite, 1992: 98; Gunningham and Grabosky, 1998: 413-422). The downside of the regime is that the government loses its grip on the actual impact regulations have. Accountability cannot be monitored by governmental actors. It is expected this type of regime will only influence effectiveness and efficiency when implemented in addition to another regulatory regime.

This set-up seems to be the basis for all kinds of construction-related initiatives, such as assessment tools and certification programmes that intend 'to reach beyond the mere requirements of building codes' (Horvat and Fazio, 2005: 76), such as for example, the Building Research Establishment Environmental Assessment Method (BREEAM), an environmental assessment method for buildings, developed in the UK in the 1990s. BREEAM is developed by BRE (Building Research Establishment), a subsidiary company owned by a trust in which members represent specific sets of interest, such as build environment professionals and contractors. BREEAM establishes benchmarks for environmental performance by rating buildings on a four-point scale. Assess-

Figure 3.6 Private regime

Level	Actors		Legend
	Government	Non-government	
Regulations	–		X responsible actor
Enforcement	–		I indirect responsible actor
Execution	–		D direct responsible actor
			→ external supervision
			↻ internal supervision
Regulatee			

ments are carried out by independent assessor organisations that are licensed and trained by BRE. Assessment criteria are partly based on the England and Wales' Building Regulations (BRE, 2006). After assessment, a certificate pointing out the rating is issued; yet, as the certificate has no legal status, it can only be used for promotional purposes (Horvat and Fazio 2005). Versions of BREEAM and similar tools have been or are being developed for Hong Kong, Australia, Canada and the US (Cole, 1998; Cole, 2000; Craweley and Aho, 1999).

A different example in which private sector actors set up an enforcement regime based on government regulations can be found in the recently introduced 'hidden defects insurance' in the Netherlands. The goal of the insurance is covering costs that might result from hidden defects that have their origin in the construction of the building, but that show up after occupation – insuring these risks was impossible before the introduction of the above mentioned insurance (Van den Berg and Overtom, 2006). The supplier of this insurance require an independent private actor to control work during design and construction and require a document of approval once the building is finished. The grounds for these control tasks are Dutch building regulations as set by the national government, the Building Decree, and if necessary, supplementary European norms.

Private regime

The final model is characterised by the absence of government involvement. It is left solely to non-governmental actors to set and enforce building regulations; yet, if done so, these will not be statutory. Non-governmental actors, especially private sector actors, might find it is in their own interests to set up and enforce regulations, or take responsibility to guarantee certain public interests by setting and enforcing regulations. If done, there may be an enforcement relationship between the enforcer and regulatee and a supervisory relationship, oversight, between and within non-governmental actors. Figure 3.6 represents the private regime.

Note that from a purist point of view I might not have introduced this model as it conflicts with the first basic principle that underlies the other mod-

els: 'a government that sets (building) regulations in order to guarantee public interests'. Yet, as my aim was to introduce models that cover the continuum that is limited by command and control and voluntarism, I felt the need to present the final model as well. Furthermore, as the regulatory pendulum seems to swing between the limits of public command and control regulation, and voluntary private initiatives that benefit the public (compare with Sparrow, 2000), it could be hypothesised that what is currently regarded as public interest, for example guaranteeing certain sustainability issues of the built environment will, in the future, be regarded as private interests.

Private regimes guaranteeing interest in the built environment have been described (Bunz *et al.*, 2006; Cole, 2000) and often show strong similarities with the assessment tools and certification programmes introduced under the substitute co-regulation regime; differing from these only as the initiatives do not refer to public building regulations.

Other examples can be found in regulations drawn up by private sector agencies to harmonise issues that have not been regulated through public regulations. In the Netherlands the national organisation for standardisation (NEN), a private sector company, provides guidance when parties enter into an agreement on products, procedures or processes and publishes these agreements (NEN, 2006). Once the agreement is set it is called a standard – these standards can be considered as private sector regulations. NEN has been so successful in developing standards that many Dutch public building regulations refer to NEN standards as minimal technical requirements that have to be complied with.

Note that this type of private sector regulation through the International Organisation for Standardisation (ISO) does get a strong grip on the building industry worldwide²⁴. The well-known ISO 9001 and ISO 14000, both a generic set of requirements for implementing a management system, the former on quality, the latter on environmental issues, seem to have a particularly strong impact on the construction industry worldwide (Ball, 2002; Chini and Valdez, 2003; Pheng and Wee, 2001; Walker, 2000).

3.4 Relationships between the regimes

From the illustrative examples, it was learned that the different regimes introduced appear to be implemented in different settings around the world. I have not paid particular attention to the underlying causes that made actors decide to implement the particular regimes. I will do so in Chapters 5 to 9

²⁴ ISO is a network of national standards institutes worldwide. ISO itself is a non-governmental organisation; its members might be private sector agencies, as is the Dutch NEN, or public sector agencies, as is the SCC, the Standards Council of Canada. Nevertheless, ISO does not set public regulations.

when focusing on particular building regulatory enforcement regimes in Australia, but for now I will briefly introduce some notions from Barnard. According to Barnard (1938: 101-102), organisations, in my case the regimes²⁵, require repeated adaptation of new purposes as '[an] organization must disintegrate if it cannot accomplish its purpose' (ibid.: 91) – when it cannot fulfil its purpose, the organization is not effective. Furthermore, an organisation 'also destroys itself by accomplishing its purpose' – when the organisation has accomplished its purpose there is no need to maintain the organisation (ibid.: 91). In Barnard's view, organisations origins are spontaneous; are the direct result of an individual's effort to organise; are set off by a parent organisation or are segmented from an existing organisation. The latter due to 'schism, rebellion or the interposition of an external force' (ibid.: 102).

As such, different relationships exist between the regimes, which all appear to be influenced by the regimes' need to adapt. This might result in conflicting purposes and eventually make one regime destroy the other (ibid.: 103). I expect the different regimes when implemented in co-existence can support, complement, replace or compete with one other (compare with Jordan *et al.*, 2005: 481). For example, in the case of the John Hopkins University and the Howard County building authority, the public regime is supported by the covenant between the University and the building authority. As such, the building authority has to exert less effort on enforcing the University.

The different examples under the substitute co-regulatory regime illustrate how the different regimes can complement one another. Through the public regime, regulations are laid down and a bottom-line is enforced through government. In the case of the Building Research Establishment Environmental Assessment Method (BREEAM), regulation from the public regime has been used to go beyond compliance. Both government and non-government actors appear to profit from the initiative (Horvat and Fazio, 2005).

In the case of the Australian Capital Territory, the conditioned co-regulation regime has replaced the former public regime. This case will be discussed in more detail in Chapter 7. In the case discussed in the United States (Listokin and Hattis, 2005) government has taken over the role of the insurance industry as a regulator – replacing a private regime with a public regime. It is notable that the insurance industry has kept a role in the regime and is currently still concerned with supporting the development of regulation and evalu-

²⁵ Barnard (1938: 94) looks upon organisations as 'a system of consciously coordinated personal activities or forces.' As such, organisations can be understood as needed to shape attitudes, understandings, customs, habits and institutions – compare with Weber's idea that social action is believed to be oriented on the existence of a 'legitimate order' (Weber, 1962: 124); Barnard refers to this as 'informal organisation' (Barnard, 1938: 116). Organisations can also be understood to be units of production, both goods and services; Barnard refers to these as 'formal organisations' (ibid.: Chapter 9).

ating building code enforcement programmes in the states and local jurisdictions (ibid.).

Finally, in both Australia, the states of Victoria, New South Wales and Queensland, and in England and Wales, private sector actors can be authorised to carry out building regulatory enforcement tasks, such as building plan assessment and construction work assessment. These private sector inspectors compete with government inspectors – competition between the public and the conditioned co-regulation regime. In both Australia and England and Wales, competition was one of the reasons to bring private sector actors into the building regulatory enforcement regime (ABCB, 1999; Baiche *et al.*, 2006). However, from studies in England and Wales it is learned that the competition between local authorities, government, approved inspectors and non-government, results in economic pressures that might ‘have a deleterious effect on the quality of inspections’ (Baiche *et al.*, 2006: 280). Then, Imrie (2004: 431) finds that inspection officers in the competitive English and Wales’ two-tier system try to avoid using harsh enforcement means such as penalties. Because contractors can decide to use another building control department or even private sector agencies to carry out the control function, the possibility of losing a client then appears to be a strong ‘incentive’ for the building control department: ‘I’m not going to put my men’s job on the line’, as one officer put it (ibid.).

A study on a similar competitive two-tier building assessment system in New Zealand shows a worst case-scenario, which Peter May addresses as ‘The Saga of the Leaky Buildings’ (May, 2003; see also, Hunn, 2002; Yates, 2003). In a relatively short period of time, the New Zealand government made two major changes in building regulation. The first was a change in the actual building regulations from prescriptive to performance-based regulation, the Building Act of 1991. The second was the introduction of (competitive) private sector building controls. The Act provided broad objectives and details for verifying compliance, but it did not specify requirements for on-site construction assessment (May, 2003: 392). The building regulatory reforms in New Zealand embraced ‘the faith in the market and limited government intervention’ (ibid.). At the same time, the development market changed: there was a strong increase in the demand for domestic building and consumers started to prefer so-called ‘Mediterranean style’ homes characterised by plaster and adobe finishes (ibid.: 392-393). The competitive marketplace responded by shifting from commercial to domestic development and stated building with cost-efficient and low-maintenance building materials. In the wet climate of New Zealand, the combination of regulatory changes and changes in the development market led to problems with the weathertightness of buildings (ibid.: 393): moisture crept through the cladding of the newly built buildings into the construction resulting in ‘cracking and eventually the partial or total collapse of the building.’ It is suggested that up to 18,000 homes and numerous multi-unit buildings have been affected in this ‘Leaky Building Crisis’.

Two major inquiry reports (Hunn, 2002; Yates, 2003) state that a combination of issues – amongst which, a lack of performance criteria; a lack of standards that could serve as acceptable solutions; differences in building plan approval between jurisdictions; local public authorities carrying out a harsher enforcement style than private sector agencies; the freedom of developers to choose between jurisdictions and enforcement agencies – led to a ‘race to the bottom in building approval standards’ (May, 2003: 395).

3.5 Conclusions and discussion

In this chapter, I developed a methodical approach to analyse different arrangements of governmental and non-governmental actor involvement in building regulatory regimes and I introduced a typology of regulatory enforcement regimes. I have done so because the study of regulation lacks a clear typology of co-regulatory regimes, which obstructs a comparative analysis of regulatory regimes.

Contrary to the various self-regulation sub-models introduced in Chapter 2, I have chosen to base my typology on a conceptual framework instead of real-life cases. This provides a clear and similar set-up for all types, which, I expect, makes it easier to analyse the various real-life cases of the different actors and responsibilities within the types, but also the internal differences between the types – i.e. both a vertical and horizontal analysis. Thus my typology differs from those introduced in Chapter 2 as I have started by defining modes of co-regulation in regulatory enforcement regimes based on a basic conceptual framework, and illustrated these modes with real life cases, whereas the previously discussed modes and (sub)models were based on real life cases that led to a.

Overview models

Let me briefly summarise the regulatory enforcement regimes I introduced in the body of this chapter. Each regulatory enforcement regime defined can be considered to be a certain attitude towards guaranteeing what is perceived as public interest, how it should be regulated and enforced – or the ‘additional values of regulatory design’ (see Bardach and Kagan, 1982: 303). The regulatory enforcement regimes are based on a certain arrangement of responsibilities regarding setting regulations, setting the rules to and oversight of enforcement, and implementing the enforcement of regulations. The following regulatory enforcement regimes have been distinguished:

- **Public regime:** all responsibilities for setting building regulations; setting the rules to and oversight of enforcement; and the enforcement framework and the execution of the enforcement lies with governmental actors. An enforcement relationship exists between enforcer and regulatee and an

oversight relationship may exist between or within government bodies.

- Prescribed co-regulation regime: the government takes full responsibility for setting building regulations; and setting rules to and oversight of enforcement. Enforcement is delegated to non-governmental actors. An enforcement relationship exists between enforcer and regulatee and an oversight relationship might exist between or within government bodies. Extra supervisory relationships, oversight, arise at execution level: in order to implement its own responsibilities the indirect responsible governmental actor might want to supervise contracts or covenants with the non-governmental actor, or might want to supervise the fulfilment of participation and administration criteria; and internal supervision might exist within non-governmental actors.
- Conditioned co-regulation regime: the government that takes full responsibility for setting building regulations. Responsibility for setting the rules to and oversight of enforcement is delegated to non-governmental actors, yet conditions are placed on setting these to and oversight of enforcement by the government. An enforcement relationship exists between enforcer and regulatee and an oversight relationship might exist between the indirectly responsible governmental actor and the directly responsible non-governmental actor. Furthermore, supervision relationships, oversight, might exist between or within non-governmental actors.
- Substitute co-regulation regime: the government takes full responsibility for setting building regulations. Responsibility for setting rules to and oversight of enforcement; and responsibility for executing enforcement is left to non-governmental actors. If non-governmental actors take this responsibility, an enforcement relationship might exist between enforcer and regulatee and supervisory relationships, oversight, might exist between and within non-governmental actors.
- Private regime: the absence of governmental involvement. It is left solely to non-governmental actors to set and enforce building regulations; yet, if done so, these will not be statutory. If non-governmental actors take this responsibility, an enforcement relationship might exist between enforcer and regulatee and supervisory relationships, oversight, might exist between and within non-governmental actors.

Advantages and disadvantages of the regimes

Based on the literature discussed in Chapter 2, I expect all regimes will have their advantages and disadvantages. Regarding the public regime, experiences have been broadly documented (e.g. Baldwin and Cave, 1999: 38-39; Gunningham and Grabosky, 1998: 44-47). The prescribed co-regulation regime is expected to have the most advantages when the strengths of the private sector – for instance specialisation and data-access – can be used for enforcement tasks. However, I expect that when private sector agents are but a mere re-

placement for public sector agents, no gain in effectiveness or efficiency will occur. Subsequently, I expect the conditioned co-regulation regime will flourish most on advantages that are usually ascribed to self-regulation, although bringing in private sector, or other non-governmental agents in the enforcement regime might result in conflicts of interest and thus might reduce the regime's accountability (Gunningham and Grabosky, 1998: 52-53; May, 2007). An extra layer of government supervision might be needed to oversee non-governmental enforcement, which could lessen those 'usual' advantages. Next, I expect the substitute co-regulation regime to generate most effectiveness and efficiency gains when those who are subject to regulations see it in their own interest to go 'beyond compliance' (Ayres and Braithwaite, 1992: 98; Gunningham and Grabosky, 1998: 413-422). However, as the public sector is unable to carry out supervision, introduction of this regime might result in a loss of accountability. It is my expectation that the models introduced work best when combined (compare with Doyle, 1997: 35-42).

The illustrative examples showed all kinds of 'new' instruments of regulation (compare with Levi-Faur, 2005: 22) being introduced in building regulatory regimes worldwide. The examples also showed that the regulatory enforcement regimes introduced in the body of this text are at least applicable to private sector involvement in building regulatory enforcement regimes. The examples also showed that when accepting co-regulation, governments tend to introduce additional layers of supervision to guarantee accountability within the regime – accountability is sometimes considered to be such a regimes' weak spot (Cohen and Rubin, 1985; DeMarzo *et al.*, 2005; Núñez, 2007). Issues of accountability, but also of effectiveness, efficiency and equity might be even more relevant when different regimes are combined and have a certain interdependency. I expect the different models when combined can support, complement, replace or compete with each other (compare with Barnard, 1938: 101-102; Jordan *et al.*, 2005: 481). A competitive relationship seems to be of particular interest for further study as economic pressures due to competition might 'have a deleterious effect on the quality of inspections' (Baiche *et al.*, 2006: 280) and the overall accountability of the regime (e.g. Imrie, 2007; May, 2007).

Further research

I expect the typology of regulatory enforcement regimes introduced has a number of advantages and I will name but a few. First, the similar set-up of all regimes – the structure, conditions and boundaries of each type are defined – adds to the reliability and validity of comparative analyses based on criteria such as effectiveness, efficiency, equity, and accountability. Secondly, I expect this typology makes it possible to compare similar types in a different setting, different types in a similar setting, and similar types in a similar setting. For example, a comparative analysis of building regulation relat-

ed cases of a conditioned, co-regulation regime in different countries, such as Australia, Canada and the Netherlands; a comparative analysis of a public regime's building regulation related cases, a prescribed co-regulation regime, and a conditioned co-regulation regime within Australia; and, a comparative analysis of a building regulation and an environmental regulation related case of a substitute co-regulation regime within a Canadian province. A third advantage, I expect that analysis based on the typology introduced can add further insight to the four major debates on regulatory literature introduced in Chapter 2; the debates on: the quality of law, enforcement strategies, enforcement styles, and enforcement actors. I expect the typology introduced makes it possible to compare different levels of the regulatory enforcement regimes. For example, a topic for further research might be whether a certain type of building regulation, for instance prescriptive regulation, system-based regulation or performance-based regulation (see May and Winter, 2000), performs best under a specific regulatory enforcement regime. Another topic for further research, for example, might be whether non-governmental building inspectors use a more responsive regulation-based enforcement style (see, for examples, Braithwaite, 2000; Nielsen, 2006) than their governmental counterparts. A fourth advantage, I expect this typology makes it possible to analyse different relationships between regulatory enforcement regimes, or different instruments of regulation. For example, a topic of further research might be whether competition between regimes influences the regimes' effectiveness, efficiency, equity and accountability.

Further analysis of a competitive relationship appears of much interest as shown by the experiences with the competitive two-tier system of statutory building assessment in England and Wales and New Zealand. These experiences appear to contradict findings by Doyle (1997: 42), who, as we have seen in Chapter 2, assumes that different forms of regulation and regulatory enforcement 'work best when they co-exist; that is, two-tier regulation is more likely to be superior to [single-tier regulation]'. We have also seen in Chapter 2 that multi-tier systems are also strongly advocated in highly influential works in the study of regulation (e.g. Ayres and Braithwaite, 1992; Gunningham and Grabosky, 1998). In these multi-tier systems, different arrangements of actors, their roles and their responsibilities are mixed in order to result in 'better' regulation.

My aim for the second part of this book, Chapters 4 to 9, is to analyse such a competitive relationship between building regulatory enforcement regimes in Australia where traditional public building regulatory enforcement regimes have been opened up to private sector involvement aiming at more competition – competitive enforcement²⁶. I will briefly introduce Australia's build-

²⁶ This includes both competition between private actors and competition between the public and private sector.

ing regulatory regime in Chapter 4. Then in Chapters 5 to 9 I will discuss private sector involvement in building regulatory enforcement regimes in the State of Victoria (Chapter 5 – a conditioned co-regulation regime), the State of New South Wales (Chapter 6 – a prescribed co-regulation regime), the State of Queensland (Chapter 7 – a prescribed co-regulation regime), the State of South Australia (Chapter 8 – a prescribed co-regulation regime), and the Australian Capital Territory (Chapter 9 – a conditioned co-regulation regime). In each chapter the formal set-up of the particular regime will be introduced and experiences with the regime discussed. The former based on literature study, the latter based on a series of interviews with key individuals. Finally, in the third part of this book I will discuss the different regimes analysed (Chapter 10, which can be considered an overview of key findings from Chapters 5 to 9) and draw conclusions on competitive enforcement (Chapter 11).

Part 2

Evaluating the regimes

4 Australia

4.1 Introduction

The Commonwealth of Australia was founded in 1901 after a period of discussions and compromises between a number of British colonies. In the Constitution, still current, the powers, roles and responsibilities of the Commonwealth Government are laid down. Subjects that are not dealt with in the Constitution are deemed the responsibility of the states and territories. Issues such as safety, health and amenities for people in buildings are not covered in the Constitution and are therefore the responsibility of state and territory governments²⁷. This has led to a situation in which each of the six states and both territories have laid down different Acts of Parliament resulting in eight different Building Acts and eight quite distinct building regulatory systems (ABCB, 2002). Some states passed on many of their building regulatory powers to their municipal Councils, which effectively enacted their own building regulatory systems by way of Council by-laws (Lovegrove, 1991b; Lovegrove, 1991c). Before WWII this situation resulted in a patchwork of very local (municipal) building regulations, which had a negative impact on the building industry (ABCB, 2002).

After WWII, the need for more uniform technical building requirements arose from building practitioners. Several of the states took up initiatives by establishing these uniform requirements. Furthermore, those states which delegated their primary responsibilities to municipal Councils started to retrieve control. Subsequently, in 1965 the Interstate Standing Committee on Uniform Building Regulations (ISCUBR) was established.

ISCUBR's first achievement was the assembling of a model technical code for building regulatory purposes: the Australian Model Uniform Building Code (AMUBC), which was released in the early 1970's. The AMUBC was based on the then Local Government Act of New South Wales and contained proposals for both technical matters and some administrative matters. Although it was intended that all states could use AMUBC as a model for their own building regulations, many states choose to follow their own administrative requirements or to leave the matter to their municipal Councils, and in practice deviations from the model have turned out to be the norm. The most significant deviation was the alteration of provisions to local needs, thus leaving the mentioned patchwork in existence (ABCB, 2002).

After the publication of the AMUBC, it became clear that in order to achieve a more nationally acceptable and uniform set of technical building requirements, more joint action was needed (Lovegrove, 1991a). As it was agreed that the focus of the project had deviated from seeking to conform to technical

²⁷ The states are: West Australia, South Australia, Victoria, New South Wales, Queensland and Tasmania; the territories are Northern Territory and Australian Capital Territory.

provisions by the complexity of achieving conformity on administrative provisions, the focus was returned to technical provisions (ABCB, 2002). In 1980, the Australian Uniform Building Regulations Coordinating Council (AUBRRCC) was established, with the goal of establishing a national building code (AUBRRCC, 1991). In 1990 the Building Code of Australia (BCA) was launched, being the first technical building code that could be used across the nation. As with the AMUBC, liberty was given to the states and territories to make adjustments due to local conditions, with a special focus on environmental and geological circumstances.

In 1989, the Building Regulatory Review Task Force was established in order to examine building regulatory systems in Australia. The Task Force's report stated that problems with the regulatory systems were costing between several hundred million and one billion dollars a year to industry, government and the community. The Task Force recommended national reform, including conversion of the BCA, then based on prescriptive requirements, into a more fully performance-based document. Furthermore, to reach these goals, a new body should be established. This led to the establishment of the Australian Building Codes Board (ABCB) in 1994 (ABCB, 2002). The main goal of the ABCB is

'to provide for efficiency and cost effectiveness in meeting community expectations for health, safety and amenity in the design, construction and use of buildings through the creation of nationally consistent building codes, standards, regulatory building requirements and regulatory systems' (PC, 2004: xxv).

In practice this has led to the development of a performance-based BCA, in which different international models (including New Zealand, British, Swedish and Dutch examples) have been used and adapted to suit the Australian building regulatory environment (ABCB, 2002).

4.2 Present day building regulations and technical requirements

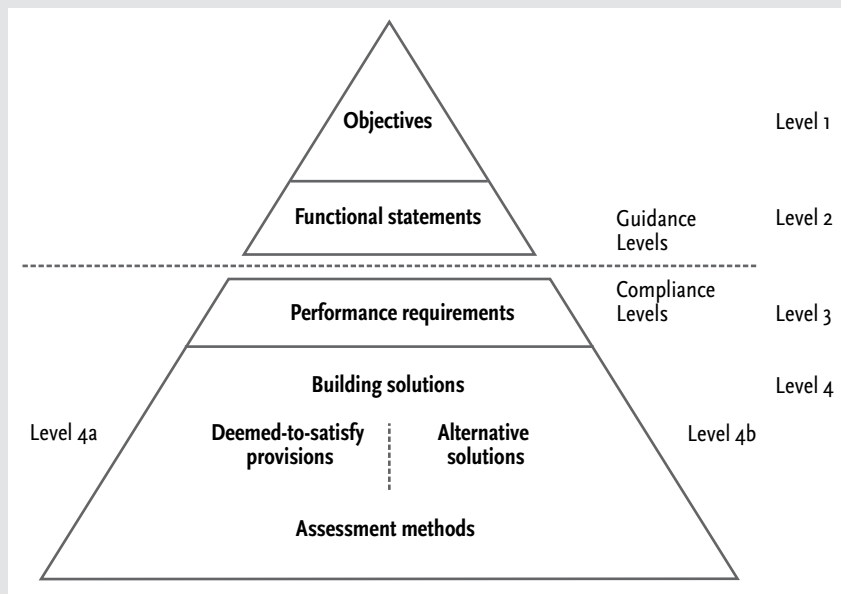
The new BCA96 substantially included the BCA90 technical requirements, with a performance hierarchy built around them. Cost effectiveness for the building industry is seen as the major advantage of a performance-based system compared to a system based upon prescriptive requirements (ABCB, 2002). The BCA is created and maintained at a national level by the ABCB. Nevertheless, it has no legal force unless adopted by state and territory jurisdictions. All states and territories have adopted the BCA; the majority in the form 'as amended from time to time', which ensures that any changes to the BCA are automatically included in their legislation. Within the BCA, states and territories have the freedom to make adjustments to suit local needs.



Endless road,
Australia

The goals of the BCA are 'to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future' (ABCB, 1996a; ABCB, 1996b). As in Australia, domestic building work roughly represents two-thirds of building development, and a strong tradition of owner-builders exists, the BCA was split into a volume for residential buildings, so called class 1 and 10 buildings, and a volume for commercial buildings, so called class 2-9 buildings. The housing provisions regarding residential building differ considerably from the provision regarding commercial building. Much attention is paid to laying down the clauses in plain English and illustrating the clauses with diagrams and explanations (ABCB, 2002). The BCA is split into four levels: objectives, functional statements, performance requirements and building solutions that set out the means of achieving compliance with the performance requirements (ABCB, 2002). The hierarchy of the BCA is shown in Figure 4.1; the levels:

- Level 1 sets out the objectives, which signify why issues are regulated. Objectives are mostly laid down in common phrases and often make reference to the need to protect people, adjoining buildings or other property. An example of an objective from the BCA is: 'The objective is to safeguard the occupants from injury or loss of amenity caused by inadequate height of a room or space.'
- At Level 2 are the functional statements, which make clear how a building

Figure 4.1 Hierarchy of the Building Code of Australia (BCA)*

* adapted by the author.

Source: <http://www.abcb.gov.au>, accessed June 2007

might suit the objectives. An example of a functional statement from the BCA is: 'A building is to be constructed to provide height in a room or space suitable for the intended use.'

- At Level 3 are the performance requirements, which state an appropriate performance level for building materials, components, design factors and construction methods to suit the functional statements. An example of a performance requirement in the BCA is: 'A room or space must be of a height that does not unduly interfere with its intended function.'
- Level 4 contains building solutions that set out the means of achieving compliance with the performance requirements. Two methods can be followed to develop a building solution within the BCA: deemed-to-satisfy (DTS) provisions and alternative solutions (AS). At Level 4a are the deemed-to-satisfy provisions, which include examples of materials, components, design factors, and construction methods, which, if used, will result in compliance. An example of a deemed-to-satisfy provision in the BCA is: 'Ceiling heights must be not less than 2.4 metres in a habitable room.' At Level 4b are the alternative solutions, which are seen as the key to the performance-based BCA as there is no obligation to adopt any particular material, component, design factor or construction method (ABCB, 2002). An approval authority may issue an approval if it differs in whole or in part from deemed-to-satisfy provisions described in the BCA, as long as it can be demonstrated that the design complies with the relevant performance requirements.

As the BCA has different compliance levels, different means of proof that a proposed material, form of construction or design meets a performance re-

quirement or a deemed-to-satisfy provision are stated in the BCA. The current set-up of the BCA allows for private sector involvement in public regulation assessment. These are:

- a report from a Registered Testing Authority;
- a current Certificate of Accreditation or Certificate of Conformity;
- a certificate from a professional engineer;
- a current certificate issued by a product certification body that has been accredited by the Joint Accreditation System of Australia and New Zealand (JAS-ANZ);
- a current Scientific Services Laboratory (SSL) Product Listing Data Sheet;
- any other form of documentary evidence that adequately demonstrates suitability for use.

As these assessment methods might not cover (all) alternative solutions, other assessment methods are denoted in the BCA; viz; verification method, expert judgement and comparison to deemed-to-satisfy solution. Verification methods include calculations – using analytical methods or mathematical models; and/or tests – using a technical operation either on site or in a laboratory to measure directly one or more performance criteria of a given solution. Nevertheless, there are no restrictions in using verification methods as long as the method used satisfies the approval authority on compliance with the BCA. Yet, the approval authority may refer to relevant deemed-to-satisfy provisions or verification methods provided for in the BCA. Then, expert judgements means the opinion of a technical expert may be accepted as physical criteria are unable to be tested or modelled. Finally, comparison to deemed-to-satisfy means it can be demonstrated to the approval authority that the building solution complies in an equivalent or superior way to a deemed-to-satisfy provision. This move away from sole reliance on prescriptive requirements is designed to encourage innovation and the use of new technology. Nevertheless, the deemed-to-satisfy solutions should give enough guidance and detailed prescriptive methods for establishing compliance with the performance requirements (ABCB, 2002).

In 2004 the Productivity Commission (PrC) conducted a study on the influence of the new BCA (from 1996 on). The objective of the study was to examine the contribution that reform of building regulation, under the auspices of the ABCB, had made to the productivity of the building industry and economic efficiency. In addition, the Commission was asked to examine the scope for further reform to make additional gains (PC, 2004).

From the study, it was learned that reform of building regulations ‘delivered greater certainty and efficiency to the building industry, as well as benefits to the broader community’ (PrC 2004: xxi), and that the ABCB ‘has successfully reduced many regulatory differences across jurisdictions; especially those based on the core elements of the Code [BCA], and established the

framework for a performance-based regulatory regime' (ibid.). The Commission also addressed some points for improvement: 'better articulating the performance-based requirements of the Code and keeping the deemed-to-satisfy requirements up-to date.' In addition, recent events, such as the introduction of energy-efficiency standards by a number of jurisdictions that are different from those contained in the BCA, 'are undermining the role of the Code as the technical basis for a national and soundly based system of building regulation' (PC, 2004: xxii).

The PrC identified some objectives of future improvement of the BCA. The PrC stated that 'there are ways other than government regulation to address market imperfections and enforce compliance' (ibid.: xxiv). Education, consultancy and (better) facilitation of access to relevant information were mentioned.

4.3 Enforcing building regulations

Under the Constitution, state and territory governments are responsible for the statutory framework for land use, planning, development and building regulations. State governments often delegate their powers to local governments and thus give local governments the power to apply, or enforce, rules relating to development. Furthermore, state and territory governments are responsible for the administration and enforcement of building regulations. Powers for planning and building approvals are routinely delegated to local Councils as well. Despite the existence of model legislation governing the administration of building regulations, only the jurisdictions of Victoria, Tasmania and the Northern Territory have adopted it to any significant degree, most preferring to retain their own administrative frameworks (PC, 2004: 188). State and territory governments often administer several of the supporting regulatory activities in the building process, such as the licensing of practitioners, the regulation of building contracts and insurance, accreditation of products and systems and dispute resolution and thus implement a framework for supervising building regulation enforcement.

Within Australia, building control can be carried out by public and private suppliers – local governments or some form of private building control surveyors, often addressed as private certifiers. In the territories, building control is carried out by private participants, while the state of West-Australia is currently making a shift from a sole public system to a system in which private sector involvement is possible. In the states of Tasmania, South Australia, Victoria, New South Wales and Queensland, a two-tiered system exists, in which a choice can be made between public sector building assessment or (a certain degree of) private sector building assessment (VCEC, 2005b).

Local governments

Local governments are established under state legislation and their structures, powers and functions are determined by that legislation – note that there is no local government tier in the two territories. Through their administration of planning schemes and enforcement of building regulations, local governments have an impact on development. Although private sector involvement in building control has been introduced, in most states, local governments still play a strong role in building approval assessment through their enforcement tasks: in most states, the private sector has little or no power to enforce breaches of building regulations.

Furthermore, as in all states, local governments have the responsibility to keep records of all building approvals issued, private participants have to supply local governments with this information, thus giving local governments insight into their work (PC, 2004). Moreover, as some states give local governments power to make their own building or planning by-laws within the local government area, sometimes variance with or additions to the BCA are found.

Private sector involvement

During the late 1980s and early 1990s, private sector involvement through certified building control made its entry within the Australian building control system (ABCB, 1999: Chapter 7; ACTPLA, 2005; Bretherton, 2001; Capetenakis, 2004; Du Chateau, 2000; PC, 2004). Federal government played a strong part in introducing private sector involvement in building control through the implementation of the National Competition Policy (NCP). The key objective of the NCP was to develop a more open and integrated Australian market to limit anti-competitive conduct and to remove the special advantages previously enjoyed by government business activities, where it is in the public interest to do so. One of the spearheads of this policy was the building industry (PC, 2004).

Certification within the building industry, in general terms, is seen as assessment and certification of a building design and work under construction for which a building permit, an occupancy permit or approval in accordance with a state or territory legislation is needed. Within the system, building professionals, public and private building surveyors, architects and engineers are all addressed as certifiers. Yet, although different states and different territories have implemented a certain system of private certification, all use a different set of qualification requirements and/or a different system of oversight. In 2003, nationally accepted qualification-requirements were introduced in all states and territories, the National Accepted Framework (NAF), in order to remove barriers that prevented cross-border practice (Capetenakis, 2004; VCEC, 2005b). The NAF seeks national harmonisation of educational qualifications, experience and work scope for professionals who are involved in building certification. The NAF was developed in consultation with indus-

try, state and territory governments and other relevant stakeholders. However, the NAF seems to be partly followed by the state and territory governments.

Within the NAF, certifiers can be registered and accredited at two levels. Each level describes the work scope, qualifications and experience a certifier needs and the functions of the certifier. The levels are (Bretherton, 2001: 4; VCEC, 2005b):

- Level 1: a candidate for this level has an industry-accepted degree (in building control surveying), or demonstrable additional education within five years after graduation, and three years of relevant experience; this level is unrestricted – the certifier may work on all classes and sizes of buildings.
- Level 2: a candidate for this level has an industry-accredited advanced diploma (in building control surveying) and two years of relevant experience; this level is restricted – the certifier may work only on buildings of a maximum of three stories high and a floor area of a maximum of 2,000 square meters.

However, although private certification is often assumed to be a solution to solve problems in statutory building assessment, mostly in terms of effectiveness and efficiency issues, some negative aspects seem present. Developers are sometimes considered to ‘shop around’ for certifiers and designers that serve their own interests in preference to serving the public interest. Corners sometimes seem to be cut, accountability is not always clear, and not all dispute resolutions result in satisfactory outcomes for building consumers. It seems difficult to draw general conclusions about the degree of non-compliance across Australia and the extent of problems seems to differ between states and territories and over various types of building (PC, 2004: 189-190).

5 Victoria

This chapter focuses on Victoria's building regulatory enforcement regimes. Firstly, the formal set-up of these regimes will be described; based on a desk study. Information was found mainly in existing research reports and on government websites²⁸ and is represented as such. This information has been discussed with representatives from Victoria's building regulatory enforcement industry. Secondly, experiences with the building control regimes will be described and discussed; based on a series of interviews²⁹. The focus is on building regulatory enforcement in urban areas.

5.1 Formal set-up of building regulations and building control in Victoria

The building regulatory framework

Most building work in Victoria, such as new buildings, additions and renovations requires a planning permit and/or a building permit as the first step in the development process. The Planning and Environmental Act 1987 (PEA87) is the legal basis for the town planning system in Victoria. The present day legislative framework for building in Victoria originates from 1993 with the introduction of the Building Act 1993 (BA93), based upon the Building Code of Australia (see Chapter 4). The BA93 introduced major changes in building control to improve the Victorian building industry. Of particular note, the BA93 introduced building permit approvals by private building surveyors – being the first state in Australia to do so. It also introduced compulsory registration and

28 Sources:

Available on Building Commission website (<http://www.buildingcommission.com.au> (Accessed: February 2007)):

- General information;
- Building Act 1993;
- BCV (2003b) What you need to know about Victoria's building legislation system, Melbourne, Building Commission Victoria;
- BCV (2003a) What you need to know about building permits, Melbourne, Building Commission Victoria;
- BCV (2005) Building in Victoria, A consumer's guide, Melbourne, Building Commission Victoria.

Available on Department of Sustainability and Environment website (<http://www.dse.vic.gov.au> (Accessed: June 2007)):

- General information;
- VCEC (2005a) Housing Regulation in Victoria: Building Better Outcomes, Victorian Competition and Efficiency Commission, Final Report, Victorian Competition and Efficiency Commission.

Phillip Chun & Associates (2000) 'State of Play' Document: Comparison of Building Regulatory Framework in Australian States and Territories, Canberra, Department of Industry, Science and Resources.

29 Conducted from 14 to 23 March 2007 in Melbourne, the capital of Victoria, with a number of key-actors from Victoria's building regulatory enforcement industry. Both governmental and non-governmental actors have been included – a list of interviewees is included in Appendix G.

insurance for builders and certain other categories of building practitioners. The object of the BA93 is

‘(a) to establish, maintain and improve standards for the construction and maintenance of buildings; (b) to facilitate: (i) the adoption and efficient application of national uniform building standards; and (ii) the accreditation of building products, construction methods, building designs, building components and building systems; (c) to enhance the amenity of buildings and to protect the safety and health of people who use buildings and places of public entertainment; (d) to facilitate and promote the cost- effective construction of buildings and the construction of environmentally and energy efficient buildings; (e) to provide an efficient and effective system for issuing building and occupancy permits and administering and enforcing related building and safety matters and resolving building disputes; (f) to regulate building practitioners and plumbers; (f) to regulate plumbing work; (g) to reform aspects of the law relating to legal liability in relation to building and plumbing matters; (h) to aid the achievement of an efficient and competitive building and plumbing industry; (i) to regulate cooling tower systems.’ – Building Act 1993

Within this framework, all building work must comply with the BA93, Building Regulations (BR) and the Building Code of Australia (BCA), unless specifically exempted. The BR contains, amongst other things, the requirements relating to building permits, building inspections, occupancy permits, enforcement of the BR, occupancy permits for mass gatherings, safety of existing buildings and maintenance of buildings. The BR refers to the BCA as a technical reference that must be complied with.

The Building Commission (BC) of Victoria looks after the BA93 and BR. The BC is a statutory authority established in 1994 to oversee building control in Victoria. The main functions of the BC are to: (1) advise the Minister for Planning and the Victorian Government on building policy and building legislation; (2) regulate the Victorian building industry by administering the BA93 and the BR; (3) communicate building legislation changes to the community, provide information and training to the industry and keep consumers informed about their rights and responsibilities; (4) determine and resolve building disputes as part of the Building Advice and Conciliation Victoria service; (5) promote improved building standards both nationally and internationally; (6) encourage sustainable building design and construction. The BC differs strongly from other government departments as it is not funded through taxes or funds, but through a building permit levy; 0.064 percent of cost of construction.

Furthermore, four statutory bodies, established by the BA93, play an important role in Victoria’s system of building control. They are administratively supported by the BC and consist of stakeholders from governmental organisations and non-governmental organisations, such as development industry groups, building industry practitioners and building consumers. These bodies are:



View from
Building Com-
mission's of-
fice, Melbourne

- The Building Advisory Council (BAC), which advises the Minister for Planning on the administration of the Building Act and the Building Regulations. The Minister for Planning appoints the members of this body from non-governmental organisations such as the Australian Institute of Building Surveyors; the Property Council of Australia; the Housing Industry Association; the Royal Australian Institute of Architects.
- The Building Regulations Advisory Committee (BRAC), which provides advice to the Minister for Planning on draft building regulations and also accredits building products, construction methods and components or systems connected with building work. The BRAC also provides advice to the BC on technical, administrative and regulatory issues. The Minister for Planning appoints the members of this body from governmental and non-governmental organisations.
- The Building Appeals Board (BAB), an independent statutory body which is empowered to determine any matter relating to the Building Act and the Building Regulations. The BAB hears appeals and disputes if any doubt, difference or dissatisfaction arises in relation to building control matters. Determinations are made to waive, modify or vary the provisions of particular regulations based upon the particular case. The BAP consist of members from governmental and non-governmental organisations.
- The Building Practitioners Board (BPB), an independent statutory body which registers building professionals, amongst which building surveyors,

engineers, building designers, and builders are included. The BPB consists solely of non-governmental stakeholders. The BPB oversees the quality and standard of practitioners in the Victorian building industry and carries out investigations of practitioners' professional conduct. The BPB advises on requirements for building professionals' qualifications and experience, such as private certifiers, which have to meet in order to be registered. The BPB also supplies Certificates of Consent, an individual's written approval to act as an owner-builder on their own land for the construction of a single dwelling in the State of Victoria.

Planning permit and building permit assessment process

For many building activities, both a planning and a building permit are necessary. A planning permit is a statement from the authority in charge that a particular use or development may proceed on a specified parcel of land. In order to get a planning permit, an applicant has to apply to the local Council's planning department – in some circumstances an application has to be made at State government level. When applying for a planning permit, applicants have to lodge an application form, fees and all necessary supporting information, such as accurate plans, reports and photographs. After the application is lodged with the responsible authority, the planning officer will check the application. Depending on the development, advertising of the development may be necessary. The application is a public document and is available for inspection at the offices of the responsible authority. This is done so that people who may be affected by the proposal can understand what is being proposed, and have the opportunity to comment upon the development and the likely impact upon them. Plans may be made available to adjoining owners as the application is a public document.

The responsible authority must keep a register of all applications received and specified information about those applications. It must also make the register available to the public during office hours without charge. At the end of the advertising period, the authority in charge will decide either to issue a permit or, if there are objections, a 'Notice of decision' to grant a permit. A planning permit can be issued with or without conditions, and a proposed development or use can only begin and continue if all conditions on the permit are met. Nevertheless, the building permit assessment process can be started whether or not a planning permit had been issued.

Building law stipulates that all building work requires a building permit unless the work is specifically exempt under the regulations. A building permit is written approval from a registered building surveyor certifying that plans comply with the Building Regulations – including BCA. A permit is needed before any work can begin. The same rules apply to alterations, demolitions and removals. The applicant has to choose between either a municipal building surveyor or a private building surveyor before applying for a building

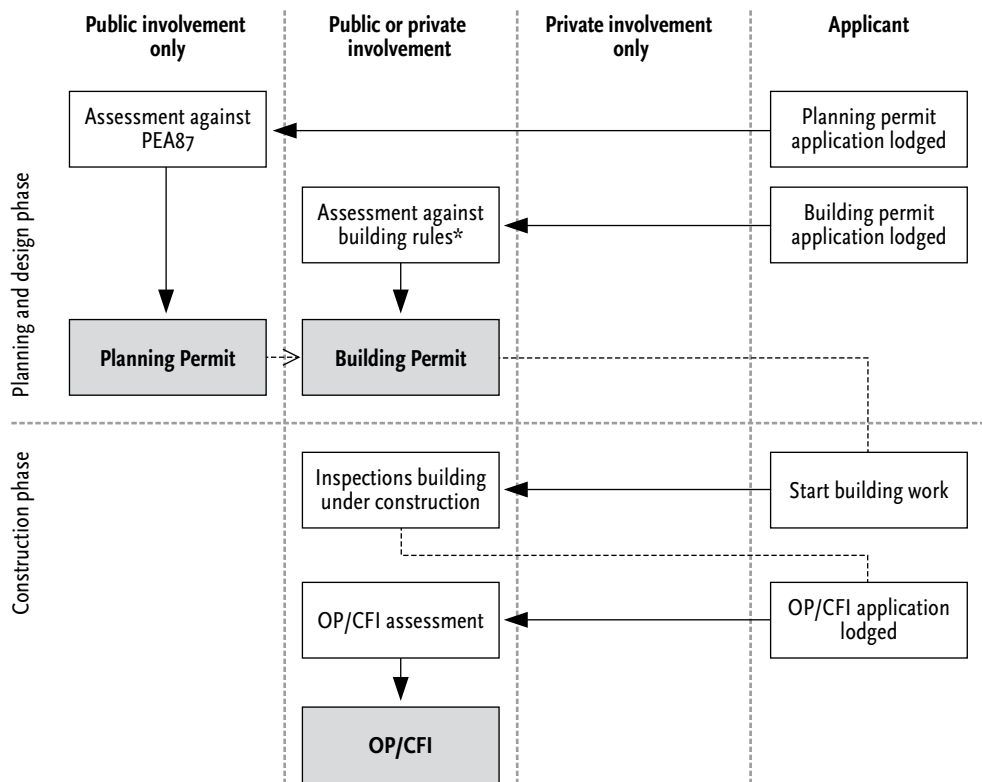
permit. When a private surveyor is chosen, the private surveyor has to send notice to the local Council within seven days. Copies of all permits or certificates issued by a private certifier/participant also have to be sent to the relevant local Council. To obtain a building permit, an application form has to be filled in and accompanied with the necessary documentation to prove that the proposed development complies with the BCA, BR and BA93.

Regulations for domestic construction covering the issuing of building permits stipulate that the applicant has to provide evidence the builder is registered, if the building project is worth more than A\$5,000 and that the builder has a warranty if the work is worth over A\$12,000. The building surveyor (municipal or private) then controls the application and issues a building permit when compliance is shown. The permit issued may be the permit for the whole of the proposed building work or for a stage of the proposed building work. Under some circumstances, where a building design cannot meet the prescriptive requirements, then a reporting authority who is in charge of that aspect, can vary the requirements. The building surveyor cannot issue the building permit without the required consent from a reporting authority, such as the Fire and Rescue Service, on various matters as set out in the Building Regulations. It is also a requirement that a building permit cannot be issued until a relevant planning permit is obtained, if required.

Once the building permit is issued, the construction work can be started. The building surveyor must state on the building permit which mandatory inspections will be required at specific stages. During construction work, the building surveyor (municipal or private) who issued the permit will carry out, or cause to be carried out, these inspections and will at least carry out the mandatory checks: footing stage, before pouring in-situ concrete, when the frame is up and after completion. Inspections can be carried out by an engineer or inspector with the building surveyor's agreement. Finally, most building work requires an Occupancy permit (OP) or Certificate of final inspection (CFI) prior to occupation. The building permit will state whether either an OP or CFI is needed before occupation. A CFI is issued for extensions or alterations to buildings, which do not require an OP. An OP signifies that a building surveyor has approved the building work as being suitable for occupation. It is an offence to occupy a new building, including a home or apartment, without an OP. An application for an OP is made to the building surveyor who issued the building permit. In deciding whether to issue an OP, the building surveyor may request certificates or statements from various practitioners involved in the construction of the building to confirm that the work complies with the relevant building legislation. Figure 5.1 gives an overview of Victoria's building permit assessment process.

For places of mass gatherings which are partially barricaded – known as Places of Public Entertainment (PPE) – and for certain temporary structures used for public entertainment there is a similar process to the BP process.

Figure 5.1 Victoria's planning permit and building permit assessment process



* This includes referral to prescribed authority for deviation from relevant prescriptive requirements.

In these cases, the event cannot be occupied unless an OP has been issued by the municipal building surveyor. For the OP to be issued, documentation similar to a BP application needs to be provided for assessment to ensure the safety, health and amenity of the public it is provided for. For some prescribed temporary structures (e.g. circus tents etc.) an OP must also be obtained from the BC, in essence this becomes equivalent to a BP; however, it is not restricted to one site.

5.2 Private sector involvement

Until the introduction of the BA93, local Councils were the sole providers of building permits in Victoria (Nassau and Hendry, 1997). In 1991, Victoria introduced legislation that allowed the certification of documents by private sector participants, however the Building Permits and Occupancy Permits were still issued by local Council and inspections were also carried out by local Council. In BA93, new legislation was introduced to enable competition and allow

private building surveyors to issue building permits. This system is known as 'private certification' and consumers now have the choice of engaging a private certifier or seeking the same service from a municipal building surveyor; planning permits can still only be approved by Councils.

Under Victoria's building regulatory framework, both private certifiers and municipal building surveyors have the same responsibilities in relation to the issue of building permits and carrying out inspections of building work under construction. However, municipal building surveyors have extensive additional functions related to community safety and the administration and enforcement of building legislation in their municipality. The functions and processes differ particularly with regards to the enforcement of building regulations. Both private certifiers and municipal building surveyors have enforcement power, such as the power to issue enforcement orders for the BP they have issued. The municipal building surveyor is not limited to the BP they have issued and can also issue enforcement orders for works they have not been involved in.

There are a number of enforcement actions that can be taken and steps that can occur within the legislation. Enforcement orders consist of 'building notice', 'building order', 'building order minor works', and 'stop work order' – a hierarchy of enforcement measures (compare with Ayres & Braithwaite, 1992). A 'building notice' is the first step in the enforcement process. The building surveyor will issue a written notice requesting the owner to 'show cause' why certain actions should not be carried out. Where an owner or a builder does not follow the direction provided by the building surveyor or does not respond to a 'building notice', the building surveyor may issue a 'building order'. This is the second step in the enforcement process. A 'building order' is a direction to carry out work to ensure a project complies with the building regulations. Where a building surveyor has reason to consider building work is not compliant with the building regulations, a building order to stop work, a 'stop work order', may be issued concurrently with a 'building notice' or by itself. For minor breaches, the building surveyor may issue a 'building order for minor works' without first issuing a building notice. Non-compliance with a 'building order', 'stop work order', 'building order minor works' may result in prosecution. If there is no rectification of works in line with one of the orders, a private certifier will refer this as a case to the Building Commission. A private certifier cannot prosecute. Prosecution will be carried out by the Building Commission when a private certifier is involved in the process. A municipal building surveyor can prosecute an offender through its Council. Additionally, a municipal building surveyor also has the power to intervene on any project in the municipality, even if a private building surveyor is appointed for that project. This may happen where, for example, the municipal building surveyor is advised of a serious breach of the regulations on a project or in the interest of public safety.

There are some special requirements placed on private certifiers that help ensure an integrated system of building control within the municipality. These include a requirement for the private certifier to notify the Council of their appointment on a building project within seven days of that appointment and a requirement to lodge copies of all permits and associated documentation within seven days of issue. In this way local government is able to maintain an up-to-date publicly accessible register of all building work in the municipality.

Private certifiers need registration in order to be allowed to carry out work. A registration can be issued by the Building Practitioners Board, as we have seen, an independent statutory body. The criteria for registration as private certifier are: to have the required experience – 4 years for both an ‘unlimited’ and ‘limited’ building surveyor; a degree/diploma in building surveying and graduate certificate in performance-based building codes for an ‘unlimited’ surveyor and a (limited) degree in building surveying for a ‘limited’ surveyor and a policy for legislative professional indemnity insurance. Mandatory insurance required by regulation should have a run-off period of ten years and give cover of A\$1 million to A\$1.5 million depending on legislative specification. The private certifier is proportionately liable³⁰ for work that is carried out based upon its involvement in a project with a limitation period of ten years. This is applicable to all building practitioners.

Specific duties within the building regulatory regime lie with local government only. These are: investigation and auditing of the safety of existing buildings; investigation of buildings damaged by fire or other means; provision of building information and advice to the community; mapping of hazardous areas, such as those subject to flooding; maintaining a register of all building permits issued in the municipality; record keeper of building permits and documents for periods set by the office of public records; checking that public, commercial and industrial buildings have essential fire safety measures in place and maintained; investigating complaints; issuing emergency orders in relation to dangerous buildings. Every Council is required to have a formally appointed municipal building surveyor to enforce the building regulations in the municipality.

Registration and licensing of practitioners

Within Victoria, different practitioners need registration and/or a licence in order to be allowed to carry out work. As mentioned above, private building surveyors have to be registered with the Building Practitioners Board. Within

³⁰ Proportionate liability is a legislated requirement by which, under certain circumstances, a person whom a court finds is liable for another person's damages can only be required to pay a proportion of the total amount of damages for which they are held by the court to be personally responsible.

Victoria, municipal building surveyors are subject to the same requirements as private building control surveyors.

All building practitioners must be registered with the Building Commission through the Building Practitioners Board; must keep their registration current; and must have the appropriate insurance. The building regulations outline the various categories and classes of building practitioners. The ability to be registered is based upon the nature and extent of qualifications and experience. The following categories and classes of building practitioners are currently required to be registered with the BPB: Building surveyor; Building inspector (Unlimited/Limited); Quantity surveyor; Engineer (Civil/Mechanical/Electrical/Fire Safety); Draftsperson (Building design – architectural, interior, services); Builder (Commercial builder – unlimited/limited); Builder (Domestic builder – unlimited/limited/manager); Builder (Demolisher – low rise buildings/medium rise buildings/unlimited); Erector or supervisor (temporary structures).

A registration has to be renewed every year. All domestic builders who enter into domestic building contracts in which the contract price for the building work is more than A\$12,000 are required to hold a Builders Warranty Insurance. This insurance provides important protection for building consumers, in the event that a builder dies, becomes insolvent or disappears, and cannot finish the building project or fix defects. Public Liability Insurance is required for builders and demolishers of low rise buildings, medium rise buildings and ‘unlimited’ buildings and for erectors or supervisors of temporary structures. Public Liability Insurance protects the building practitioner against legal liability resulting from any claim or claims made during the period of insurance. Finally, all commercial builders need a builders’ indemnity insurance for structural defects

If an individual wants to carry out construction work as an owner-builder, this person has to accept the same responsibilities, risks and liabilities as a professional builder. This might include responsibility for insurance, occupational health and safety of workers on the site, arranging permits and inspections, making sure tradesmen have appropriate registration and insurance and ensuring compliance with all legislation. For any domestic project where the cost of work exceeds A\$12,000, domestic building insurance will be required. Domestic building insurance covers structural defects for 6 years and non-structural defects for 2 years.

A prospective owner-builder first has to obtain a ‘certificate of consent’ from the Building Practitioners Board if the building project is worth more than A\$12,000. A building permit will only be issued once the owner-builder has this ‘certificate of consent’.

5.3 Evaluation of Victoria's building regulatory enforcement regimes

Two building regulatory enforcement regimes appear to have been adopted in Victoria: building assessment can be carried out by public and private sector agencies. Involvement of public sector agencies can be compared with a public regime; involvement of private sector agencies can be compared with a conditioned co-regulation regime – both regimes are described in Chapter 3.

To gain an insight into the experiences with these building regulatory enforcement regimes and into the competition between these, a series of interviews have been conducted; this part is based on the interviews. Quotes in the text come from these interviews³¹.

Experiences with the regimes

Different opinions were found regarding the introduction of the system of private building control surveyors. Interviewees named top-down and bottom-up initiatives and sometimes both. Top-down initiatives were found in the Federal Government's National Competition Policy and the introduction of the Model Building Act that opened up possibilities for privatisation. Bottom-up initiatives were found in the construction industry's criticism regarding councils: councils were lacking staff to deal with applications in time – both qualitatively and quantitatively. Subsequently, local governments' fees were legally set and were too low to cover actual costs. And, furthermore, local building control authorities were seen as monopolistic, sometimes having a bad name due to slow process times and dictatorial employees. Private surveyors in Victoria started to carry out building permit assessment and councils started to accept the work of private surveyors as complying with the regulations. Nevertheless, regulations had to be amended in order to allow private surveyors to issue building permits, carry out on-site inspections and issue occupancy permits. Bottom-up initiatives were named mostly by private participants; top-down initiatives were named mostly by public participants.

In general, the interviewees rate the quality of the construction industry in Victoria as good to very good. Reference was made to the apparent non-occurrence of construction-related incidents during occupation in class 2-9 buildings (commercial buildings) and the seemingly low occurrence of construction-related incidents during occupation in class 1 and 10 buildings (domestic buildings) – the latter being fire-related, as a result of which the law has been amended. With regards to class 2-9 buildings, only the fatal roof collapse of the Riverside Golf Club in Adelaide, South Australia in 2002, and the fatal Childers Hostel fire in Childers, Queensland in 2000, are mentioned.

³¹ The number preceding a quote refers to the number of the interviewee in Appendix G.

However, as the quality of the construction industry is broadly regarded as good, all interviewees share the opinion that building control is needed in Victoria. The building regulatory framework is considered as being the reason why the quality of the building industry is what it is. Interviewees state that less or no control might lead to a drop in standards; people might start pushing the line and start cutting corners; and the common denominator, or benchmark, might deteriorate. Overall, building regulations and building control are considered as needed to secure public interest – safety, health, amenity and sustainability issues – and to secure the building market itself as building regulations provide a level for contractors to quote against and building control might lead to improvements in the quality of the construction industry as it might force devious players out of the system. As one of the private certifiers put it:

o10: Why do we need building control? (...) It's just because, I think, of human nature... once people perceive there's no barrier or there's no incentive to do something, they won't do it or they'll go outside the barrier, they'll push the limits. It just needs to be that... overriding control. I guess ... a community standard; a community expectation. To make sure that everyone is keeping within the realms of possibility and safety and expectations of buildings. But I think that if there was no building control then it eventually would become anarchy. People would build what they want. However, having said that, the market wants to do a certain number of things. There are a lot of clients now who do not want to move into a building unless it is a four and a half green star from an energy point of view. (...) So the market forces are there anyway. I think regulations are only necessary to pick up those gaps where market forces do not generate a reasonable level of compliance.

Some interviewees divide the construction industry into a commercial and domestic market. The commercial market, then, is regarded as very sophisticated and regimented, whereas the domestic market is valued less positively. It seems that in this sector builders are tight on budgets and corners are being cut and, therefore, the sector shows the most complaints and issues. However, it could be that consumers become more vocal over the years and know where and how to lodge their complaints. Furthermore, interviewees consider the Victorian building regulatory framework, including enforcement, as complete and sometimes as the best in Australia. This opinion is shared by both public participants interviewed and by participants in the private sector.

Due to the two-tier system and its accompanying competition between public and private, a 'natural split' appears to have occurred. Typically, private certifiers seem to get involved in larger development projects, such as commercial and larger residential projects. Small construction work, such as fences, house extensions and alterations, typically seem to go to Councils. Reasons might be found in the fact that applicants for this type of work, mostly owner-builders and mum-and-dads, have the perception that the Council is

the place to go to when it comes to applying for a building permit. This split was not seen to be problematic, yet some rivalry between municipal building control surveyors and private certifiers was found. Identity was sometimes mentioned as a probable obstacle as the private system is still perceived as biased; the system of disciplining a private building control surveyor is not widely accepted as being effective as it takes a long time before an offender gets disciplined and penalties are relatively low; and, there are still issues of non-acceptance between private and municipal building control surveyors. A Building Commission employee mentioned:

o09: The pitfall in the system is the non-acceptance of private and Council building surveyors of each other's work. That's the biggest pitfall in the system.

Private participants interviewed more often focused strongly on the positive aspects of private sector involvement and the negative aspects of municipal building control, whereas public participants interviewed were more neutral on positive and negative aspects. Finally, as legislation places overall responsibility for building control with the Council, Councils are allowed to interfere in the private building control surveyors' process. In practice, Councils pass complaints through to the private certifier in charge to have issues sorted out in the first instance. If this does not occur, then Councils will step in; where there is no private certifier involved, for instance with existing buildings, Council will take the necessary action.

Effectiveness

Some indication was found that the introduction of the private sector in the building enforcement regime has made the regime more effective. Under the competitive two-tier model, applicants seem to have a preference for private certifiers in terms of building permit assessment. Roughly 75 percent of all building permits are issued by private certifiers, leaving 25 percent to the Councils. In terms of building costs, roughly 87 percent is taken up by private certifiers, leaving 13 percent to the Councils³². The preference for private certifiers is considered to come from relations private certifiers can build up with their clients; the high level of service private building control surveyors provide – speed, specialisation; broader knowledge, working hours/accessibility; and their incentive to keep things going. Councils might still be suffering from the stigma of being cumbersome and their employees being non-proactive. Furthermore, planning assessment, which has to be dealt with by Councils, might be the reason for applicants to choose a private certifier for the building permit assessment.

³² Information based on Building Commission statistics, available through the Building Commission's website.

From this 'split' it could be expected that because of the private sector's ability to specialise over the public sector, regulation is better enforced when a specialised private actor assesses a building plan or construction work in its 'specialisation'. A Building Commission employee stated:

008: Personally I think there is a perception from the general consumer, the general house owner, that the Council is the place to go. Councils consider they still have a role in the building industry for maintaining information and building permit collection area and service. From an ordinary public point of view, a lot of people still perceive Council is the appropriate place to get certification. But the change in 1994 to private certifiers (...) maybe that actually hasn't improved anything...

Interviewer: The larger projects go to private certifiers and the smaller projects stay with the Council?

008: That's right. And I think that's more on the basis that the private guys have got the manpower; or the resources to actually look at larger projects in reasonable timeframes, where Councils are probably understaffed or they don't have the skills. You tend to find the private guys certainly to be very qualified building surveyors, possibly having done some post-graduate studies in fire-engineering or fire in general. They may actually be double-degreed type people that have building control or engineering as a background.

And, in different interviews, private certifiers made clear:

010: I think for the simple reason that you get the most appropriate building surveyor for the project with the private system; the private system shows the best compliance. That's not to say that the Council guys aren't good enough. If someone would say to me: 'Hey, check a house', I'd probably struggle; and if they would say to me: 'Hey, check a hospital' I wouldn't have a problem. And if we [the private certifier and the Council employee] swap around it probably be the same thing.

003: It is difficult to measure any difference in the level of compliance, however I consider with the acceptance of private certification by the building industry and with the introduction of registration and audits of building surveyors/certifiers and other practitioners, the new robust nature of the approval process would have contributed to its efficiency and a higher level of compliance.

Competition between private certifiers and the system of auditing introduced is also considered to have made the system more effective. Private certifiers are more aware that they are responsible for monitoring building practitioners' compliance with building regulations. Again, in another interview, a Building Commission employee commented:

013: We've got 20,000 building practitioners in the state of Victoria. All we need to do is monitor 450 surveyors. This is the truth... we don't have to worry about what the builder does; what we have to do is monitor what the surveyor does. Because the surveyor will say to the builder: 'That's wrong and that's wrong and that's wrong...' (...) and the builder is responsible for his subcontractors. (...) We know we don't just go for the bloke at the bottom... If you make the surveyors monitor the right thing, they monitor the rest of the... they monitor the engineers and so on. (...) That's why it is better to audit actively than raise the complaints.

Efficiency

Different opinions were found regarding the introduction of the system of private certification. Interviewees named top-down and bottom-up initiatives and sometimes both. Top-down initiatives were found in the Federal Government's National Competition Policy and the introduction of the Model Building Act that opened up possibilities for privatisation. Bottom-up initiatives were found in the development industry's criticism regarding Councils: Councils were lacking staff to deal with applications in time – both qualitatively and quantitatively. Subsequently, fees were legally set and were too low to cover actual costs. Furthermore, local building control authorities were seen as monopolistic, sometimes having a bad name due to slow processing times and dictatorial employees. Private surveyors in Victoria started to carry out building permit assessment and Councils started to accept the work of private surveyors as complying with regulations.

In general, this appears to have resulted in a situation in which private certifiers are able to provide building assessment faster than Council employees. The Building Commission employee comments continued:

013: There is no preference. Probably in the city, a private surveyor can issue a building permit a little faster than a Council. (...) The private certifier would check as much work as he or she wants and work seven days a week if they want. (...) At the private certifier, the client does not have to start at the end of the line [one that pays can be helped quickly].

Equity

Interviewees generally did not perceive a difference in the way groups of applicants are treated – a difference was made between non-professionals, such as owner-builders and mums-and-dads, and professionals, such as developers, investors, architects, advisors and constructors. This might be the outcome of the 'natural' split the two-tier system brought about: non-professionals mostly turn to Councils, whereas professionals mostly prefer private building control surveyors. Also, in the implementation of enforcement tasks, not much difference was perceived between the groups – the difference was between the municipal and private building control surveyors.

Nevertheless, although the general opinion appeared to be that all appli-

cants are treated alike and work is carried out both by private certifiers and Council employees, the natural split might be an indicator of inequity – I will return to this in Chapter 10 when comparing the different cases.

Accountability

The two-tier system of public and private assessment was generally considered to be positive. Nevertheless, when asked, some objections to the system were made – mostly relating to issues with accountability. The main issues named as most serious or second most serious had to do with commercial pressure; other major issues named as obstacles are changes in design during the development process, insurance, and the thin line between controlling and consulting.

Commercial pressure was referred to as a possible obstacle on different levels. Firstly, as it is believed that private certifiers might be less fanatical about acting in the public interest than municipal building control surveyors – private certifiers are considered to keep a business point of view in mind. Secondly, client binding might be a risk when a private certifier becomes too dependent on a client or a small number of clients – to keep its client, a private certifier might choose to cut corners. Thirdly and finally, it was noted that competition might erode standards as margins are small. A director of a consultancy agency mentioned:

007: Commercial pressures. We're a very competitive industry. (...) Everyone's still working on very small margins, it's very competitive. So people are always looking for ways to get an edge. (...) I think boundaries are being stretched and sometimes being breached. (...) People think they can get away with it.

However, a Building Commission employee made it clear that under the previous sole public regulatory enforcement regimes other issues arose:

009: What is important to put in here... The government at that time [before the introduction of the private sector] weighed up the loss of control, the loss of certainty or professionalism, or the loss of... the danger of corruption that was then in the Council. The Council had the monopoly – it actually had control over the building sector. They were prepared to have slightly less standards by allowing them to the free market and allowing some cowboys to act, if you want to put it that that way, or to allow development to deteriorate; that was the trade-off.

Changes during the development process were named as an obstacle. Alterations during the design and construction seem to be accepted rather easily by private building control surveyors without keeping up with formal procedures. Also the planning procedure was named as an obstacle. This procedure still lies with the Councils, which might extend their powers to obtain

more influence in building controls. Insurance was named as an obstacle as the cost of obtaining insurance is high; sometimes the private certifier gets blamed when it is cheaper to pay out than to investigate. Bringing in insurance companies was also said to have changed the level-playing field in interest groups, which influence government.

The thin line between controlling and consulting was named as some interviewees considered this line might be crossed by private certifiers when they get involved too much during the design phase. Nevertheless, the involvement of private certifiers in the design process was seen as an advantage as well. With the exception of the insurance issues, which were named by private participants only, all obstacles were named by both public and private participants. A Council official noted:

oo6: The definition of design is a tricky one. Because if you're involved as a private building surveyor at the beginning of the project as it is being designed, the private building surveyor is often asked to be part of the team. And they will sit at the table. The private building surveyor will tell: 'If you have your stairway there, then you can meet all your distances of travel without having to have an extra stairway and thus save yourself so much money.' That is probably really being involved in the design. So strictly speaking if you start being involved like that on a project – you can do that, but then you can't issue a building permit for that project.

Regarding government oversight of the private certifiers' system, opinions seem to be coherent. The Building Commission oversees the system through registration, auditing and complaints investigation – note that different boards within the Building Commission have different roles; note furthermore that these boards consist of governmental and non-governmental stakeholders. All interviewees were aware of these issues. Yet, in terms of their perception of the effectiveness and efficiency of this oversight, the interviewees had different opinions. Most critics of supervision focus on the auditing system, which is commonly regarded as insufficient. Yet, not only is the number of audits criticised as being too few – private participants interviewed recall being audited once every seven to ten years – but the audits are criticised for having too much of a focus on procedures. It was found that audits were not focusing on the content of building permits issued and controls performed on-site, but on ticking boxes and following procedures. Or, to quote one of the private participants interviewed, '(...) the lack of reliability of the auditing system makes people in the field [building control surveyors and builders] feel pretty safe.' Problems with auditing were named by interviewees from all groups, including Building Commission employees. A Council official mentioned:

o14: The auditing is a joke. One of the problems is that it is easy to nail somebody for something that is easy [to find]. It is hard to know if someone has done something wrong

when it is hard to find what is wrong. (...) I've once filed a complaint against a private certifier who made a major mistake. Then [the auditors] come up and say: 'Oh, look he didn't sign that form, we've got him!', or 'He didn't lodge on a certain day, we've got him!', or 'He didn't do this or that...'. I look at this plan that doesn't comply and have someone to technically check it. But that never happens. (...) They don't tackle the hard things.

And a private certifier said:

o10: We've had a bit [of auditing]. I think we had... Ok, look, we didn't have a lot, to tell you the truth. But I don't think we had any more or less than anybody else...

Interviewer: Which is?

o10: You know, being audited once every 10 years.

Other criticisms of oversight related to the penalising of offenders. The long period between the complaint and the disciplining and the level of penalties were regarded as not having a strong impact on the sector. Furthermore, the failure to impose compulsory training on an offender was seen as a flaw in the system, since suspending or cancelling registration only stops the offender – for a specified period – but does not make actual changes. Two representatives of the Building Practitioners Boards made clear:

o15: We can require them not to do something, but we can't require them to do something. Training is classic example: 'Go and do a course on that and come back and demonstrate to us that you have.' We cannot do that.

o11: We can cancel their registrations. That's what we can do.

6 New South Wales

This chapter focuses on New South Wales's building regulatory enforcement regimes. Firstly, the formal set-up of these regimes, based on a desk study, will be described. Information was found mainly in existing research reports and on government websites³³ and is represented as such. This information has been discussed with representatives from New South Wales's building regulatory enforcement industry. Secondly, experiences with the building control regimes will be described and discussed; based on a series of interviews³⁴. The focus is on building regulatory enforcement in urban areas.

6.1 Formal set-up of building regulations and building control in New South Wales

The building regulatory framework

Most development proposals in New South Wales (NSW) must be assessed to ensure compliance with relevant planning controls and, according to nature and scale, that they are environmentally and socially acceptable and sustainable. State, regional and local plans and policies indicate what level of assessment is required, and who is responsible for assessment: Council, an accredited private professional or the Minister for Planning – the Department of Planning assesses proposals for the Minister. Planning and development in NSW is carried out under the Environmental Planning and Assessment Act 1979 (EP&A Act) and Environmental Planning and Assessment Regulation 2000. The object of the EP&A Act is:

'(a) to encourage: (i) the proper management, development and conservation of natural

33 Sources:

Available on Building Professionals Board website (<http://www.bpb.nsw.gov.au> (Accessed: February 2007)):

- General information.

Available on NSW Government Department of Planning website (<http://www.planning.nsw.gov.au> (Accessed: February 2007)):

- General information;

- Environmental Planning and Assessment Act 1979.

OFFT (2004) Consumer building guide, Parramatta, Office of Fair Trading.

NSW Government (2007) Improving the NSW Planning System. Discussion paper, Sydney, NSW Government, Department of Planning.

Phillip Chun & Associates (2000) 'State of Play' Document: Comparison of Building Regulatory Framework in Australian States and Territories, Canberra, Department of Industry, Science and Resources.

34 Conducted from 2 to 7 April 2007 in Sydney, the capital of New South Wales, with a number of key-actors from New South Wales' building regulatory enforcement industry. Both governmental and non-governmental actors have been included – a list of interviewees is included in Appendix G.

and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment, (ii) the promotion and co-ordination of the orderly and economic use and development of land, (iii) the protection, provision and co-ordination of communication and utility services, (iv) the provision of land for public purposes, (v) the provision and co-ordination of community services and facilities, and (vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and (vii) ecologically sustainable development, and (viii) the provision and maintenance of affordable housing, and (b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and (c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.’ – Environmental Planning and Assessment Act 1979

Almost all development requires Development Consent. Under The Environmental Planning and Assessment Act 1979, ‘development’ is defined as: the use of land; the subdivision of land; the erection of a building; the carrying out of work; the demolition; or any other matter controlled by an environmental planning instrument. To obtain development consent, an applicant must lodge a Development Application (DA) with the responsible authority, mostly local Council. Some minor development, called Exempt Development, does not require consent. Another type of development, called Complying Development, requires a Complying Development Certificate prior to commencing use. Both local authority and private accredited certifiers can issue these Complying Development Certificates; ‘ordinary’ Development Consents can be issued by public authorities only.

When undertaking any building or structural work, a Construction Certificate has to be obtained – previously known as a Building Approval. A Construction Certificate certifies that the detailed construction plans and specifications for the development are consistent with the Development Consent and comply with the Building Code of Australia. The certificate is required prior to commencing work. A Construction Certificate can be obtained from the local Council or from a private accredited certifier. For some minor work, such as office partitioning, some Councils allow or encourage a joint or combined Development Application/Construction Certificate submission to be made. In addition to the above mentioned legislation, the Home Building Act 1989 lays down the present-day legislative framework for residential building work.

Development consent and the construction certificate assessment process

For most types of development proposals, a DA has to be lodged with the local Council. Once a development application is lodged, the Council will, if required by a public notification, notify the neighbours and in some cases notify a broader audience, including advertising in the local or regional newspapers. If



View from
Sydney Harbor
Bridge

the application is successful, the Council will grant development consent, usually subject to condition. If the application is not successful, a Development Consent will not be granted, yet, reasons for not issuing it have to be stated.

In addition to the Development Consent, most building work requires a Construction Certificate. A Construction Certificate essentially certifies that: (1) the detailed construction plans and specifications for any development are not inconsistent with the Development Consent and comply with the Building Code of Australia, and for residential work, with the Home Building Act 1989; (2) all required contributions and charges have been paid; (3) all Development Consent conditions have been satisfied.

The EP&A Act prescribes two conditions for consents involving building work. Building work must be carried out in accordance with the BCA and, for residential work for which the Home Building Act 1989 requires a contract of insurance, the contract must be in force.

Following the issue of Development Consent, work cannot commence until a Construction Certificate is issued, a Principal Certifying Authority (PCA) is appointed, and notice to the Council on the intention to commence work is given. Either the Council or a private accredited certifier may carry out the construction certificate assessment process. The applicant is free to choose between either the Council or a private accredited certifier. Once the applicant has both Development Consent and a Construction Certificate, the applicant has to appoint a PCA. The PCA can be either the Council or a private accredited certifier. There is no requirement for the Council or private accred-

ited certifier that was involved in either the assessment for development consent and/or the assessment for a Construction Certificate to be appointed as a PCA. The role of the PCA is:

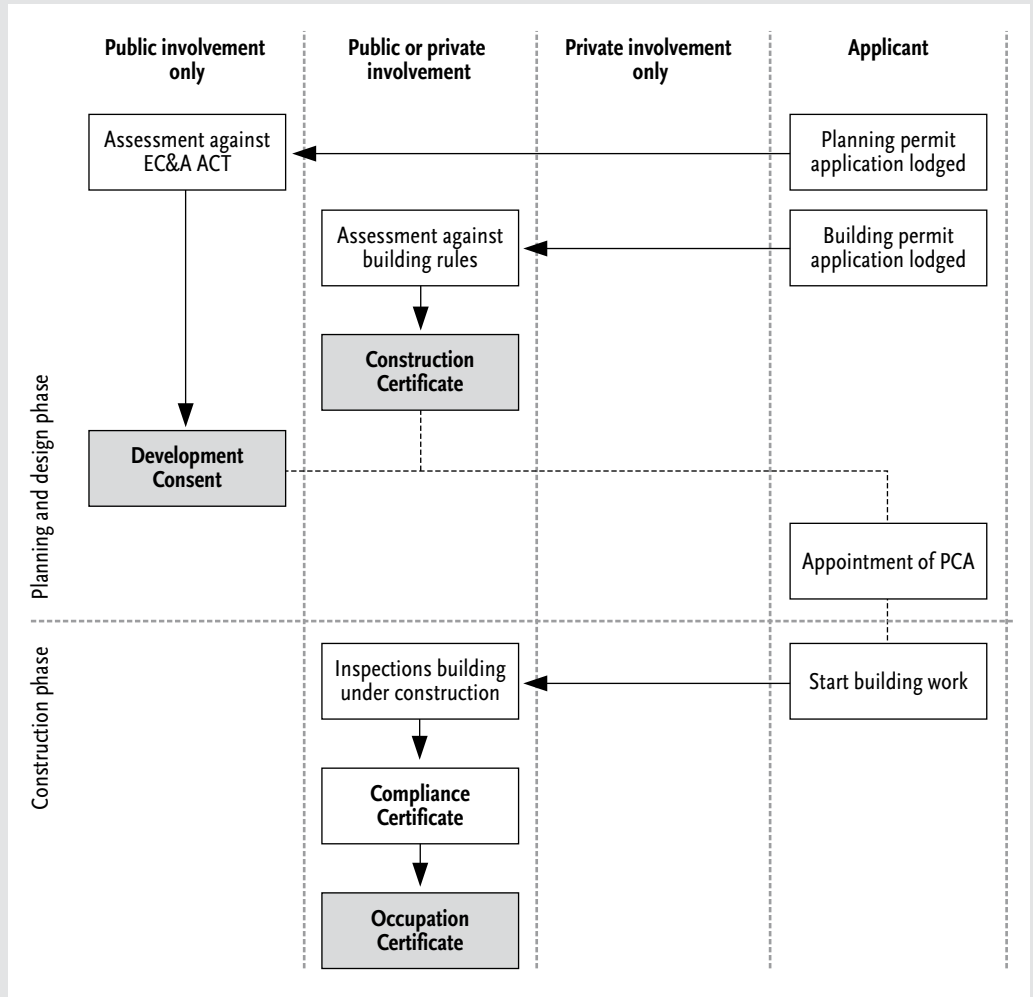
- to check if a Construction Certificate is issued for the building work the PCA has control over;
- to check that the principal contractor holds the appropriate licence and the appropriate insurance;
- to check that an owner-builder holds an owner-builder permit;
- to conduct inspections of building works during their construction; no mandatory checks are included in the regulation;
- to issue Compliance Certificates specifying that conditions of consent have been satisfied or that the work complies with the plans and specifications, or nominating the classification of a building under the BCA; Compliance Certificates are not compulsory;
- to enforce the conditions of development consent; and
- to issue Occupation Certificates specifying that the PCA is satisfied and that the building is suitable for occupation or use – it does not certify full compliance with all aspects of the EP&A, Building Code of Australia and other standards; Occupation Certificates are compulsory and a building or part of a building may not be occupied without it.

If the PCA is a private sector agent, it has limited enforcement powers – I will return to this when discussing private sector involvement. Figure 6.1 gives an overview of New South Wales' development assessment process.

6.2 Private sector involvement

Prior to 1 July 1998, Councils had the sole responsibility for approving development. Under present legislation regarding building work, private certifiers are able to check that development proposals comply with the required technical standards (such as the Building Code of Australia) and regulations. A private certifier will issue construction certificates and become a PCA later in the development process. When appointed as a PCA, a private certifier has the authority to carry out the above mentioned tasks. These tasks can also be carried out by Council building control surveyors. Major differences between Council surveyors and private certifiers in their role as a PCA are enforcement powers. A private certifier only has the authority to issue a 'notice of proposed' order if there is a failure to comply with the regulations. The private certifier cannot, however, take follow-up action, such as issuing a formal order, as this is the local Council's responsibility. The private certifier must give notice to the local Council of the issuing of the proposed order; the Council must then decide whether it should proceed to issue an order. If the order

Figure 6.1 New South Wales' development assessment process



is not complied with, the Council can seek enforcement of the order through the Courts, which can also include the issuing of Court orders and fines.

Private certifiers are required to be accredited by an authorised body in accordance with the standards set out in the accreditation body's approved accreditation scheme. Furthermore, certifiers have to demonstrate, through a relevant scheme, a series of competences, mostly regarding education and experience, to gain accreditation. Certifiers have to hold mandatory professional indemnity insurance with a run-off period of ten years. The private certifier is proportionately liable³⁵ for work carried out based upon his

35 Proportionate liability is a legislated requirement by which, under certain circumstances, a person whom a court finds is liable for another person's damages is only required to pay that proportion of the total amount of damages for which they are held by the court to be personally responsible.

involvement in a project with a limitation of ten years. Certifiers have to be re-accredited every year and undertake continuing professional development in order to be re-accredited every year. A certificate of accreditation shows: (1) the extent of a private certifier's authorisation; (2) the types of certificate that can be issued; and (3) whether the private certifier can operate as a principal certifying authority (PCA) for work on a building or subdivision. Each certificate of accreditation is given a unique number, which is used on all documents to identify the private certifier. A private certifier must be re-accredited each year.

Private certifiers are subject to governmental oversight through a system of investigation of complaints and assessment and a system of auditing. Private certifiers are furthermore subject to conflict and interest provisions as set out in the EP&A Act. These state that a private certifier is not allowed to have any direct or indirect financial, legal or equitable interest in the work or have any relationship, whether personal, professional, commercial or financial, with the applicant or its builder and a certifier must not be involved in the design or construction of the work being done.

Since 1 March 2007, the body responsible for accrediting, auditing and investigating complaints against private certifiers has been the Building Professionals Board (BPB), an agency within the Department of Planning. The BPB has set down regulation, which identifies the categories of accreditation in which applicants can seek accreditation; there are 21 categories. This regulation sets out all criteria requirements for applicants – skills and knowledge. Performance criteria are split into core criteria and specialist criteria. Furthermore, the BPB facilitates training for accredited certifiers, provides information to the public about how projects are certified and assists consumers in locating a certifier. The Board provides specialist expertise to the accreditation and disciplinary processes for certifiers; to ensure that certifiers are competent and act in the interests of the community; and to give consumers confidence that buildings are constructed in accordance with the approved plans.

Registration and licensing of practitioners

Within NSW, different practitioners need a registration and/or a licence in order to be allowed to carry out work. As mentioned before, private certifiers have to be accredited within the NSW system. Employees working at local building control authorities do not need registration.

The NSW Home Building Act 1989 requires builders and tradespeople to be licensed to carry out domestic work and to have proper contracts and insurance in place for most jobs. A licensed builder is required for residential building work where building and materials costs are more than A\$1,000 and/or when specialist work is undertaken. Specialist work means: plumbing work, gas fitting work, electrical work, installation or maintenance of certain refrigeration systems and air-conditioning work. All contracts for work over

A\$12,000 must have 'home warranty insurance' for each dwelling. A builder must give a certificate of insurance to the homeowner before taking a deposit or commencing any work. There are no requirements for builders and tradespeople that carry out non-domestic work.

Special regulation applies to owner-builders. An owner-builder is required to hold a permit for carrying out construction work. The permit is available only to an individual owner of the land (or a person having a prescribed interest in the land, for instance a long-term lease) upon which the work is to be carried out. Only one owner-builder permit can be issued within a five year period, unless the application and any earlier permit relate to the same dwelling, or unless special circumstances exist. If the value of the proposed work is over A\$12,000, the (applicant) owner-builder must provide evidence that he/she has completed an approved owner-builder course or has the approved equivalent experience. The owner-builder is responsible for: (1) overseeing and supervising all tradespeople; (2) ordering and delivering materials and managing the building site; (3) obtaining all necessary Council and authority approvals for the work; (4) ensuring that the financial, taxation and insurance requirements of the building work are met, and ensuring compliance with all laws; (5) providing a safe work environment; (6) ensuring any contractor engaged is suitably licensed to do the work contracted for.

6.3 Evaluation of New South Wales' building regulatory enforcement regimes

As in Victoria, two building regulatory enforcement regimes have been adopted in NSW: building assessment can be carried out by public and private sector agencies. However, as in Victoria, private sector agencies are being overseen by the Building Practitioners Board, a statutory independent board, which consists of governmental and non-governmental stakeholders, which is also responsible for setting up participation and administration criteria, these tasks are carried out solely by the government in NSW. Involvement of public sector agencies in NSW can be compared with a public regime, whereas involvement of private sector agencies can be compared with a prescribed co-regulation regime – both regimes are described in Chapter 3.

To gain an insight into experiences with these building regulatory enforcement regimes and into the competition between these, a series of interviews have been conducted; this section is based on the interviews. Quotes in the text come from these interviews³⁶.

³⁶ The number preceding a quote refers to the number of the interviewee in Appendix G.

Experiences with the regimes

Different opinions were found regarding the introduction of the system of private certification. Interviewees named top-down, bottom-up initiatives and initiatives regarding private sector involvement in Victoria (see Chapter 5). Top-down initiatives were found in the Federal Government's National Competition Policy. Bottom-up initiatives were found in pressure from the construction industry to make the building control process more efficient and bring in competition. Interviewees state that it took councils quite long to issue Construction Certificates, longer than it appears to take private certifiers at present. Finally, the introduction of private building control surveyors in Victoria was mentioned as a motive to introduce private certification in NSW: 'everything that happens in Victoria happens in NSW.'

The quality of the higher end of the domestic market and the commercial market was evaluated as good, whereas the lower end of the domestic market was valued less positively by the key-actors interviewed. Furthermore, some interviewees perceived the suburbs and countryside as places where devious builders can hide more easily, as levels of control might be lower due to distances and clients might be less demanding or less professional. Building regulations and building control were said to be needed to set minimum levels regarding safety, sustainability, health and amenities. The government was looked upon as needed to set and enforce the regulations, as market players do not seem to do so by themselves. As a representative of the Royal Australian Institute of Architects put it:

o24: Building control is needed only because ... there is so tight a margin that there are people out there who just have to cut corners constantly to bring the job in.

Overall, the two-tier system of public and private building control was generally regarded as positive as it was considered to have improved the standards of building surveyors – both public and private. However, when asked, some objections were made. The main issues that were named as most serious and second most serious were conflicts of interest and changes in design during development. Other major issues named were identity, clarity of the regulations and insurance issues.

Conflicts of interest were referred to as a possible obstacle to both public and private participants. Private certifiers were perceived as being subject to commercial pressure; Council employees were perceived as being subject to political pressure. Changes in design during development were referred to as obstacles, as these changes might lead to a re-assessment of the Development Consent, which might slow down work. Identity was named as an obstacle, as building control often only becomes an issue when things go wrong. Lack of clarity in the performance-based building regulations was named as an obstacle as it is not clearly specified what 'satisfactory' means, especially regard-

ing alternative solutions. Checking compliance might therefore be difficult. Finally, insurance was named as a possible obstacle as the insurance industry can place a lot of pressure on the surveying process by not offering adequate insurance policies that are needed to set up a robust building assessment system. Both public and private sector certifiers mentioned conflicts of interest and changes in design during development as obstacles; identity, lack of clarity in regulations and insurance were named by the public sector only. State officials made it clear:

021: (...) We require a ten year run-off period [for the personal indemnity insurance], but the insurance industry said: "We're not going to offer it anymore.". (...) So, we cannot make it mandatory. (...) One, it's not good for them [the certifiers], if they do get sued they can lose their personal possessions. And secondly, it's not good for the consumer, because if they do have a problem and do want to sue someone that doesn't have the insurance, they don't get the money. It's such a small industry pool, which makes it difficult to require anything more than what the insurance industry agrees to.

The competitive two-tier model seems to have resulted in a 'natural split': generally larger developments, such as commercial works and the higher end of the domestic market, are assessed by private certifiers, whereas smaller developments, the lower end of the domestic market, are assessed by the Councils. This split in clientele was, in general, not experienced as problematic; yet, some rivalry was found between municipal building control surveyors and private certifiers. Some interviewees pointed out that there has been and still is major rivalry and animosity between Council building surveyors and accredited certifiers. A Council official commented:

018: When we all worked-on under local government control (...) there was a lot more sharing of knowledge and skills and it worked a lot better. Now there seem to be these two groups (...) and there's definitely a split between the two groups. The Council certifiers aren't happy to pass on their experiences and knowledge at a professional level to the private people.

Effectiveness

As in the other jurisdictions analysed, no direct indication was found that the introduction of the private sector has made building assessment more effective. However, as private certifiers appear to specialise over their Council counterparts, and as private certifiers often get involved early in the development process, it might be expected that private sector involvement has a positive influence on the system's effectiveness. A Council official said:

019: A lot of private certifiers that I come across that are working closely with developers have a background in and good knowledge of the development industry, whereas a lot of

people in Council have a declining building surveying attitude... it's more of a tick-the-box kind of exercise. (...) Whereas I think there's a much greater awareness of the development process as a whole by private certifiers. Because they are the ones who are going to be subject to developers pushing the lines (...) and I guess they're working more proactively. Instead of telling that X, Y and Z is wrong with the application, they'd probably be suggesting ways to work things out.

Efficiency

The introduction of private certifiers in the system seems to have resulted in a preference for private certifiers' involvement by professional clients, such as developers; and a preference for Council involvement by non-professional clients, ordinary citizens. The preference for private certifications seems to come from familiarity between a private certifier and his clients; the high level of service private certifiers provide – speed, qualified people; and the possibility to negotiate with a private certifier on fees and service. The preference for the Council building control surveyors seems to come from lack of awareness or familiarity with private certification; traditional confidence in the Council; and lack of private certifiers in the countryside, which gives applicants no choice but to go to the Council. Due to political issues it might sometimes be more convenient to use the Council building control authority. An architect clarified his preference for private sector involvement and briefly hinted at instances when he would decide to use the Council:

o24: With [private involvement] it has become much faster. (...) They will do all the paperwork before the Development Consent is issued by the Council. Then, as soon as you get all those papers together they [the private certifiers] issue the Construction Consent. Whereas with Councils they tend to nothing until the Development Consent is issued. It's a real timewaster I think. We rarely would use the Council for a Construction Consent. Only if you feel there's a political advantage, you would use the Council.

Interviewer: Political advantage?

o24: You've got to remember that Council employees see private certifiers as obstructing their jobs. So if you want to get in at the right side of the Council than you sort of... but I have to say, we rarely use the Council. They're just too cumbersome.

A Council official said:

o18: In big projects the one factor that determines a preference for the private certifier... because you're paying that person there deemed to be a closer relationship between the builder or the applicant and the certifier. And that person who is paying the individual (...) tends to have a greater control over them. So they have a greater flexibility. In oth-

er words when there is a problem on site (...) they can ring that private certifier quickly. Get him to come over... it's more flexible. Whereby, with an organization like government, generally we work Monday till Friday, generally from eight till five. (...) whereby, with a private certifier the general perception is they are available seven days a week, pretty much at any time. (...) It gives the builder or the applicant greater flexibility to resolve with problems. And invariably with building projects they never go as planned; there are always problems. There is always something that has to be changed or a solution that has to be resolved. And it has to be done quickly, because in the construction phase you can't move ahead until something is resolved. So, I think it is the ability to be able to ring someone, get him on site, resolve it, and then move on. I would almost say that Councils, or State government, or government regulators prevent that... I think there is a perception in the [construction] industry there is a perception that you've got a better change and a better outcome when you use a private person.

Equity

The interviewees were careful about making statements regarding this topic and only minor differences were mentioned in the way the Council and private certifiers actually carry out their tasks. It was noted that most private certifiers present used to be Council building control surveyors. It was therefore expected that they perform work in the same manner. The difference appears not to be the difference between either Council employees or private certifiers but, some interviewees commented, it is the individual that matters. An architect made it clear:

o22: Some of the private certifiers do it better, because they are more qualified and better specialized. They would deal in specialized areas, whereas Council has to deal with everything; so Council officers come across stuff that they don't know about. (...) Like an alternative isolation, a lot of Council employees would not be in a position to deal with it and understand it. But as government they have to. (...) Government would be better, generally, at take the trail and making sure that you show, generally, [compliance]. The accredited certifiers that I come across, and the ones that are doing it well (...) they are harder than Council ... and that's what makes them good [certifiers].

Nevertheless, it might be that private certifiers work faster, keep more flexible working hours, and have more experience and skills. Council surveyors are expected to be more discrete as they are independent from their clients. Council employees however might feel less responsible for their work as they are part of a larger body, whereas accredited certifiers have personal responsibility and liability for their work. Council employees might therefore feel protected being part of a larger organisation – there is a difference in mentality between Council employees and private certifiers.

Then, as the competitive two-tier system has brought about a natural split, Councils often seem to be involved in minor construction work of ordinary

citizens – mums-and-dads, owner-builders; whereas private certifiers get more involved in major construction work. It appears that professional clients, such as developers, architects and constructors prefer private certification. Some indication was found that private certification is more expensive than Council involvement.

Accountability

The main objections to the system named by the interviewees were commercial pressure on the private certifier and, related conflicts of interest as the private certifier depends on its clients and might therefore have a business-driven attitude, instead of one based on public interest. Some interviewees however mentioned that in the Council surveyors might, as a State official illustrated, also get involved in this type of issue:

o21: There's also in conflicts of interest a big difference. We are quite strict in saying that the accredited certifier can't get involved in the design side of things. There's no similar... it doesn't apply to Council offices. There may well be a conflict of interest if they [Councils] get involved with design and tell: 'Do this, you should that here...'. That's design work, or advice, but that's not regulated.

Most of the criticism on the accountability of the system was, however, directed at the commercial pressure on the private certifier. An illustrative quote was given by a Council official:

o18: I have a problem with the builder, or applicant paying the certifiers. One is that certifiers then are reliant on that person for their income. And they feel obliged to maybe give that person something which may not be legal. In other words they give them a dispensation from the code, or maybe overlook something that is obviously wrong because they feel pressure from that person. (...) My suggestion is that instead of paying the construction fees to the private certifier, it should be paid to a fund and then the fund pays the certifier. (...) Then the private certifiers wouldn't feel they have to give favors to person who is paying them. They would be in a stronger role to enforce the rules, because it wouldn't matter how much pressure they apply to their clients to get something done because the money is paid by a third party.

And an architect said:

o22: [Shortly after the introduction the private sector.] The conflict of interest provisions were difficult to understand. People never dealt with that before, having to get paid, doing a job and then say: 'No.'

When analysing New South Wales' regulatory regimes, the Building Professionals Board (BPB) had recently been established to oversee the private certi-

fiers, nevertheless, most interviewees agreed upon the need for oversight and audits. It might take some years to get an insight into the impact of the BPB on the regulatory regimes, however, it was possible to assess some of the experiences.

At present most audits appear to be carried out randomly and the focus seems to be on processes rather than on the technical content of building control, as was illustrated by two BPB representatives:

o20: The problem with the auditing is that... (...) The auditing process has not been a really systematic business. (...) The auditing is not our strongest thing.

o21: We have had our successes. (...) We do go out and do the audits. (...) But it has been pretty ad hoc...

o20:... and probably mostly complaint-based...

Furthermore, the BPB has the power to audit both Councils and private certifiers, but lacks the power to discipline Councils. In effect, Councils seem to supervise themselves and are subject to general oversight by the Department of Planning, investigations into complaints by the Ombudsman, and occasionally the Independent Commission against Corruption (ICAC). From the interviews it was established that the Victorian system of supervision (see Chapter 5) is seen to be strong as both building control surveyors (includes both municipal surveyors and private certifiers in Victoria) and builders are supervised and penalised by one self-funded body, the Building Commission. A private certifier commented: "Supervision should be both proactive and reactive; educating and preventing while also enforcing and penalising."

7 Queensland

This chapter focuses on Queensland's building regulatory enforcement regimes. Firstly, the formal set-up of these regimes, based on a desk study, will be described. Information was found mainly in existing research reports and on government websites³⁷ and is represented as such. This information has been discussed with representatives from Queensland's building regulatory enforcement industry. Secondly, experiences with the building control regimes, based on a series of interviews³⁸, will be described and discussed. The focus is on building regulatory enforcement in urban areas.

7.1 Formal set-up of building regulations and building control in Queensland

The building regulatory framework

The framework for development regulation in Queensland is provided by the Queensland Development Code (QDC). The QDC aims to improve the health, safety and well-being of the community in and around buildings and improve the design of buildings to suit Queensland's climate and its purpose:

'[to provide] a framework within which Queensland-specific building standards are consolidated into a single document. The standards cover Queensland matters outside the scope of and in addition to the Building Code of Australia (BCA), such as requirements for private health facilities, and on-site building standards.' – Queensland Development Code

37 Sources:

Queensland Government website (<http://www.qld.gov.au> (Accessed: February 2007):

- General information;
- Queensland Development Code.

Queensland Government Department of Local Government, Planning, Sport and Recreation website (<http://www.lgp.qld.gov.au> (Accessed: February 2007)):

- General information;
- QLDGOVT (2002) Queensland Building Work Enforcement Guidelines, Brisbane, Queensland Government, Department of Local Government and Planning.

Building Service Authority website (<http://www.bsa.qld.gov.au> (Accessed: February 2007)):

- General information;
- BSA (2006) Facts for home builders and renovators, Brisbane, Building Service Authority.

Phillip Chun & Associates (2000) 'State of Play' Document: Comparison of Building Regulatory Framework in Australian States and Territories, Canberra, Department of Industry, Science and Resources.

38 Conducted from 9 to 13 April 2007 in Brisbane, the capital of Queensland, with a number of key-actors from Queensland's building regulatory enforcement industry. Both governmental and non-governmental actors have been included – a list of interviewees is included in Appendix G.

Yet, only a part of the QDC is mandatory, the part known as Schedule 13 of the Standard Building Regulation 1993, all other parts of the QDC are advisory standards only. Schedule 13 focuses on: workplaces; workplaces involving spray painting; detention centres; retail meat premises; private health facilities; fire safety budget accommodation buildings; pastoral workers' accommodation; sustainable buildings; design and site standards for single detached housing on lots under 450 square meters; design and site standards for single detached housing on lots of 450 square meters and over; higher risk personal appearance services; rainwater tanks; residential services building standards; child care centres and tents. All other building work is subject to the BCA. The QDC is clear on its relationship with the BCA:

'The BCA also provides a nationally uniform set of technical building standards. However, it currently contains numerous additional provisions specific to Queensland. As the number of these provisions is increasing, it is not practical to include them in the national code. For example, new mandatory standards for Queensland, such as Fire Safety in Budget Accommodation are included in the QDC, rather than the BCA. (...) The existing Queensland provisions currently contained in the BCA will be removed and placed into the QDC. These standards will remain mandatory standards, which cannot be changed by a local government. Building certifiers will enforce mandatory standards as a building certifying function. (...) Therefore, all Queensland specific mandatory standards will be consolidated into the QDC.' – Queensland Development Code

For most building work in Queensland, building development approval is needed – some minor building work does not require a building permit. Since 30 March 1998, under the Integrated Planning Act 1997, a building development application can be lodged with either a municipal building certifier or a private certifier. All building certifiers, both municipal and private, must be registered with the Building Services Authority (BSA), as accredited building certifiers.

The BSA is a statutory authority established under the Queensland Building Services Authority Act 1991 to regulate the building industry by licensing contractors, educating consumers about their rights and obligations, making contractors aware of their legal rights and responsibilities, handling disputes fairly and equitably, protecting consumers against loss through statutory insurance, implementing and enforcing legislative reforms and, where necessary, prosecuting individuals not complying with the law.

The BSA carries out audits of building certifiers' work, investigates complaints and can take disciplinary action against building certifiers found guilty of professional misconduct. Any person may lodge a complaint with the BSA against the action of a building certifier. Furthermore, the BSA provides mandatory insurance: the BSA Home Warranty Insurance, which provides protection against non-completion of the work covered by the contract;



Brisbane skyline

defective construction and subsidence or settlement of the building.

All Councils are required to provide building certification services. This includes providing general advice on building applications, statutory building assessment and issuing building approvals. However, many smaller Councils only provide those services on a part-time or consultancy basis. In addition, where a concession to building planning is required, the Council has a specific obligation to consider any request to relax those requirements.

Building development assessment process

For building works, the assessment process is split into an assessment against the QDC and/or Town Planning schemes and an assessment against the BCA and the scheme's 13 requirements in the QDC. The vast majority of assessments regarding planning aspects are made by the Councils, some specific applications are examined by a State agency.

If the application involves assessment against the Building Act, the applicant is free to choose between the Council or a private certifier to assess the plan in the light of the Building Act. The building application assessment process involves assessment by a building certifier against the Building Act and associated regulations and standards, and the issue of building approval. A private certifier cannot issue building approval until such time as all other necessary approvals have been issued, such as a preliminary approval under

the planning scheme for assessment of the character of the building, or a reduction in the minimum distance between a building and a boundary.

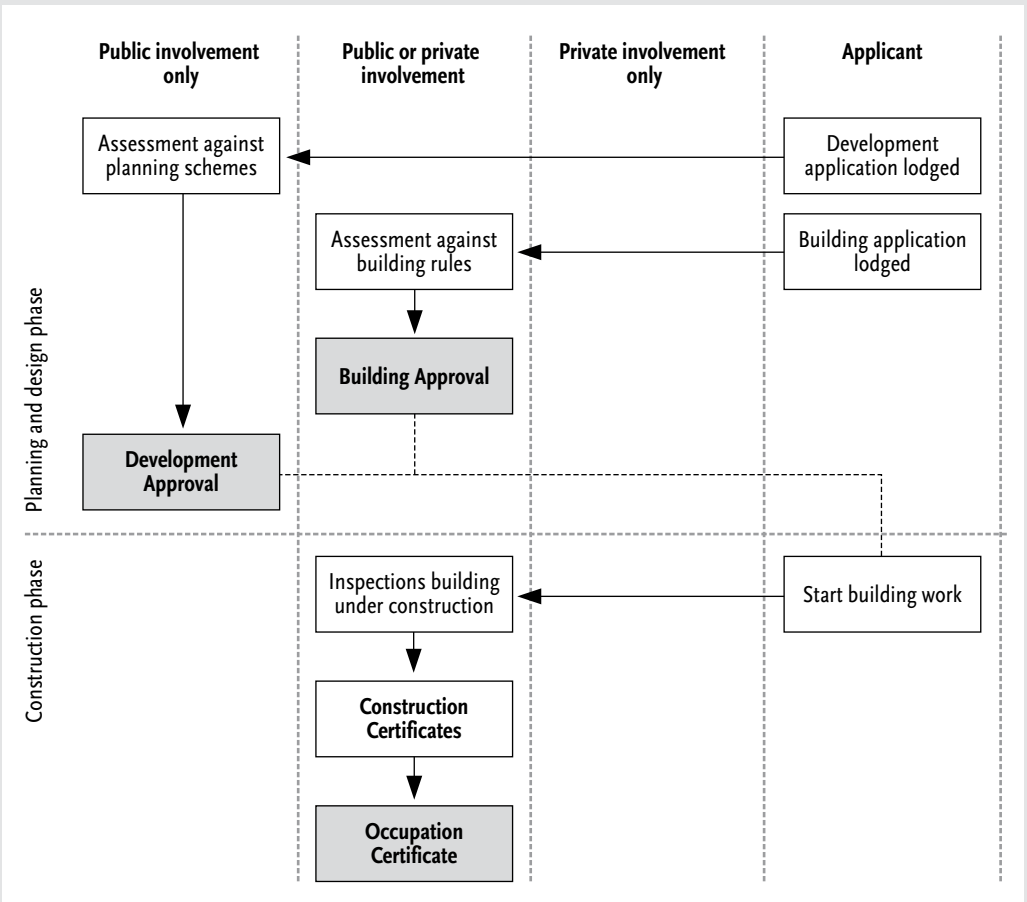
The building approval will state which inspections are required and at what stages of construction. The Council or private certifier who issued the building approval is responsible for carrying out these inspections. When building approval is given, a condition of the approval will be that certain mandatory inspections must be carried out. Once the building work reaches a stage when the work can be inspected, the builder must give the building certifier a notice, whether in writing or by other means, advising that building work has been carried out to a stage when inspection can take place. The purpose of the inspections is to ensure that the building work is carried out in accordance with the building permit and relevant building standards.

Building certifiers may carry out inspections personally, or may authorise a competent person to carry them out. For example, the building certifier may authorise an engineer who is experienced in the inspection of concrete structures to carry out the inspection of the reinforcement steel of a concrete swimming pool instead of doing the inspection personally. The building certifier is responsible for determining whether a person is competent to carry out a particular inspection, and must do this prior to the inspection. Building certifiers often rely upon competent individuals to inspect and certify aspects of work that are outside the competence of the building certifier, or where the certifier is unable to be present during a particular phase of construction.

Mandatory inspections are: for the foundation and excavation stage, before the footings are poured; for the slab stage, before the concrete is poured; for the frame stage, generally before the cladding and lining is fixed; for reinforced masonry construction, before the wall cavities are filled; and for the final stage, at the completion of all aspects of building work. Certificates will be issued if the inspection reveals compliance with building regulations. In addition to these building inspections, there are also mandatory plumbing and drainage inspections. Furthermore, a building certifier, either municipal or private, is allowed to issue certificates that allow the lawful occupation of class 2 to 9 buildings as well as final inspection certificates that allow the lawful occupation of class 1 and 10 buildings. Figure 7.1 gives an overview of the Queensland building development assessment process.

The private certifier has far-reaching enforcement powers and obligations, as does the Council. When a building certifier, either municipal or private, becomes aware of a development offence, 'show-cause' or enforcement notices can be issued. The purpose of a 'show cause notice' is to invite a person to show-cause why an enforcement notice or a revocation notice should not be given to them; and make representations about the issues dealt with in the notice. Furthermore, prosecution proceedings can be instituted. If the offender fails to comply with a notice served by a private certifier, the private certifier is required to refer the matter to the local government. The private certi-

Figure 7.1 Queensland's building development assessment process



fier has, however, the obligation to resolve the problem. Making notice to the local government does not relieve the private certifier from this obligation. If necessary, a private certifier has to bring the offender to court. A private certifier's failure to act may constitute professional misconduct. When the private certifier fails to act, the local government is empowered to enforce the provisions of the Building Act.

7.2 Private sector involvement

Private certifiers are building certifiers whose BSA licence is specifically endorsed to allow them to work in any local government area. To be licensed one has to be accredited as a building certifier by the BSA. Criteria to become certified relate to education and experience. A building certifier, for example, has to have a degree and 3 years of practical experience. There are two different levels of licence for private certifiers related to the size of projects they can undertake. Within these levels, private certifiers are able to perform the

following work: assessing building applications; issuing building approvals for building work; inspecting and certifying construction; issuing enforcement notices on building work they are directly involved with and issuing certificates to allow the lawful occupation of certain classes of buildings. Private certifiers are required to have at least A\$1 million professional indemnity insurance with a run-off period of ten years. The private certifier has joint and several liability³⁹ and this liability has no run-off period. Registration has to be renewed every year and building certifiers have to be re-accredited every three years.

There are, however, a number of matters over which private certifiers have no authority and which can only be decided by the local government. These matters include: assessing town planning regulation; reviewing the capacity and location of public utilities (e.g. sewer mains, water supply); exercising discretion on the planning issues of buildings (e.g. reducing the setback requirements); and granting exemptions to the installation of swimming pool fences. All accredited building certifiers are bound by a strict code of conduct, and have an obligation always to act in the public interest. Severe penalties can apply if they fail in these duties.

Registration and licensing of practitioners

Under the Queensland Building Services Authority Act 1991, with a few exemptions, all builders, building designers and most trade contractors must be licensed to carry out residential building work. A licence is required for work of any value involving Plumbing and Draining, Gas Fitting, Pest Control, Fire Protection, Residential Design, Building Design and Interior Design. To obtain a BSA licence, certain financial, experience, technical and managerial criteria have to be met. The BSA is responsible for assessing licence applications, issuing licences and ensuring that licensees continue to meet the required standards.

As mentioned before, building certifiers have to be accredited within the Queensland system and need a licence to work in either local government or in private practice. The difference between public and private bodies is that private certifiers must carry professional indemnity insurance.

Special regulation applies to owner-builders. An owner-builder is an individual who does owner-builder work and holds a permit for that work. The role of an owner-builder is that of head or main contractor. The owner-builder is personally responsible for dealing with individual subcontractors if there are any problems with workmanship. Applying for an owner-builder permit

39 Joint and several liability is a common law requirement under which a person found by a court to be partly liable for another person's damages, can be required to pay any amount of the total damages which any other party also found to be liable proves unable to pay.

involves completing an application form, paying the permit fee and providing the BSA with proof of identification and specific proof of ownership or sufficient legal interest in the property. If the value of the work (labour & materials) is over A\$11,000, an (applicant) owner-builder will be required to complete an Owner Builder Course run by a course provider recognised by the BSA.

7.3 Evaluation of Queensland's building regulatory enforcement regimes

As in Victoria, two building regulatory enforcement regimes have been adopted in Queensland: building assessment can be carried out by public and private sector agencies. However, as in Victoria, private sector agencies are being overseen by the Building Practitioners Board, a statutory independent board, which consists of governmental and non-governmental stakeholders, which is also responsible for setting up participation and administration criteria, these tasks are carried out solely by the government in Queensland. Involvement of public sector agencies in Queensland can be compared with a public regime, whereas involvement of private sector agencies can be compared with a prescribed co-regulation regime – both regimes are described in Chapter 3. As such, the system is comparable with that of New South Wales, with the exception that the statutory insurance scheme in Queensland is run by the government, whereas in New South Wales, insurance is provided by private insurance companies.

To gain an insight into experiences with these building regulatory enforcement regimes and into the competition between these, a series of interviews have been conducted and are covered in this section. Quotes in the text come from these interviews⁴⁰.

Experiences with the regimes

Various opinions were expressed regarding the introduction of the system of private certifiers. Interviewees cited top-down and bottom-up initiatives, and often both. Top-down initiatives were found in the Federal Government's National Competition Policy and the introduction of the Model Building Act that opened up possibilities for privatisation. Bottom-up initiatives were found in the construction industry's criticism of the councils. The councils had a monopoly over the building control system; it took a long time to get Building Approval; and applicants were often bound by a local building control surveyor's personal interpretation of the rules.

The interviewees rated the quality of the construction industry from 'good'

⁴⁰ The number preceding a quote relates to the number of the interviewee in Appendix G.

to 'quite poor'. In terms of the commercial sector, the quality was generally rated as good. As in the other jurisdictions analysed, reference was made to the ostensible (almost) absence of incidents in the construction industry. Only the fatal Riverside Golf Club roof collapse in Adelaide, South Australia in 2002 and the fatal Childers Hostel fire in Childers, Queensland in 2000, were mentioned. The commercial sector and the upper end of the domestic sector seem to look after themselves – sometimes this was referred to as 'natural selection'. The lower end of the domestic sector was generally rated less positively. Reasons mentioned were the focus on theory instead of practice in the apprentice system and lump sum contracts. According to the interviewees, building regulations are needed to protect the consumers and public in general; to perform and establish acceptable standards on health, safety and amenity; issues that are not taken up (enough) by the market-driven construction industry. A private certifier said:

o30: I think it's probably the 80-20 rule. I think probably 80 percent of the people see the big picture. And they see that to get repeat work from the client or more work from the same area you need to provide a quality building that's safe and fit for occupation. You rely on your reputation. You're only as good as your last building that you build. And you can build a hundred excellent building in a row and build one bad and that's what you're known for. So I think for 80 percent of the people it critical to their existence in the business to provide good service and quality buildings. But the other 20 percent of the people don't see it that way. They're very short sighted. They get into a new industry. They make as much money as they possibly can and when they get caught or something goes pear-shaped for them they get out and find a new industry. And I think that it is probably the 20 percent of the people building control is needed for.

Under the competitive two-tier model, applicants seem to prefer private certifiers for building control – it must be noted that only private building control exists in the city of Brisbane. Private certifiers were said to be better at providing a more cost-effective; faster; more specialised; and more available service than the Councils. Shortly after the introduction of the private certification system, the Councils seemed to make many complaints about private certifiers as there was strong rivalry between Council surveyors and private certifiers. At present, fewer complaints appear to be made, yet, the rivalry still exists. Interviewees mentioned that the boundary between town-planning regulations and building regulations seems to be blurring. As in the other jurisdictions analysed, additional demands regarding town-planning might be used by Councils to recover their grip on building control. A representative of the Housing Industry Association commented:

o45: They tried all sorts of things to interfere with the [private certifiers'] processes and they constantly made complaints to the Building Services Authority. It was about proce-

dural sort of things. (...) But I think we've got sort of got over all of that. They tried to frustrate the system initially, but I think it sorted itself out now. Those sorts of problems aren't there anymore now. (...) There is one area that is becoming an issue for private certification. There is a blurring of the boundaries of what is building control and what is planning control. Local governments in particular are introducing all sorts of requirements, that they are not really supposed to be introducing, that impinge on building control. And to an extent they are trying to claw back control of the system by requiring a planning approval for more and more development. (...) There was a time when probably five percent of all detached housing required a planning approval, it's probably sixty percent now.

An architect mentioned:

038: [Private certifiers] are very concerned about their personal indemnity insurance. (...) And this is probably one of the side objectives... they tend to be very conservative in a lot of their approaches because they don't want to get into trouble, or be penalized if they do anything wrong. (...) If he [a private certifier] makes a mistake, gets fined it comes out of his personal indemnity insurance and his premiums go up, or he can even be... and they are talking about substantial fines, like thirty thousand dollars for the first offence.

In general, private certification was rated positively. When asked, however, some objections to the system were made. The main issues mentioned as most serious or second most serious were commercial pressure and insurance issues. Other major issues mentioned are getting and keeping people in the business; the builder's role in choosing a private certifier; the loss of feedback to State government; and planning issues. The different issues were mentioned by both public and private participants interviewed.

Insurance was referred to as an obstacle on different levels. Firstly, as private certifiers run high risks in terms of their professional indemnity insurance – personal fees get raised when the insurance company has to pay out – private certifiers tend to be risk-averse and have a preference for known deemed-to-satisfy solutions, instead of innovative performance-based solutions. As such, the private certification scheme seems to have a negative impact on the effectiveness of the performance-based building regulation scheme. Secondly, as the insurance is mandatory, the 'good guys' seem to suffer because of the 'bad guys' as fees get raised when many pay-outs have to be made across the industry. A representative of the Housing Industry Association said:

045: In the early days there were a lot of aggressive private certifiers out there that pushed the system to the boundaries, which then produced some insurance issues that came together with a bad cycle in the insurance industry [HIH collapse in Australia and international insurance market after 9/11] so a lot of private certifiers had a lot of trouble to

get insured. That made them quite conservative in their approach. (...) It has been interesting to watch the cycle go from sort of being very aggressive and risky, I suppose, in their approaches into now being kind of conservative in what they do as the market settles down.

Getting and keeping people in the business in Queensland seems to be part of a national problem. The average age of employees in the sector is currently roughly 50 years (Zillante, 2007). Many private certifiers made their move from municipal building control authorities to an independent business, which resulted in a drain of experience and knowledge in the Councils. The profession of building control furthermore seems to be suffering an 'identity' crisis: the community is often not aware of what building control implies and exactly what building controllers do and young people do not seem to be keen to enter the business.

Then, loss of feedback was mentioned as an obstacle, since under the old system, Council employees knew what was going on in the field and could inform State or Federal government if issues arose. It is believed that this feedback got lost under the private certification system. Finally, planning issues were mentioned as an obstacle, as the Councils seem to use additional planning-related regulations to regain control over the building control process.

Effectiveness

No indication was found that the introduction of the private sector has made building assessment more effective. Yet, as private certifiers appear to be able to specialise over their local counterparts, it might be expected that regulations are better enforced when a private certifier assesses a building plan of its 'specialisation' than when a Council official does.

Efficiency

Various opinions were found regarding the introduction of the system of private certifiers. Interviewees cited top-down and bottom-up initiatives, and often both. Top-down initiatives were found in the Federal Government's National Competition Policy and the introduction of the Model Building Act that opened up possibilities for privatisation. Bottom-up initiatives were found in the construction industry's criticism regarding the Councils. The Councils had a monopoly over the building control system; it took a long time to get Building Approval; and applicants were often bound to a personal interpretation of the rules by a local building control surveyor. A representative of the Housing Industry Association commented:

o45: The choice has happened. When private certification was introduced in the mid-nineties there was both [public and private sector involvement]. But what quickly hap-

pened was that in the volume market private certifiers were able to offer a much more cost-effective service than Councils could and the private certifiers took a lot of skilled resources out of the councils to provide that service. So, in a bizarre kind of way, it was the same people providing the same service, but in a very different, commercial environment instead of a regulatory environment until the point where the Councils could no longer compete.

A state official mentioned:

o41: [Private certifiers] just provide a better seamless service. They are more client focused, and I hate the term, but they are more of a one-shop-stop. (...) In essence that's what it is.... and availability.

This notion seems to get underpinned by the experience with private certifiers as shared by an architect:

o38: [By] getting the building certifiers on board, they come on board with the design team. So it means that they are involved in the whole process. So as we actually go through the process they actually have a say as to what happens in terms of the design. So rather than being hit with a whole stack of documents...

o44: They are not designing, but they are giving advice.

o38: So basically it is more of an interactive team approach. And by the time we finish our drawing we can basically give the drawings to the private certifier and he will basically stamp them and approve them within a week or two. Whereas in the past we had to finish all our drawings, give 'm to the Council, they'd have a look at and say: 'ah, no, you missed your escape here', or: 'this escape distance isn't right', or: 'the fire hose wheel won't reach that far', or: 'incorrect materials'. We used to have a lot of problems, even down to the type of door-hardware sometimes. So we had a lot of issues in the passed and that used to delay.

Equity

From the interviews it became clear that in urban areas in Queensland most building assessment work is carried out by private certifiers. Therefore little insight was gained into the equity of the systems, as was possible in other states – see Chapters 5, 6 and 8. Nevertheless, an illustrative observation of a state official gives the impression that, as in the other jurisdictions analysed, there are differences between groups of applicants:

o47: The process got faster, but also prices [fees set by private certifiers] for larger projects went down, whereas the prices of the smaller domestic jobs went up. Small projects [and thus owner builders] are risky and difficult for the private certifier to deal with.

Accountability

Commercial pressure was referred to as an obstacle on different levels. Firstly, private certification was sometimes referred to as a purely commercial, money-driven activity; private certifiers are believed to protect their personal rather than public interests. Secondly, in Queensland, the private certifier has an obligation to enforce, which might imply bringing an offender to court. Yet, a private certifier who takes this measure has to pay for the trial itself. To avoid ending up in expensive lawsuits private certifiers seem to take provisions in contracts to stay out of court issues by making it possible to end the contracts. Thirdly, it was noted that contracts with clients and clients that shop for certifiers that suit their needs puts pressure on the private certifiers. Fourthly and finally, private certifiers seem to look upon owner-builders as risky and more difficult to deal with – fees for inspecting small jobs are relatively high. A private certifier mentioned:

o30: There's a lot of pressure on the private certifier to circumvent the system, to speed up the process. As an example I think typically most ... when somebody sits down to judge the feasibility of a project they draw a line in the sand somewhere in the future, a year or two or three year in advance. And they say that at the end of May we must start construction on site. So the feasibility and the planning and preliminary design and discussions with Council start. Design and redesign starts to take place. And that period of time elongates until just before construction is about to start when they finally decide that they going to come to their private certifier to get a building approval. Now, the developer and the engineer and the architect have had twelve months, two years, three years to go over all the design and redesign that they're familiar with; the client's expectations; what the goals and objectives are for the building; how many people are going to occupy it; and what the use of the building is. And a week before construction is supposed to start on site they lob eight inches of plans and paperwork on your desk and say: 'We need this next week.' (...) And the reason is they've booked the plant and machinery and materials to arrive on site. And if they drop that date, if they're going any further than that they starting to loose profits. They're not going to build the building in time, so that means they don't get rent for the occupancy. And so for every day over they lose so many tens of thousands of dollars. In their mind, if they don't start on that date it is costing them money and the feasibility of the project is going down the toilet all the time. And because they come to you last in the chain they see you as the hurdle to get over before they can start construction. And if you find any faults in the design at that late state of the process, you are the worst bastard under the sun. You cost 'm their money, you cost 'm their time. 'Who do you think you are? We don't even need you in this process. We've got these top architects; they know what they're doing. And you are just this lowly building inspector. And I wouldn't even come to you if it wasn't necessary. So what are you going to do for me? I'm paying you good money to do this and I need my plans approved by then.' There's a very large percentage of the development community out there that sees us as rubber-stampers. We rubber-stamp plans and we drop a decisionnaire and how long can that take, really?

As in other jurisdictions, builders were mentioned as an obstacle as it is often them who choose the private certifier, or 'advise' a client to choose certain private certifiers. Clients are therefore often not aware which private certifier they have chosen, as the builder takes provisions in the contract to include a certain private certifier.

To bring more accountability into the system the Building Service Authority (BSA) licenses, audits and investigates complaints. Furthermore, the BSA runs the statutory insurance scheme, which is limited to domestic work and apartments up to four storeys high. In terms of the effectiveness and efficiency of this oversight, the interviewees in general shared the opinion that the oversight could be stronger; especially in terms of auditing. A state official explained the present-day auditing system:

047: [The Building Service Authority deals with eighty disputes a year with over 200.000 approvals issued per year.] So we would think, there are two things, either the standards are good, or B, we are not out there enough... (...) We, the BSA, want to get out there out there earlier. We think if we can get to the projects under construction, we can reduce the number of defects. We think preventative strategy is better than post-strategy. (...)

Interviewer: To what extent are the audits on the administrative side or the technical side of building assessment?

047: You've got to be a bit careful with the terminology. When we say administrative audits, they are actually audits of building certifiers' assessment processes. (...) When we do the administrative audits we go to the certifier and check how he has checked the application [carried out on a regular basis]. (...) Now, our technical audits are actually of work under construction or of work that is being completed [carried out on a random basis]. (...) In addition we muster [three times a year] the entire resources of the BSA ... and we descend on building sites across Queensland and look at all works under construction. (...) Now that's part of this pro-active letting the industry know that we are out and about. (...) We bring some industry awareness.

Nevertheless, there appeared to be a difference in experiences with the auditing system. Public participants interviewed perceived auditing as supervision of both the private certifiers' administrative process and the contents of building control. However, private participants interviewed experienced auditing as a control of their administrative processes and mentioned that there are no checks on content. Finally, the Victorian model (see Chapter 5) is regarded as better than the Queensland model of oversight, as the Building Commission oversees and disciplines both private certifiers and builders.

8 South Australia

This chapter focuses on South Australia's building regulatory enforcement regimes. Firstly, the formal set-up of these regimes, based on a desk study, will be described. Information was found mainly in existing research reports and on government websites⁴¹ and is represented as such. This information has been discussed with representatives from South Australia's building regulatory enforcement industry. Secondly, experiences with the building control regimes will be described and discussed; based on a series of interviews⁴². The focus is on building regulatory enforcement in urban areas.

8.1 Formal set-up of building regulations and building control in South Australia

The building regulatory framework

The framework for building rules and standards in South Australia (SA) is provided by the Development Act 1993 and associated Development Regulations 1993. The main technical documents, the Building Rules that are referenced by the Development Act and the Development Regulations are the Building Code of Australia (BCA) and the South Australian Housing Code. The object of the Development Act is

'to provide for proper, orderly and efficient planning and development in the State and, for that purpose: (a) to establish objectives and principles of planning and development;

⁴¹ Sources:

Planning SA website (<http://www.planning.sa.gov.au>, last checked (Accessed: February 2007)):

- General information;
- South Australia Development Act;
- Planning SA (2001) Guide to South Australia's Integrated Planning and Development Assessment System (Revised April 2001), Adelaide, Planning SA, Department for Transport, Urban Planning and the Arts.
<http://www.planning.sa.gov.au/download.cfm?DownloadFile=F6C6E4A8-F203-0D46> (Accessed: February 2007);
- Code of Practice for Private Certifiers and the Building Rules Assessment Function of Councils
Office for Consumer and Business Affairs website (<http://www.ocba.sa.gov.au/assets/files/BuildingWorkContractors.pdf> (February 2007));
- General information;
- OCBA (2006) Building Work Contractors. Getting it right under the Building Work Contractors Act 1995, Adelaide, Office of Consumer and Business Affairs.

Phillip Chun & Associates (2000) 'State of Play' Document: Comparison of Building Regulatory Framework in Australian States and Territories, Canberra, Department of Industry, Science and Resources.

⁴² Conducted from 5 to 9 March 2007 in Adelaide, the capital of South Australia, with a number of key-actors from South Australia's building regulatory enforcement industry. Both governmental and non-governmental actors have been included – a list of interviewees is included in Appendix G.

and (b) to establish a system of strategic planning governing development; and (c) to provide for the creation of Development Plans: (i) to enhance the proper conservation, use, development and management of land and buildings; and (ii) to facilitate sustainable development and the protection of the environment; and (iia) to encourage the management of the natural and constructed environment in an ecologically sustainable manner; and (iii) to advance the social and economic interests and goals of the community; and (d) to establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform; and (e) to provide for appropriate public participation in the planning process and the assessment of development proposals; and (f) to enhance the amenity of buildings and provide for the safety and health of people who use buildings; and (g) to facilitate: (i) the adoption and efficient application of national uniform building standards; and (ii) national uniform accreditation of buildings products, construction methods, building designs, building components and building systems.’ – SA Development Act 1993

Planning SA’s Building Policy branch, a State government body, reviews the technical standards and provisions within the BCA to ensure compliance with South Australian conditions. The Building Policy branch also produces the SA Housing Code as a document of the BCA that is ‘deemed to satisfy’, and provides advice on Australian Standards and other codes for national accreditation of products and systems. To assist the building industry, the branch is involved in the development and review of Minister’s Specifications, which are called up under the Development Act for issues that require specific attention in SA. Advisory Notices are issued to assist in the interpretation of building legislation and to inform building practitioners of proposed changes to legislation and other building control matters. Finally, liaison with the construction industry through conferences, regional meetings, forums and the provision of information through professional journals ensures that the building industry, local government and the wider community are aware of issues being dealt with by the branch.

Under the Development Act, Development Approval (DA) is needed in order to be allowed to build. There are about 50,000 development applications lodged in South Australia every year. There are specific types of activity, which are perceived as development and need approval before they are undertaken. In general, the types of activity which are classified as development and require approval are the construction, addition and alterations to buildings; a change to the current use of land or buildings; the creation of new allotments (including by community or strata titles); and the removal of, or damage to, a significant tree; and the demolition of a building. The process for obtaining Development Approval will vary according to the type of development proposed.

Development assessment process

For building works, the development assessment process is split up into an



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assessment of the Development Plan and an assessment under the Building Rules. The vast majority, around 90 percent, of assessments against the Development Plan are determined by local Councils in their role as assessment authorities. Some specified kinds of development application are determined by an independent Development Assessment Commission (DAC), while a small number of declared Major Developments are determined by the Governor, on the advice of State Cabinet, after going through the Major Developments proposal process. This occurs when the specific development is perceived as being of major environmental, economic or social importance to the State. The assessment process of the Development Plan for building works will generally involve submitting an application form, paying fees (which will vary according to the type of development and consent being sought) and presenting plans and details which describe the proposed development. In the case of building work, technical plans of footings and structures and technical specifications prepared by a qualified person have to be lodged for assessment against the BCA or other appropriate standards. Then, in some cases, the Council may request a copy of the Certificate of Title for the property; or the local community or adjoining land owners may be invited to comment on a proposal. Some applications are sent to state agencies and statutory authorities for advice or direction.

The relevant authority (usually the local Council) has the task of assessing the nature of the proposed development (whether it 'complies', 'does not

comply' or if it is to be considered 'on merit' as defined under the Development Act or Regulations and/or in the relevant local area Development Plan). It must then complete the appropriate statutory assessment processes for the specific kind of development (including whether the application needs to be referred to prescribed bodies or agencies for advice, and whether the public needs to be notified of the application and a consultation conducted). And finally, upon the completion of those processes, deciding whether to issue a Development Plan Consent (DPC) without changing the application, approving the application subject to conditions, or refusing the application.

The responsibility for compliance with the Building Rules can be undertaken either by local Councils, as part of the development assessment process, or by registered private certifiers. The applicant has the choice of either option. This assessment has to prove that the completed building will meet certain technical standards, including matters such as structural stability, fire safety, safety, health and amenity and equitable access. The assessment process normally leads to the issuing of a Building Rules Consent (BRC). This BRC can be applied for and processed on the basis of a single application, or the application can be lodged in stages to minimise any delays in being able to commence work on site.

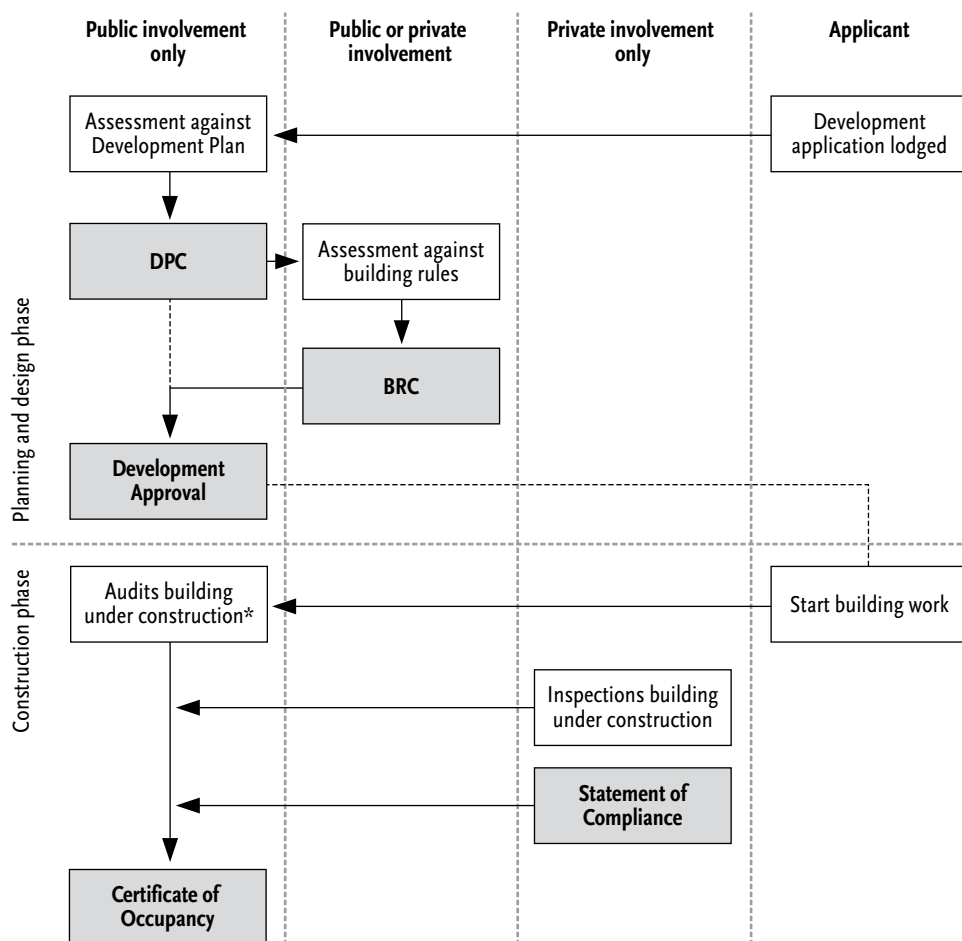
When submitting an application for a BRC, the applicant is responsible for supplying all of the required information for the assessment process. However, this information is frequently assembled by an experienced or qualified person on behalf of the applicant (an architect, engineer, building designer or builder). The information includes plans and specifications, as well as calculations and reports to demonstrate compliance with the Building Rules and other requirements. The application must also be accompanied by a fee to cover the administration and assessment costs; evidence that a levy has been paid to the Construction Industry Training Fund; and (for domestic buildings) a Certificate of building indemnity insurance.

For a BRC to be issued, the plans and specifications must meet the performance requirements of the Building Code of Australia. In the event that the applicant chooses to engage a private certifier to assess the plans and specifications and issue the Building Rules Consent, the Council concerned is then responsible for issuing the Development Approval. This intends to ensure consistency between the planning and building consents.

Once the DPC and the BRC have been granted, a Council can then issue the final Development Approval (DA). The building work and/or change in land use can then proceed, provided there are no additional approvals or licences required under other legislation – examples may include licences required from the Environment Protection Authority or the Liquor Licensing Court.

The Development Act gives Councils the power and responsibility for building inspections in their area. Councils are required to develop and adopt a building inspection policy for any building work within their area. It is up to the Council and the policies it has adopted whether a building will or will

Figure 8.1 South Australia's development assessment process



* As indicated in the figure both private and public participants carry out on-site inspections when a building is under construction. Nevertheless, a public audit of construction work is different from a private inspection as an audit will include legislative requirements in addition to the technical requirements set out in BCA 2007.

not be inspected. Most inspections are conducted randomly. On a day-to-day basis, Councils delegate a variety of building inspection powers to authorised officers who hold the appropriate qualifications to function as inspectors.

Under the Development Act, an owner or builder must give the Council one business day's notice of the commencement of building work on site and of completion of the building work. Furthermore, a builder needs to engage a registered building work supervisor or private certifier to oversee the construction of the building work from commencement to completion and to sign a Statement of Compliance that verifies the building work has been built in accordance with the approved documents and all of the required notifications were given during construction.

After receiving this Statement of Compliance, the relevant authority, typically the Council, issues a Certificate of Occupancy. This certificate only states that a building is suitable for occupation, not that it complies with building regulations or that all works have been completed. Figure 8.1 gives an overview of South Australia's development assessment process.

The decision-making timeframe allows the approval authority, most commonly the Council, four weeks to process the Development Applications. To these are added: prescribed times for refunds, prescribed times for carrying out the DPC assessment and an extra five days for issuing the DA once all consents are in place.

8.2 Private sector involvement

Private certification was introduced in SA in 1993. Under the Development Act, private certifiers can perform the same duties as Councils in relation to the building rules assessment function. They may assess proposed developments against the building rules, assign classifications, grant Building Rules Consents, impose conditions under which the building work must be constructed (if necessary) and may issue essential safety provisions. When the Development Assessment Commission (DAC) is the relevant authority in the Development Approval process, a private certifier can supply the DAC with the necessary certificate of compliance with the building rules.

The responsibilities of a private certifier are considerable as they are required to act in the same way as the Council to protect public interests. They must therefore hold a current registration and licence issued by the Registration Authority – the Minister for Urban Development and Planning. Evidence of registration will be in the form of a Certificate of Registration. In order to be registered, the private certifier must meet the following three criteria: be accredited as a Building Surveyor by the Australian Institution of Building Surveyors (AIBS); have the required experience – eight years post graduate experience in architecture, civil engineering or building surveying; and hold a policy for professional indemnity insurance as prescribed by the Regulations. The regulations stipulate that the mandatory professional indemnity insurance should have a run-off period of ten years and give cover of A\$2 million. The private certifier is proportionately liable⁴³ for work that is carried out based upon his involvement in a project with a limitation period of ten years. Registration has to be renewed annually. The Registration Authority is responsible

⁴³ Proportionate liability is a legislated requirement by which, under certain circumstances, a person whom a court finds liable for another person's damages can only be required to pay that proportion of the total amount of damages for which they are held by the court to be personally responsible.

for determining whether or not private certifiers comply with these requirements.

Private certifiers must comply with a Code of Practice that is also intended as an advisory Code of Practice for Local Government. This is intended to provide all Council officers acting as authorised officers or providing professional advice on Building Rules with similar authoritative guidance on acceptable standards of conduct. When undertaking the assessment of an existing building, the private certifier also has the powers to require that all, or part, of the building be upgraded to comply with the BCA, if the private certifier is of the opinion that the building in its current form is unsafe, structurally unsound or in an unhealthy condition.

Registration and licensing of practitioners

Within South Australia, different practitioners need registration and/or a licence in order to be allowed to carry out work. As mentioned above, private certifiers have to be registered and licensed by Planning SA within the South Australian system. Furthermore, Council building surveying staff must be accredited at an appropriate level of building surveying (Building Surveyor, Assistant Building Surveyor or Building Surveying Technician) by the Australian Institute of Building Surveyors or be authorised by the Minister to do so. No registration criteria apply to Council surveying staff.

Building work contractors have to be licensed under the Building Work Contractors Act in order to operate a building business. The Commissioner for Consumer Affairs has responsibility for supplying building work contractors' licences and defining what kind of work the licence relates to, and what experience or qualifications a contractor should have in order to be licensed to carry out that type of work. The Development Act requires licensed contractors to ensure the building work is supervised by a registered and approved supervisor authorised to supervise such work. The licensed contractor has to seek the Commissioner's approval for an individual to be its registered building work supervisor at the same time as an application for a licence is made.

If a person holds both a contractor's licence and a supervisor's registration, they are taken as being approved to supervise their own work. Furthermore, the licensed building contractor must carry Building Indemnity Insurance. Nevertheless, this requirement applies to domestic building work only and is to protect the building owner (and any future owner) from the non-completion of the building work and/or failure by the contractors to fix the work if they die, disappear or become insolvent within five years from the date of completion. The maximum value of this insurance is A\$80,000.

Contractors must take out indemnity insurance where the domestic building work is A\$12,000 and over and Council approval is required. If a person is trading as a builder without holding a contractor's licence and is convicted by the courts, that person may be liable for a penalty of up to A\$20,000⁴⁴. Addi-

tionally, that person will not be entitled to any fee or other earnings if operating a building business without a licence.

If an individual wishes to carry out construction work as an owner-builder, this person does not have to be registered or licensed. Yet, such a person is required to be supervised by individuals holding the required qualifications.

8.3 Evaluation of South Australia's building regulatory enforcement regime

As in Victoria, two building regulatory enforcement regimes have been adopted in South Australia: building assessment can be carried out by public and private sector agencies. However, as in Victoria, private sector agencies are being overseen by the Building Practitioners Board, a statutory independent board, which consists of governmental and non-governmental stakeholders, which is also responsible for setting up participation and administration criteria. These tasks are carried out solely by the government in South Australia. Involvement of public sector agencies in South Australia can be compared with a public regime, whereas involvement of private sector agencies can be compared with a prescribed co-regulation regime – both regimes are described in Chapter 3. As such, the system is comparable with that of New South Wales, with the exception that the private certifiers are only authorised to carry out statutory building plan assessment, whereas in New South Wales, private certifiers are authorised to carry out both building plan and construction work assessment. Private sector agencies do however carry out non-statutory construction work assessment in South Australia.

To gain an insight into experiences with these building regulatory enforcement regimes and into the competition between these, a series of interviews have been conducted; this part is based on the interviews. Quotes in the text come from these interviews⁴⁵.

Experiences with the regime

Different opinions were found regarding the introduction of the system of private certification. Overall, the interviewees stated that councils were lacking resources to deal with applications in time. The general opinion appears to be that councils were carrying out building control at a reasonable level. However, some interviewees referred to the councils as being monopolistic and inefficient. Most interviewees also state that under the National Competition Policy, privatisation was introduced to make the Building Rules Consent (PBR)

⁴⁴ In 2007, this was about €12,000 or A\$17,500.

⁴⁵ The number preceding a quote relates to the number of the interviewee in Appendix G.

application process more streamlined.

Generally, the interviewees regarded the quality of the development industry in South Australia as good. Reference was made to the ostensible (almost) non-occurrence of incidents in the construction industry; in terms of South Australia, only the fatal roof collapse of the Riverside Golf Club in Adelaide, South Australia, 2002, was mentioned. To point out that few incidents occur within the Australian building industry in general, reference was made to the only known fatal incident: the Childers Hostel fire in Childers, Queensland in 2000. Yet, the quality of the development industry was rated higher at the commercial and upper end of the domestic market than the lower end of the domestic market – single family houses, alterations to houses and smaller jobs. And, although the quality of the construction industry is regarded as good, all interviewees consider building control is needed to protect consumers from mistakes or offences that might be made, deliberately or unintentionally, by different (private) players in the field. Building regulation and building assessment, through local building control authorities or private certifiers, is regarded as an openly independent step in the building development process. As one of the private certifiers put it:

o50: Why is building control needed? (...) In many ways I see that as an aspect of quality. The fact that it is there, the fact that it is part of an actual standard – it means that people generally do build to the right level. It is just part of a quality control mechanism. (...) It is a layer of quality control, of quality insurance, that is really there to protect the community. (...) Legislation sets the common denominator at a level which assures the community of a level of safety and amenity. And if you would shift that level, shift that denominator and allow market forces to set it then what is going to happen is (...) somebody, sometime in the future will say: 'I'm going to drop my fees. And I'm going to be a little bit more risky. Maybe I can save a little bit of steel from a little bit of concrete.' And then that denominator starts to drop and someone else is going to say: 'Look, I can't compete unless I do the same.' And you find over a period of time that that common denominator has gone down so low that basically it forms a risk for the community.

Overall, the two-tier system of public building control and private certification was evaluated as positive. Some objections to the system were identified; yet, none of these were major. Only the perception of building control by the general public and the construction industry was experienced as problematic by different interviewees. The community's expectations of building control surveyors' (whether municipal or private) tasks and responsibilities are often unrealistic, whereas the construction industries seem to undervalue the building control surveyors' role. A Council official said:

o53: I think that it is probably that most of the developing industry – builders, speculative developers and architects – don't truly value the input of the building surveying func-

tion. For example, I've had several builders tell me over the years that they consider the only reason you get an approval is because the legislation tells you have to. It has no vantage or use to them. And I think most of them have that attitude. (...) And that comes down to perhaps a lack of understanding of what value can be contributed by the process of assessing applications.

The two-tier system and its accompanying competition between the public and private sector appear to have brought about a 'natural split'. Typically, private certifiers seem to get involved in larger development projects, such as commercial and large domestic jobs. Smaller developments, such as house extensions, alterations and small structures, seem to be checked by the Councils. This split was not said to be experienced as problematic and not much rivalry between Council building control authorities or private certifiers was said to exist.

However, some information from the interviewees gave a different impression. For instance, although the Councils are not allowed to re-check the work of a private certifier in practice, some individuals in the Councils seem to do so, which could indicate that private certifiers are not always trusted. Most issues are found when Provisional Building Rules Consent (PBRC) is inconsistent with Provisional Development Plan Consent (PDPC) – which is consistent with data from the other jurisdictions analysed (see, for example, Chapters 5-7). The Council official continued:

053: The legislation prevents us from reviewing a certifier's decision. However, if the certifier has made a gross error we can employ some unofficial mechanisms to try to reverse disaster. (...) We would normally ring the private certifier if for some reason we become aware of this, it is not always likely we become aware of it either... We would ring the private certifier and draw it to their attention. Give them an opportunity remedy the situation. If they fail to take action we can raise a complaint with the Minister about the conduct of the certifier. Hopefully the Minister would agree and then would require the situation to be fixed up. Perhaps from that, the only other sort of review that happens is a comparison between the Planning Consent documentation and the Building Consent documentation to check if they're consistent. And if they're not we can say we're not going to issue a Development Approval until such time that the inconsistency is being rectified (...) which [happens] very often. [This] mainly because the documentation is prepared for Planning Consent and Building Consent at the same time and is submitted to the two different assessment bodies at the same time. Through the assessment process changes are required in the documentation and the changes are generally not the same and [the documentation] ends up being inconsistent. (...) [This] has come about since the introduction of privatization of the Building Rules Consent. When [Planning and Building Consent] were still being assessed by Councils Planning and Building work closely together so there would be close communication on any changes that have occurred either from a building issue or from a planning issue.

It was found that government employees had a different experience to the private certifiers interviewed on this topic: the latter did not mention Council interference with their work. Furthermore, concern seems to arise regarding fees and commercial pressure. Councils seem to end up with the less-profitable or non-profitable jobs and commercial pressure on the private certifiers might lead to a perception of compromise to conform to the clients' wishes. Another Council official observed:

054: Private certifiers obviously rely on their commercial relationships with their clients. Many of the clients are repeat business providers. (...) Architects will tend to provide the large projects that give good value, good fees. And private certifiers would like to maintain a good relationship with those architects. So there are in fact commercial pressures on private certifiers to bend to the will of their client, which may compromise their ability to achieve the objectives of the Act.

This statement was backed up by observations from different private certifiers, for instance:

051: It is always costs! (...) Sometimes developers want to build bigger with less money and that puts pressure on us to make sure we don't lower that denominator for the sake of saving money.

Effectiveness

No indication was found that the introduction of the private sector in the building enforcement regime has made the regime more effective – neither the interviewees nor additional information could offer insight that indicated that there was better compliance with regulations than before the introduction of the prescribed co-regulation regime. However, under the new competitive model, applicants seem to have a distinct preference for private certifiers in terms of the BRC assessment. Roughly 70 percent of all BRC applications seem to get checked by private certifiers, leaving roughly 30 percent to the Councils. The preference for private certifiers is considered to come from relations private certifiers build with their clients; the high level of service private certifiers provide – speed, specialisation; and negotiable fees that undercut Councils' fees on larger developments.

From this 'split', it could be expected that due to the private sector's ability to specialise over the public sector, regulations are better enforced when a specialised private actor assesses the building plans in its area of 'specialisation'. As a private certifier mentioned:

050: [The applicants] can pick an individual that has expertise in the area they're looking for. If they are doing a hospital they can pick someone who has done a lot of hospitals; that compared with perhaps getting a novice at a Council.

Efficiency

Different opinions were found regarding the introduction of the system of private certification. Overall, the Councils seemed to be lacking resources to deal with applications in time. The general opinion seemed to be that the Councils carry out building controls at a reasonable level. However, some interviewees refer to the Councils as being monopolistic and inefficient. Furthermore, private certifiers were considered to be able to carry out assessment tasks quicker and, in terms of the large projects, charged lower fees than the city Council. A state official commented:

052: There are set fees the Councils charge. But the private certifiers can charge whatever they like; it is not regulated for private certifiers. Part of that is to make sure that if you are going through a Council, the fees are kept affordable. (...) Particularly with bigger buildings, you will quite often find the private certifiers will undercut the [set fees a Council may charge] by fifty percent.

Then, as to the observed difference in processing times, or more specifically, the cost-efficiency advantage private certifiers seem to have over their local counterparts, according to a private certifier, this originates from:

050: There are a couple of things. Predominately the quick turn around. They... the industry feels that can get a job – their building approval; their building consent as it called here – through a private certifier a lot quicker than what they would through Council. The second important factor is that if you have a developer or a project builder that have a lot of projects a year and they have to lodge a lot of applications, they find it is a lot easier to deal with one person, who... they understand each other. They know what is expected of them, rather than having to make a separate case with sixty-seven or sixty-eight different Councils. Every time you lodge an application they may ask for information that somebody else wouldn't have. So that's a major fact... [the applicant develops] a good professional report with [the private certifiers]. And the third one, which I don't think is really... I would put it very low in terms of ranking, is sometimes you can negotiate fees, you know... which may be, you know... a lot more advantageous than would when you went through the Council.

However, a Council official seems to agree that private certifiers appear to carry out building assessment tasks quicker, but pointed out:

053: A really good example: if somebody with limited knowledge on how to document a proposal goes to a private certifier and asks for a price, it is likely that that certifier will look at documents that have been prepared and decides that this is probably going to be a time-consuming project for him to get involved in. And so will charge a very large fee to cover their time. And then when [that somebody] comes to the Council and asks for a price, we can only offer the scheduled fee, which is in the Act, or a fee that is based on the

scheduled fee (...), which will no doubt be substantially less than the fee that was offered by the private certifier. A consequence there is that Councils end up with the more difficult or problematic jobs... they take more time to assess. So we end up with a very large queue of clients waiting for us to assess their jobs and that can be an obstacle to people getting approval and getting along with building...

054: Which, I think, increases that perception that, you know, private certifiers... or [assessment] through a private certifier, the process is a lot quicker... (...) [A private certifier] is prepared to, or would advise their clientele that a job can be assessed within a particular time, not taking in account, you know, they could work seven days a week, or whatever. Whereas with the local authority they are not restricted, but it is very unlikely that the officers would work greater than, you know, seven and a half hours.

Equity

The interviewees did not perceive a strong difference in the way groups of applicants are treated – a distinction was made between non-professionals, such as mums-and-dads and owner builders, and professionals, such as developers, investors, architects/advisors and constructors. This might be the outcome of the natural split the two-tier system brought about: non-professionals mostly turn to Councils, whereas professionals mostly rely on private certifiers. Also, in the implementation of a building plan or construction assessment, the interviewees did not perceive a strong difference between the groups – a distinction was made between municipal building control and private certification. On the assessment side, it was considered that Council building control surveyors carry out their work in the same way as private certifiers. However, it was emphasised that private certifiers might be able to specialise more than their local counterparts, but have no enforcement powers.

Yet, although the general opinion appeared to be that there is not much difference in the way applicants are treated or how work is carried out by different actors, the 'natural split' might be an indicator of inequity. Private certifiers were sometimes said to have less of a preference for small construction work and type-specific applicants prefer the Council to private certifiers. As such, some differences seem to exist. A state official said:

052: What you quite often find is that that twenty percent [of applications that are dealt with by] the Council will normally be composed of the small works: house extensions, alterations, and small structures – those sorts of things. (...) The private certifiers don't want to know them [the small works], because they're too messy and fiddly, and would charge exorbitantly if you insist them on doing... They really don't want the work.

However, a private certifier clarified:

051: It is not that we don't like to do them [the small jobs]. We're doing anything if there's a dollar at. But the way fees are based on area... If someone is doing a 50 square meter house addition and the Council therefore has to do it for hundred dollar; we just can't do it for a hundred dollars. (...) We don't see carports and sheds and swimming pools.

Accountability

In terms of the accountability of the regime, opinions seemed to diverge. Some interviewees noticed that commercial pressure on the private certifiers made them willing to bend to their clients' will; others believe that private certifiers are strong enough to deal with this pressure. But, in general, there appeared to be agreement that private certifiers are subject to commercial pressure. On the other hand, an interviewee observed, local officials are subject to political pressure.

General agreement existed on the need for a (better) system of oversight – both of private certifiers and local building assessment authorities. Currently, Planning SA, a State government agency, supervises private certifiers by registering private certifiers, investigating complaints and receiving regular data on the number of approvals being issued. An auditing system is about to be introduced and not much experience has yet been acquired. Public participants have a more critical perception of supervision than the private participants involved in the interviews. Nevertheless, the introduction of auditing was valued by all interviewees. A state official mentioned:

052: A number of the certifiers said to me they would be very happy when the auditing comes in. To them it's an issue of competition; being on a level playing field. They see that... because ... from the way they see it, there are some certifiers that are cutting too many corners. Doing things they don't think are correct. And auditing would expose those. They have actually lost clients, they have lost people to another certifier who... is a bit more generous or a bit more lax in the way they apply those... [the way these certifiers carry out assessments].

9 Australian Capital Territory

This chapter focuses on the Australian Capital Territory's building regulatory enforcement regimes. Firstly, the formal set-up of these regimes, based on a desk study, will be described. Information was found mainly in existing research reports and on government websites⁴⁶ and is represented as such. This information has been discussed with representatives from the Australian Capital Territory's building regulatory enforcement industry. Secondly, experiences with the building control regimes will be described and discussed, based on a series of interviews⁴⁷. The focus is on building regulatory enforcement in urban areas.

9.1 Formal set-up of building regulations and building control in the Australian Capital Territory

The building regulatory framework

The Territory Plan is the key statutory planning document in the Australian Capital Territory (ACT), providing the policy framework for the administration of planning in the ACT. The framework for the Territory Plan is laid down in the Land (Planning and Environment) Act 1991. The object of the Territory Plan is:

'to ensure, in a way not inconsistent with the national capital plan, that the planning and development of the ACT provides the people of the ACT with an ecologically sustainable, healthy, attractive, safe and efficient environment in which to live, work and have their recreation.' – Land (Planning and Environment) Act 1991

Regulation of Building Work in the ACT mainly comes under the Building Act 2004. Most building work requires some sort of approval; development ap-

46 Sources:

Australian Capital Territory website (<http://www.act.gov.au> (Accessed: February 2007)):

- General information;

- Land (Planning and Environment) Act 1991.

ACT Planning and Land Authority website (<http://www.actpla.act.gov.au> (Accessed: February 2007)):

- General information;

- ACTGOVT (2005) A guide to building and renovating your home, An ACT consumer's guide, Canberra, ACT Government.

Phillip Chun & Associates (2000) 'State of Play' Document: Comparison of Building Regulatory Framework in Australian States and Territories, Canberra, Department of Industry, Science and Resources.

47 Conducted from 26 to 29 March 2007 in Canberra, which roughly covers all of the Australian Capital Territory, with a number of key-actors from the Australian Capital Territory's building regulatory enforcement industry. Both governmental and non-governmental actors have been included – a list of interviewees is included in Appendix G.

proval, building approval or more commonly, a combination of both. Not all work requiring development approval requires building approval and similarly not all work requiring building approval needs development approval. Smaller outdoor structures and some other developments are exempt from development and/or building approval. Development approval exemptions are listed in the Land (Planning and Environment) Regulation 1991, and building approval exemptions are listed in the Building Regulation 2004.

If a proposed job requires development approval, the plans must be lodged at the ACT Planning and Land Authority Customer Service Centre, except for developments in 'designated areas'. In these areas, application has to be made to the National Capital Authority. If a proposed job requires building approval, the plans must be lodged with a licensed building surveyor, appointed as a building certifier for a building project. These building certifiers are always private sector individuals. In the ACT, public bodies, with the exception of government-issued development approval plans, do not issue building approvals.

Development and building assessment process

For building works, the assessment process is split into an assessment according to the Territory Plan and an assessment according to the Building Act 2004. The Territory Plan assessment process will generally involve lodging an application and fees, after which the ACT Planning and Land Authority (ACT-PLA) will carry out the assessment. The Authority must provide a decision within 30 working days from the date the applicant lodges an application or 45 working days, when an application is required to be notified to neighbours and objections have been received. The applicant may be asked in writing for this period to be extended if further assessment is required. As part of its assessment, the Authority may refer the application to other Government agencies and service providers, such as the Environment ACT, for advice. The ACT-PLA will consider their responses when assessing the application and, if one of the agencies raises major concerns, will arrange joint discussions between the applicant and the agency to resolve them. Once all issues have been identified and assessed, a decision will be prepared and sent to all relevant parties, including interested third parties, such as community members who have submitted comments on the proposal during the public notification period and Government agencies. The decision will be either: approved as submitted; approved with conditions or rejected.

Once development approval is issued, the applicant will need to engage an ACT registered private building certifier to handle the Building Approval assessment, unless the work is exempt from building approval. Responsibility for appointing a certifier lies with the landowner, but can be given to another person, such as the builder, to act as the landowner's agent.

In general terms, a certifier is engaged to act in the landowner's interests to ensure that the building plans and work are completed in accordance with

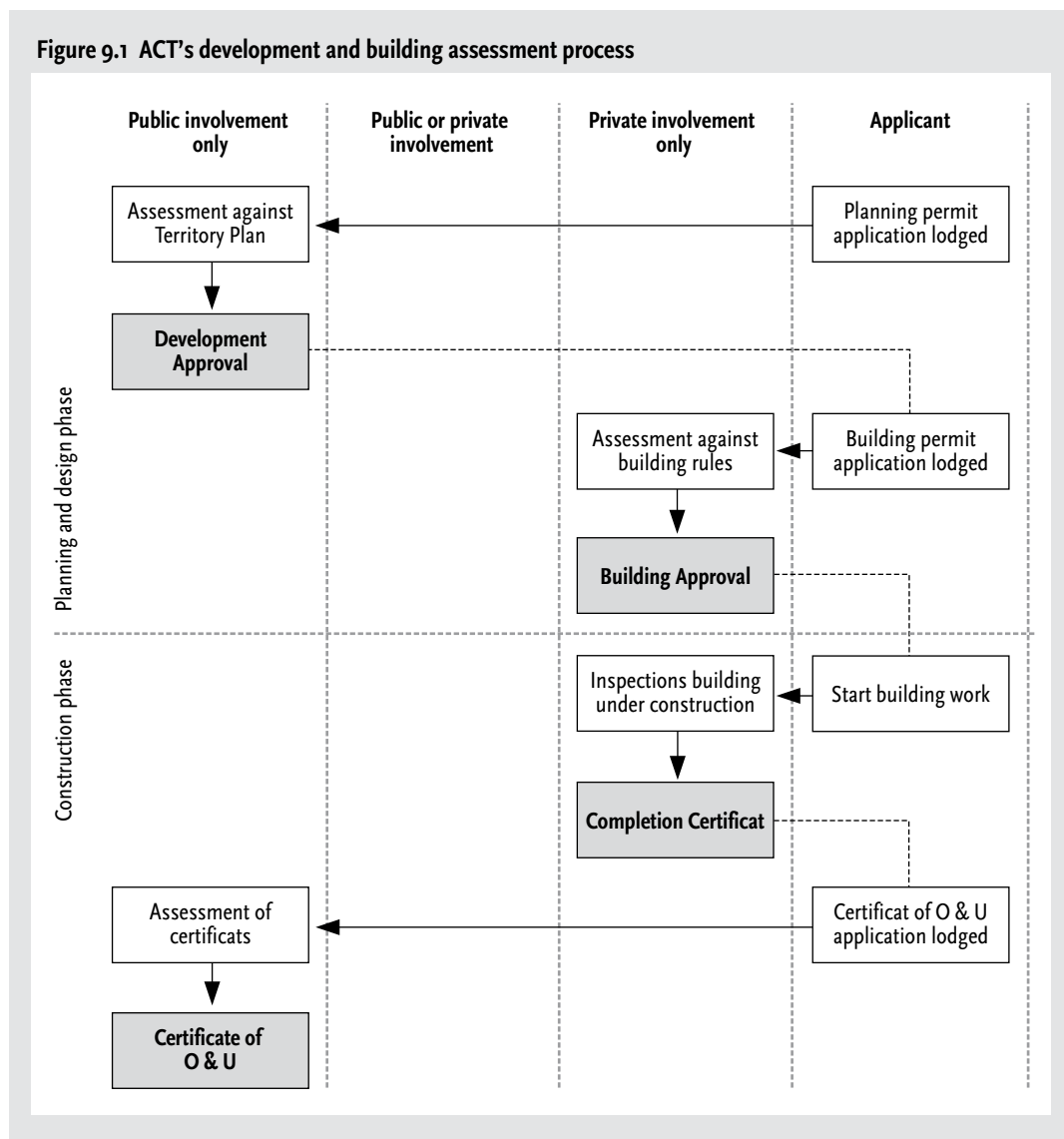


Parliament
House, Can-
berra

the building legislation, including the Building Code of Australia. Certifiers are responsible for building plan approval and ensuring the plans are considered by other government agencies, where required by the Building Act 1972. Certifiers are also responsible for giving copies of the plans to the ACT Construction Occupations Registrar for record-keeping purposes. The responsibilities of a certifier after issuing the building approval include issuing the builder with a commencement notice and, if required for residential building work, ensuring that housing indemnity insurance or a fidelity certificate is in place before work begins. During construction, the certifier conducts a set number of inspections. Upon satisfactory completion of the building work, the building certifier will issue a Certificate of Completion.

In the ACT, certifiers have limited enforcement powers. Generally they are limited to certifying, but they may issue 'stop work notice' when non-compliance is found during the construction of a building. A 'stop work notice' can only be issued on grounds of certain contraventions of the Act, such as not building in accordance with approved plans or regulations. The government carries out all compliance and prosecution action. Certifiers are required to give directions to builders when certifiers discover non-compliant work, but the directions are not binding, and are only advisory. Certifiers furthermore have to notify ACTPLA when non-compliance is found, upon which the ACTPLA takes further action. The ultimate power of ACT certifiers is to refuse to approve sub-standard plans or to refuse permission for sub-standard work to proceed.

Figure 9.1 ACT's development and building assessment process



A 'certificate of occupancy and use' is needed to be allowed to use the building. The building owner has to apply to the ACTPLA for the 'certificate of occupancy and use'. The ACTPLA will issue a 'certificate of occupancy and use' if the building work and any associated electrical and plumbing work have been certified as complete. Figure 9.1 gives an overview of the ACT's development and building assessment process.

9.2 Private sector involvement

Before deregulation, the role of the certifier was undertaken by building inspectors employed by the ACT Government. As mentioned before, now only licensed building surveyors, appointed as building certifiers, carry out this role.

There are different classes of licence for a building certifier: a principal building surveyor to certify any building work; a general building surveyor to certify a building up to three storeys high and with a floor area up to 2,000 square meters; or a plumbing plan certifier to certify plumbing or drainage plans for commercial work.

To become a licensed principal building certifier, one has to be accredited as a building surveyor with the Australian Institute of Building Surveyors (AIBS) or has to be registered with the Institution of Engineers, Australia (IEAust) or the National Professional Engineers Register as a Principal Building Certifier; both non-governmental organisations. Registration requirements involve proof of qualification, experience and insurance. In order to become a licensed principal building surveyor one has to have a degree and three years of practical experience. In order to become a licensed general building surveyor, one has to have an advanced diploma and one year of practical experience. Evidence of insurance is needed later in order to get a licence. For all building certifiers, professional indemnity insurance has to include a minimum limit of indemnity of A\$1 million for any one claim, a minimum limit of indemnity of A\$1 million for the total of all claims against the insured made in the period of cover and a minimum limit of indemnity for the costs and expenses of defending or settling a claim of 20 percent of the limit of indemnity for the claim. For plumbing plan certifiers, professional indemnity insurance has to include a minimum limit of liability of A\$1 million for each period of insurance. The private building certifier is proportionately liable⁴⁸ for work that is carried out based upon his involvement in a project with a limitation period of ten years. Registration has to be renewed annually.

Furthermore, a certifier must be independent and is not allowed to have any direct or indirect financial, legal or equitable interest in the work or have any relationship, whether personal, professional, commercial or financial, with the applicant or its builder. A certifier must also not be involved in the design or construction of the work being done.

The ACTPLA regulates licensed building surveyors. The regulation process may include the investigation of complaints, disciplinary inquiries, the issuing of licence demerit points that might lead to disqualification of licensees or other licence sanctions, and infringement notice offences or referral to the ACT Director of Public Prosecutions for prosecution of offences. A list of licensed building surveyors can be found on the ACTPLA website or is available from ACTPLA offices.

⁴⁸ Proportionate liability is a legislated requirement by which, under certain circumstances, a person whom a court finds is liable for another person's damages can only be required to pay that proportion of the total amount of damages for which they are held by the court to be personally responsible.

A certifier is not necessarily responsible for checking all aspects of the quality of the work undertaken by the builder. Some certifiers may provide additional services, such as quality control, for an additional fee. However, the applicant can engage the assistance of its own representative, such as an architect or building consultant, to inspect and monitor the quality of the work, to ensure that it is being carried out in accordance with the contract.

Registration and licensing of practitioners

An individual or entity that provides a service relating to the design and construction of a home typically needs to be licensed, registered or accredited. This includes architects, builders, owner-builders, certifiers, electricians, energy assessors, gasfitters, gas workers, plumbers, drainers, corporations and partnerships. To be licensed, registered or accredited, most individuals or entities require certain qualifications, training or work experience. Restrictions may apply to work that can be done and conditions may be placed on the individual or entity.

A licensed builder is required for any building work that requires building approval. Builders can have a class A, B, C or D licence or an owner-builder licence. The Mandatory Qualifications Schedule sets out the qualifications required for the different types of licences. These include tertiary qualifications and work experience.

Separate licensing applies to owner-builders. An owner-builder is allowed to carry out building work, other than specialist building work or handling asbestos, on a class 1, class 2 or class 10 building that is, or is to be, the licensee's main home or ancillary to it. To become an owner-builder and coordinate construction work oneself, an owner-builder licence has to be obtained from the ACT Planning and Land Authority. To ensure that an (applicant) owner-builder has reasonable knowledge of the work that is to be carried out and the process of construction, the applicant will be required to satisfy the qualification requirements set by the Construction Occupations Registrar, which might involve passing a test.

9.3 Evaluations of the Australian Capital Territory's building regulatory enforcement regime

Contrary to the other jurisdictions analysed, only one regime has been adopted in the ACT: building assessment can be carried out by private sector agencies. However, as in Victoria, private sector agencies are being overseen by the Building Practitioners Board, a statutory independent board, which consists of governmental and non-governmental stakeholders, which is also responsible for setting up participation and administration criteria, these tasks are

carried out solely by the government in the ACT, whereas entry criteria for private certifiers are set by a non-governmental body. Involvement of private sector agencies in the ACT can be compared with a prescribed co-regulation regime – this regime is described in Chapter 3. Note that the private regime has replaced the former two-tier system in which building assessment could be carried out by both public and private sector agencies; note, furthermore, that the government criteria that building certifiers in the ACT have to meet to be allowed to work as a certifier are partly based on regulations from non-governmental organisations.

To gain an insight into experiences with this building regulatory enforcement regime, a series of interviews have been conducted; the text in this part is based on the interviews. Quotes in the text come from these interviews⁴⁹.

Experiences with the regimes

In general, the quality of the construction industry in the ACT was rated as good. Nevertheless, the domestic construction market was valued less positively than the commercial construction market. The ACT can be considered to be an island within New South Wales (NSW – see Chapter 6) and was referred to as a ‘small country town’ in which devious builders get forced out of the market due to their bad reputation. The same goes for the roughly 30 private building certifiers that work in the ACT. The ACT seems to be an exceptional case as Canberra, covering all of the ACT’s terrain, is a relatively young city. The city was set up in 1908 as the nation’s capital.

The current sole private sector involvement in building assessment that has replaced the former competitive two-tier system was said to have sped up the process, made the system more liable and brought in better educated and specialised certifiers. In general, the present day system was rated positively. Yet, when asked, some objections were made; none of these however were major. Interviewees named the identity of (private) building control, the regulations and commercial pressure as objections.

There is an objection to the identity of the building controller in the ACT as the general public’s perception appears to be that government involvement in building control would be better than the current private sector involvement, since the government is expected to be more independent than private certifiers. Furthermore, building control surveying is not seen as a profession, such as architecture or engineering are. A private certifier observed:

o6o: There’s a perception amongst the public that the government always do things better. Because of the independence. And most people out there in the community, especially the home owners, are still convinced it is still a government function.

⁴⁹ The number preceding a quote relate to the number of the interviewee in Appendix G.

There is an objection to the regulations as the language of the codes is too difficult for the builders to understand and the performance-based codes do not quantify how to reach or control compliance. Commercial pressure was regarded as an objection as private certifiers might experience conflicts of interest: they have to serve the public interest, but want to keep their business going.

Effectiveness

No proof was found that the introduction of private certification has made the system more effective. However, as in the other jurisdictions analysed, it might be expected that the system profits from the private certifiers' ability to specialise over their public counterparts. As a federal official made clear:

059: I think [private certifiers] are better educated and more experienced than the local [inspectors]. They're becoming more professional. They're better educated... rather than having someone in the local government that is, you know, really only has been there for only ten or fifteen year and isn't really re-educating themselves in different methods of construction and technologies. And also, you know, Australia is a big country you may have a very sparsely populated area where the local government is one person who does everything. And some wants to build, say, a car-station or a major facility then [local government] don't know how to deal with that. So you can bring in a specialist [a private certifier].

Efficiency

Private sector involvement in the building regulatory enforcement regime seems to have been introduced in order to make the regime more liable and shorten procedure time. For a short period after the introduction of private certification, the ACT had a competitive two-tier system of building control: public and private sector involvement, as in the other jurisdictions analysed (see Chapters 5-8). During this period, larger building development came to private certifiers, whereas smaller jobs came to public building control authorities. The public system had no mandatory inspections, unlike the privatised system that mandated all relevant inspections. It appears the private certifiers were able to provide a more specialised service than their government counterparts.

Equity

Interviewees did not perceive a strong difference in the way groups of applicants are treated – a distinction was made between non-professionals, such as owner builders and mums-and-dads, and professionals, such as developers and constructors. Changes with the traditional monopolistic public regimes were experienced regarding fees. Under the public system, the public sector charged comparatively low fees for their services, particularly for low cost

work – the fees were based on a percentage of the cost of the work or on a minimum fee. Under the current system, private certifiers charge higher fees for minor development and lower fees for major development than the government used to do. A territory official explained:

o61: My view is that the reason that the private sectors prices for small work are pumped up in the ACT is merely to cover their administrative costs including travel time. Government used to charge less than a hundred dollars for a carport, but only inspected it when it was finished. Government probably lost money on that work, but that did not matter as the government's funding was not reliant on cost-recovery from fees charged. However, the private certifier's need to recover their costs, so for a carport they need to cover the office administration costs; travel time; and inspection time, which is twice as much as the time government used to spend as under the private system the certifier must look at the footing before concreting and then again at the final of the whole job. So it is simply cost-recovery that has pumped the price, not risk.

Accountability

The ACTPLA supervises the system through licensing and auditing. The audits seem to focus both on process and content of building controls. Nevertheless, the system is regarded as having problems at the bottom of the market, as well as being a workable system; but workable just because the ACT is a small jurisdiction. A private certifier said:

o6o: It is working very well here because the fact is that Canberra is a small community. (...) If I certify something I can ask somebody else [for peer review]. I think that's very important and this is one of the things that can get lost in the private system. In the government system we all worked in the same office and were able to bounce issues off to each other. Whereas now in the private system, because it is also competitive, and of course you get one certifier competing against another per project, there won't be that keen and discussing the merits of the project and how it should be checked.

Part 3

Comparing the regimes

10 Discussion and comparison

Under the Commonwealth of Australia's Constitution, state and territory governments are responsible for the statutory framework for land use, planning, development and building regulations. In the present day situation this has led to a situation in which states and territories have implemented individual building regulatory enforcement regimes. Based on the methodical approach introduced in Chapter 3, the Australian regimes can be described based on the different arrangements of responsibilities between governmental and non-governmental actors and can, as such, be compared.

This final part contains a comparative analysis of different building regulatory enforcement regimes in the Australian states of Victoria, New South Wales (NSW), Queensland (QLD) and South Australia (SA) and the Australian Capital Territory (ACT). In part 2 of this book, each jurisdiction has been dealt with in an individual chapter. The main focus in these chapters was on the building regulatory enforcement frameworks. Each chapter has been divided into an introduction of the formal set-up of the building regulatory framework and enforcement regime and a discussion on experiences with this enforcement regime in daily practice. The former was based on a desk-study, the latter was based on a series of interviews with different key-actors in government and the building industry. In this chapter, the different building regulatory enforcement frameworks analysed in the previous chapters will be discussed and compared. This chapter can be considered as an overview of key-findings from Chapters 4 to 9. Conclusions will be drawn in the next and final chapter, Chapter 11.

10.1 Regulatory frameworks

In all states and territory analysed, the building regulatory framework is based on the Building Code of Australia (BCA); regulatory additions or alterations are based on local circumstances, mostly due to geographical or natural features. The BCA sets standards for structural sufficiency, safety, health and amenity. In the BCA, objectives are stated, which signify why issues are regulated. Functional statements make it clear how a building might suit its objectives. Subsequently, performance requirements state an appropriate performance level for building materials, components, design factors and construction methods to suit the functional statements. And finally, building solutions set out the means of achieving compliance with the performance requirements; these can be provisions or alternative solutions that are deemed to satisfy. Within the BCA, assessment methods for regulatory compliance are stated. Within the current set-up of the BCA, a possibility exists to have building assessment executed by private sector agents and agencies. Table 10.1 shows which documentation lays down the jurisdictions' building regulatory framework and building regulations.

Table 10.1 Building regulatory framework and technical building regulations

Jurisdiction	Building regulatory framework	Building regulations
Victoria	Building Act 1993	Building Regulations
New South Wales	Environmental Planning and Assessment Act 1979	Environmental Planning and Assessment Regulation 2000
Queensland	Queensland Development Code	BCA
South Australia	Development Act 1993 and Development Regulations 1993	BCA
Australian Capital Territory	Land (Planning and Environment) Act 1991	Building Regulation 2004

Table 10.2 Terminology used regarding statutory planning and building approvals

Jurisdiction	Planning approval	Building approval
Victoria	Planning Permit	Building Permit
New South Wales	Development Consent	Construction Certificate
Queensland	Development Approval	Building Approval
South Australia	Development Plan Consent*	Building Rules Consent*
Australian Capital Territory	Development Approval	Building Approval

* In South Australia both approvals are needed to obtain a statutory Development Approval

Development assessment

Most development in the states and territory analysed requires government approval. And, though different terminology is used, to obtain approval it has to be shown that planning or zoning regulations and/or (technical) building regulations will be complied with. Assessment of the former traditionally was and still is the responsibility of the public sector; assessment of the latter can, in the present day, be carried out by both public and private sector agencies in the states analysed; or by private sector agencies only in the territory analysed. The former results in some form of 'planning approval'; the latter results in some form of 'building approval' – note again that different terminology is used throughout the jurisdictions analysed, see Table 10.2.

In most jurisdictions analysed, planning regulations assessment and building regulations assessment are regarded as complementary, but individual, procedures. In order to be allowed to start building, both planning approval and building approval are needed – exemptions regarding 'permit free construction' are laid down in the regulations. In most jurisdictions analysed, application for planning approval and building approval can be made simultaneously and both assessments can be administered individually, either simultaneously or in succession. If, having been assessed, compliance with regulations is shown, approval will be issued and once both approvals are obtained, construction can legally be started. An exception was found in South Australia where statutory development approval is needed to be allowed to start building and can only be issued once both planning and a building approval have been supplied.

Building regulation assessment procedures show a certain amount of similarity amongst the jurisdictions analysed. The owner of a building has final

Table 10.3 Relevant authority regarding statutory procedures in building regulation enforcement

Jurisdiction	Building plan assessment	Building approval	On-site building assessment	Final assessment
Victoria	Public or private	Public or private	Public or private	Public or private
New South Wales	Public or private	Public or private	Public or private	Public or private
Queensland	Public or private	Public or private	Public or private	Public or private
South Australia	Public or private	Public or private	Public	Public
Australian Capital Territory	Private	Private	Private	Public

responsibility for compliance with building regulations. As such, the owner of a (intended) building has to apply for building approval, or put out this job. Most jurisdictions offer 'prior to application' consultancy, yet, this is not statutory. The first formal step in applying for building approval is to lodge a form, accompanied with supporting information on the building plan, and pay fees to the relevant authority – depending on the jurisdiction, this could be a public or a private sector agency. The relevant authority will then assess the plan against the building regulations in force. If compliance is shown, building approval will be issued by the relevant authority. Once all relevant approvals have been obtained, construction can be started.

During construction work, inspections will be carried out in order to check if the building is being built in compliance with the building regulations and the building approval issued; mostly statutory inspections are stated on the building approval. The owner of the (intended) building, or its authorised representative, has the responsibility of informing the relevant authority on the progress of the building work. In most jurisdictions analysed, the relevant authority that carries out these statutory on-site controls is the same as the authority that has issued the building approval, yet, in South Australia statutory on-site controls can only be carried out by public sector agencies, mostly local Councils, whereas the building assessment procedure can be carried out by a public or private sector agency.

Finally, in all jurisdictions analysed, approval is needed in order to be allowed to occupy the finished construction. In South Australia and the Australian Capital Territory (ACT), this final assessment can only be carried out by public sector agencies; in Victoria, New South Wales and Queensland by either a public or a private sector agency. Relevant authorities, public or private sector agencies working on building plan assessment, building approval provision, on-site building assessment and final assessment in the various jurisdictions analysed are represented in Table 10.3.

10.2 Private sector involvement

In all jurisdictions analysed, private sector agencies can be involved in the building regulation enforcement process. As Table 10.3 shows, private sector involvement differs in the jurisdictions. In Victoria, New South Wales and Queensland, consumers can choose to have either public or private sector agencies involved in all building assessment procedures. In South Australia

this is only limited to building plan assessment. And in the Australian Capital Territory, consumers have no choice between public or private sector involvement. Building plan assessment and on-site building assessment is carried out by private sector agencies, yet, a final assessment is carried out by the public sector.

In order to be allowed to participate in the building regulatory enforcement regime as a private sector agent, one has to meet certain criteria. Criteria differ slightly in the jurisdictions analysed, yet, in general, criteria relate to a level of education and experience and there is a policy for legislative professional indemnity insurance. Sometimes government criteria refer to non-governmental criteria, for instance in South Australia, a private certifier has to meet the criteria of the Australian Institute of Building Surveyors. Furthermore, in all jurisdictions, private sector agents need registration in a public register. The register is mostly administered by a government body or an independent body authorised to do so by a government body.

As all private sector involvement in building regulatory regimes differs slightly, a short overview will be given for each jurisdiction. Table 10.4 on page 159 represents some key features.

Victoria

Private sector agents can be registered as a private certifier by the Building Practitioners Board (BPB) – an independent statutory authority which consists solely of non-governmental stakeholders. The BPB advises on the private certifier's registration criteria; the actual registration criteria are set by the Minister for Planning. These criteria are: to have the required level of education and experience and to hold a policy for professional indemnity insurance as prescribed by the regulations. Registration has to be renewed every year. The BPB is also authorised to oversee the private certifiers' conduct and ability to practice and the BPB has the authority to discipline private certifiers, which includes cancellation or suspension of registration and issuing fines. The Building Commission (BC), a statutory government organisation funded through a building permit levy, provides administrative support for the BPB and in practice is usually its conduit to the Minister and other parts of government. At present the BPB, through the BC, investigates complaints and audits private certifiers – structural and random. The BPB also has the authority to oversee the work of building practitioners, such as contractors, and discipline these when non-compliance is found.

The structure of the Building Commission as a government body and the different statutory boards as independent bodies make the Victorian regime an exceptional case within this analysis. Responsibilities regarding setting rules to enforcement, for instance the criteria that private certifiers have to meet, and responsibilities regarding the oversight of enforcement, for instance, auditing and disciplining private certifiers, lie with both government-

tal and non-governmental actors. In all other cases analysed, these responsibilities lie solely with governmental actors, though sometimes reference is made to private regulations, as in New South Wales and the Australian Capital Territory. The Victorian regime is considered an example of a conditioned co-regulation regime.

The private certifier is proportionately liable for work that is carried out based upon its involvement in a project with a limitation period of ten years. Within Victoria's building regulatory enforcement regime, private certifiers are allowed to:

- Carry out both building plan assessment and construction work assessment.
- Issue a building permit when, upon assessing building plans, compliance with regulations is shown.
- Issue an occupancy permit when, upon assessing the construction work and the finished building, compliance with regulations is shown.
- Carry out enforcement tasks by issuing a series of 'enforcement orders' – written notices that, according to the 'enforcement pyramid of sanctions' regulation (Ayres and Braithwaite, 1992: 35-38), lead to harsher and harsher sanctions with each follow-up order. Non-compliance with an enforcement order may result in prosecution. The private certifier however will not carry out the prosecution himself, but will refer the case to the Building Commission, which takes over the enforcement from that point on.

These tasks can also be carried out by public agencies, which have additional responsibilities, such as keeping records of construction and assessing development against planning regulations.

New South Wales

Private sector agents can be accredited as private certifiers by an authorised body in accordance with the standards set out in the accreditation body's approved accreditation scheme. This accreditation body is the Department of Planning's Building Professionals Board (BPB) – a state government agency. In order to be accredited, a private certifier has to meet the following criteria: have the required level of education and experience and hold a policy for professional indemnity insurance as prescribed by the regulations. Accreditation has to be renewed each year. Private certifiers are supervised by the BPB. At present, the BPB investigates complaints and audits private certifiers – structurally and randomly. The BPB has the authority to discipline private certifiers. Nevertheless, the BPB has only been in existence in its present form since 1 March 2007.

Within the New South Wales' regime, all responsibilities for setting the rules to and oversight of enforcement lie with governmental actors. Non-governmental actors are only allowed to carry out enforcement tasks. The New South Wales regime is considered an example of a prescribed co-regulation regime.

The private certifier is proportionately liable for work that is carried out based upon its involvement in a project with a limitation period of ten years. Within the New South Wales' building regulatory enforcement regime, private certifiers are allowed to:

- Carry out both building plan assessment and construction work assessment.
- Issue building permits and occupancy permits.
- Issue compliance certificates for inspections at critical stages of construction work when compliance with the regulations is shown.
- Carry out enforcement tasks by issuing a notice of proposed order. The private certifier however cannot take follow-up action, such as issuing a formal order, as this is the local Council's responsibility. The private certifier must give notice to the local Council on the issuing of the proposed order; the Council must then decide whether it should proceed to issue an order. If the order is not complied with, the Council can seek enforcement of the order through the Courts, which can also include the issuing of Court orders and fines.

These tasks can also be carried out by public agencies, which have additional responsibilities, such as keeping records of construction and assessing development against planning regulations.

Queensland

Private sector agents can be licensed and accredited as an accredited building certifier by the Building Service Authority (BSA) – a state government agency. In order to be accredited, a building certifier has to meet the following criteria: have the required level of education and experience and hold a policy for professional indemnity insurance as prescribed by the regulations. Note that within Queensland this insurance is supplied by the government, whereas in the other jurisdictions analysed, this insurance is supplied by the private sector. Registration has to be renewed every year and building certifiers have to be re-accredited every three years. Accredited building certifiers are supervised by the BSA. At present, the BSA investigates complaints and audits accredited building certifiers. The BSA has the authority to discipline accredited building certifiers.

Within Queensland's regime, all responsibilities for setting the rules to and oversight of enforcement lay with governmental actors. Non-governmental actors are only allowed to carry out enforcement tasks. The Queensland regime is considered an example of a prescribed co-regulation regime.

The accredited building certifier has joint and several liability⁵⁰ for work

⁵⁰ Joint and several liability is a common law requirement under which a person found by a court to be partly liable for another person's damages can be required to pay any amount of the total damages which any other party also found to be liable proves unable to pay.

that is carried out based upon its involvement in a project and this liability has no run-off period. Within Queensland's building regulatory enforcement regime, accredited building certifiers are allowed to:

- Carry out both building plan assessment and construction work assessment.
- Issue building permits and occupancy permits.
- Issue compliance certificates for inspections at critical stages of construction work when compliance with regulation is shown.
- Carry out enforcement tasks, including prosecution.

These tasks can also be carried out by public agencies, which have additional responsibilities such as keeping records of construction and assessing developments against planning regulations.

South Australia

Private sector agents can be licensed and registered as a private certifier by the Registration Authority – the Minister for Urban Development and Planning administered by Planning SA, a state government agency. In order to be registered, the private certifier must meet the following criteria: be accredited as a Building Surveyor by the Australian Institute of Building Surveyors; have the required experience; and hold a policy for professional indemnity insurance as prescribed by the regulations. Registration has to be renewed annually. Private certifiers are supervised by Planning SA. At present, Planning SA only investigates complaints; future plans are to introduce an auditing system. Planning SA has the authority to discipline private certifiers.

Within South Australia's regime, all responsibilities for setting the rules to and oversight of enforcement lies with governmental actors. Reference is made though to non-governmental criteria a private certifier has to meet. Non-governmental actors are, however, only allowed to carry out enforcement tasks. The South Australian regime is considered an example of a prescribed co-regulation regime.

The private certifier is proportionately liable⁵¹ for work that is carried out based upon its involvement in a project with a limitation period of ten years. Within South Australia's building regulatory enforcement regime, private certifiers are only allowed to:

- Assess building plans.
- Issue building consent when upon assessing building plans compliance with regulations is shown. This consent is not a building permit. Building permits are issued by local Councils after the building consent is processed.

⁵¹ Proportionate liability is a legislated requirement by which, under certain circumstances, a person whom a court finds is liable for another person's damages can only be required to pay that proportion of the total amount of damages for which they are held by the court to be personally responsible.

These tasks can also be carried out by public agencies; all other building assessment is to be carried out by public agencies only, mostly local Councils, which have additional responsibilities, such as keeping records of construction and assessing development against planning regulations. Furthermore, the private certifier's Building Rules Consent can be checked by the relevant public agency in a development assessment process.

Australian Capital Territory

Private sector agents can be licensed and registered as a building certifier by the ACT Planning and Land Authority (ACTPLA) – a territory governmental body. In order to be licensed, the building certifier has to meet the following criteria: be accredited as a building surveyor with the Australian Institute of Building Surveyors or has to be registered with the Institution of Engineers, Australia on the National Professional Engineers Register as a Principal Building Certifier; have the required level of education and experience and hold a policy for professional indemnity insurance as prescribed by the regulations. Registration has to be renewed annually. Building certifiers are supervised by the ACTPLA. The supervision process may include the investigation of complaints, disciplinary inquiries, the issuing of licence demerit points that might lead to the disqualification of licensees or other licence sanctions, and infringement notice offences or referral to the ACT Director of Public Prosecutions for the prosecution of offences.

Within the Australian Capital Territory's regime, all responsibilities for setting the rules to and oversight of enforcement lie with governmental actors. Reference is made though to non-governmental criteria a private certifier has to meet. Non-governmental actors are, however, only allowed to carry out enforcement tasks. The Australian Capital Territory regime is considered an example of a prescribed co-regulation regime.

The building certifier is proportionately liable for work that is carried out based upon its involvement in a project with a limitation period of ten years. Within the Australian Capital Territory's building regulatory enforcement regime, building certifiers are allowed to:

- Carry out both building plan assessment and construction work assessment.
 - Issue building permits and completion certificates – which only show that the work has been carried out according to the regulations, but do not state – as an occupancy permit does – that the building complies with the regulations and can as such be occupied. The assessment of finished construction prior to occupation and the issuing of an occupancy permit, in practice a formal procedure, can only be executed by the public sector.
 - Carry out limited enforcement tasks by issuing a stop work notice. The building certifier however cannot take follow-up action as this is the responsibility of the ACTPLA. The private certifier has to give notice to the ACTPLA on
-

Table 10.4 Some key-features of the building regulatory enforcement regimes analysed

Key-feature	Victoria	New South Wales	Queensland	South Australia	Australian Capital Territory
Private sector involvement	Private certifier	Private certifier	Accredited building certifier	Private certifier	Building certifier
Participation criteria	Education, experience, insurance	Education, experience, insurance	Education, experience, insurance	Education, experience, insurance	Education, experience, insurance
Authorised and supervised by governmental or non-governmental agency	BPB Victoria – independent agency that solely consists of non-governmental stakeholders	BPB New South Wales – governmental agency	BSA – governmental agency	Planning SA – governmental agency	ACTPLA – governmental agency
Liability	Proportionately	Proportionately	Joint and several	Proportionately	Proportionately
Allowed to					
- assess building plans	Yes	Yes	Yes	Yes	Yes
- issue building approval	Yes	Yes	Yes	Yes	Yes
- assess construction work	Yes	Yes	Yes	No	Yes
- issue occupation approval	Yes	Yes	Yes	No	No
Special feature	BC does take over private certifiers' duties in enforcing non-compliers; BPB has authority to discipline registered building practitioners, such as contractors		BSA runs statutory insurance scheme	Reference is made to non-governmental participation criteria a private certifier has to meet	Reference is made to non-governmental participation criteria a private certifier has to meet

the issuing of the notice; the ACTPLA then takes over enforcement tasks.

These assessment tasks cannot be carried out by public agents (apart from statutory exemptions), yet assessment of the finished construction prior to occupation, in practice a formal procedure, can only be executed by the public sector. Furthermore these public agencies have additional responsibilities, such as keeping records of construction and assessing development against planning regulations.

10.3 Experience with building regulatory enforcement regimes

In order to gain insight into the different building regulatory enforcement regimes, a series of interviews has been carried out. Over 60 key-actors from the

building industry and different public bodies have joined the interviews – a list of all interviewees is included in Appendix G. From the interviews a wide range of experiences with the building regulatory enforcement regimes has been collected. These experiences are represented for each jurisdiction analysed in an individual chapter; Chapters 5 to 9 of this book. In this paragraph, the similarities and differences between the experiences of the different jurisdictions analysed will be discussed. Quotes in the text come from these interviews⁵².

From the interviews, some experiences with the regimes were frequently mentioned in all jurisdictions, though different terminology was used. In order to evaluate these experiences, the interviews were sent a questionnaire containing 20 statements that relate to these experiences – statements that were taken from the interview transcripts. The interviewees were asked to express their agreement with the statements on a four-point forced Likert scale – see Appendix F for the questionnaire. Data from the returned questionnaires is included in the following overview of experiences with building regulatory enforcement regimes in the jurisdictions analysed.

Preference for private sector involvement

In all jurisdictions there appears to be a preference for private sector involvement. Private certifiers carry out more building assessment than their public counterparts both in number and value. Yet, private certifiers are generally involved in larger developments, such as commercial works and the higher end of the domestic market; whereas smaller developments, such as the lower end of the domestic market, are assessed by Councils.

From the interviews it was learned that the preference for either private certification or Council involvement might come from lack of awareness of the system: professional developers know about the private system, have experience with it and therefore go to private certifiers; ordinary citizens are not familiar with the building regulatory enforcement regime and thus go to Councils. Then there might still be a conviction amongst home-owners that building assessment is a government issue and that the government is more independent and serves the public interest better than private agents do. From the interviews it was also learned that it is relatively more expensive to have a small building project assessed by a private certifier than a large building project; and this is the other way around with the Councils. It was noted that Councils end up with the less profitable jobs as a result of private sector involvement in the regimes. It was found that public participants involved agreed with the statement ‘private actors dislike small jobs, such as assessing applications for alterations, house extensions and fences’; private partici-

⁵² The number preceding a quote refers to the number of the interviewee in Appendix G.

pants involved disagreed.

Advantages of private sector involvement

From the interviews it was learned that private certifiers are able to provide a more cost-effective, faster, more specialised, more client-friendly, and more available service. Their fees are negotiable and private certifiers seem to have a more businesslike attitude than their public counterparts. It might well be these advantages that help private certifiers build relationships with their clients. Furthermore, clients might prefer coming back to a known private certifier and thus save on transaction costs.

The introduction of private sector involvement was generally considered to have made the building regulatory assessment processes more efficient – most assessment is carried out faster and cheaper, from the client's point of view, by a private certifier than a public agency. This opinion was agreed upon by both public and private participants involved. However, it is still unclear if private sector involvement did make these processes more effective. There was no clear indication of an increase in building regulatory compliance. However, with the private certifiers' ability to specialise over their public counterparts it might be expected that regulations are better enforced when a private certifier assesses a building plan in its area of specialisation. Compare, for instance, comments of a federal official, Council official and a private certifier:

059: I think they [private certifiers] are better educated and more experienced than the local [inspectors]. They're becoming more professional. They're better educated...

019: A lot of private certifiers that I come across that are working closely with developers have a background in and good knowledge of the development industry, whereas a lot of people in Council have a declining building surveying attitude... it's more of a tick-the-box kind of exercise.

050: They [the applicants] can pick an individual that has expertise in the area they're looking for. If they are doing a hospital they can pick someone who has done a lot of hospitals; that compared with perhaps getting a novice at a Council.

Disadvantages of private sector involvement

The most common disadvantage of private sector involvement heard was commercial pressure on the private certifiers. Initially, the perceived advantage of the relationship that a private certifier might build up with a client may also be a disadvantage. A private certifier might become too dependent on a client or a small number of clients – to keep his client a private certifier might choose to cut corners. It was also mentioned that a client is often unaware of its private certifier as contractors tend to set up contracts that compel clients to a certifier. It is then questionable if the certifier can operate unbiased. Next, competition amongst private certifiers might erode standards –

especially as it is the clients who can choose to hire and dismiss private certifiers. Finally, private certifiers might experience conflicts of interest: they have to serve the public interest; yet, they want to keep their own business going.

Another disadvantage seems to be the fine line between controlling and consulting. Although private certifiers are statutorily not allowed to act as consultants they were often considered to do so. The risk then is that a private certifier has to check his own advice. Bringing private certifiers early into the development process however has advantages as well. The private certifiers' experience with building regulations when brought early into the development process might help the client to comply with the regulations.

Enforcement was mentioned as a disadvantage as well. Private certifiers in Queensland have the obligation to enforce non-compliers, which can be their clients. This might result in bringing non-compliers to court. If this were to happen, the private certifier would have to pay for the costs of the trial. As a result, private certifiers tend to set up contracts that provide room for getting out of the project before they have to take these enforcement measures.

Private certification might furthermore lead to a loss of feed-back, as private certifiers might feel less of a need to report problems encountered with building regulations to government agencies than the Councils do. An architect noted:

o48: Local government used to have a large role in the input of regulations. This was based on experiences in the field. Now the loopback from Council to State or Federal government has been lost.

A final disadvantage that was generally mentioned touched on the performance-based set-up of the jurisdiction's building regulations. It seems private certifiers have a preference for low-risk deemed-to-satisfy solutions, instead of innovative or alternative solutions, as the private certifier has either proportionate or joint and several liability for work that is carried out based upon his involvement in a project. Defects in buildings can thus be related to the private certifiers' involvement in building work, which might lead to a penalty or an increase in insurance fees.

Disadvantages mentioned were generally agreed upon by public participants involved; amongst private participants involved opinion was divided. It has to be noted that most participants, both public and private, agreed on the statement that 'rivalry exist between private certifiers and Council employees'. Participants may therefore have been biased when agreeing or disagreeing with the disadvantages.

Role of Councils

With the exception of the ACT, Councils still play a large role in all jurisdictions analysed. Councils often keep a record of the built environment and get

involved in almost all development. Councils are often the first point of contact when planning a development as the assessment in line with planning regulations can, in all jurisdictions, only statutorily be carried out by a public authority. Furthermore, Councils often serve ordinary citizens as these are either unaware of the possibility of involving the private sector or do not want to do so. Finally, the Councils often have final responsibility for protecting public interests. Furthermore, the Councils are often thought to be better equipped to take legal action against prosecutors than private sector agencies. As a director of a consultancy agency put it:

[Interviewer: To what extent do public and private certifiers carry out their roles in a similar way?]

007: I think substantially yes, but... The public surveyors... because their mayor role now is enforcement... probably a developer's mindset is they are more bureaucratic and suspicious and they act like policemen and think we are all bad. (...) The public sector is still more reactive than proactive. (...) Private building surveyors would still be perceived as finding solutions to problems; municipal building surveyors would be perceived as identifying problems. If you do go to the enforcement side, rather than just issuing the permits, I think that still does get difficult for a private surveyor – to issue a building notice or a building order [enforcement orders] onto the person that is paying his bills. And also at a time when it is a process that he has been mentally involved in and may even have contributed to – a situation that occurs. So I think a municipal surveyor still acts much better in that regard; when things go wrong. (...) There's no financial... there is no risk of implicating yourself into a poor decision or something, that's been... you know... Upping yourself up into litigation, I suppose... because maybe what went wrong, you were partly... you might have some blame or some accountability for. So I think [the private surveyor's] work does get difficult. (...) The municipal building surveyor is more independent.

Remarkably, planning issues were often mentioned as an obstacle within the regulatory regime as the Councils appear to have a tendency to regain control of building regulatory assessment through additional planning issues and regulations. It was found that most participants involved, both public and private, agreed with the statement 'local Councils use planning regulations to regain their grip on building control.'

Furthermore, assessments carried out in line with planning regulations and building regulations, often performed by different agencies, might lead to a different set of measures being taken to make the plans comply with the regulations. It was found that this might lead to a discrepancy in building plans and in practice this might result in a situation where building plans approved based on an assessment according to planning regulations differ from those approved based on an assessment made according to building regulations.

Role of the insurance industry

The insurance industry is often considered to be an influential player in the regimes. If insurers do not supply statutory professional indemnity insurance policies, private sector involvement has no chance of survival. Yet, insurers try to keep risks low and were, in most jurisdictions, unwilling to join in when the specific regulatory regime was introduced. After governmental intervention, the insurance industry had to supply policies. Nevertheless, private certifiers currently still seem dependent on the insurers. When an insurer has to pay out because a private certifier holding a policy is found responsible for some error, an individual's fees are raised. And when insurers have to pay out, often because of repetitive risks, all private certifiers' fees are raised. The insurance industry is furthermore considered to exert strong pressure for changes in and enforcement of building regulations. As a federal official made clear:

059: The insurance companies have a lot of power. At one stage, this was probably three or four years ago, they were saying: 'Look, we won't permit a designer to undertake a performance based design, it must be to the prescriptive code; and if it is not to the prescriptive code we won't insure the building.' So they are very, very ill-informed and they use a very, very blunt instrument. But they've settled down and they have realized that, you know, that the system needs to work under performance and agents have to assess their risks.

There was a thread as well in Australia that the insurers were going to drive the building certifiers out of the market, but that is settled down again. And I think it will happen again, you know, when there is a failure they'll look for the dangers. Companies are smart. They look to get the legislation changed. There used to be this ten year period [the run off period of the personal indemnity insurance] and they asked for that to be relieved. 'We can't deal with that.' So they've got a motive to kick off a fuss. If there is money to be made in the market, than they'll be in the market. But they want to get the market in their favour... I don't know so much if it is a pitfall... I think it is just something that we all have to deal with...

Oversight

Within all states, private sector agents involved in the building regulatory enforcement regime are supervised. With the exception of Victoria, supervisory agencies are all exclusively public bodies. These supervisory agencies set and enforce participation criteria, which have to be met in order to be allowed to work as a private certifier. Furthermore, these agencies investigate complaints against private certifiers and have the authority to discipline them.

Supervision is mostly carried out administratively through a licence or registration renewal process and audits. Audits are often referred to as having a strong focus on private certifiers' compliance with statutory set procedures and less on the content of the assessments being carried out. Private certi-

fiers and Council officials made complaints about the quality of these types of audits: too much on processes, too much on ticking the box; and too little on the content, too little on the actual technical assessment of building plans or building work under construction. Furthermore, supervisory agencies often seem to lack the means to carry out audits structurally. It was found that public participants were usually more sceptical about this supervision; whereas most private participants involved had more confidence in the system, yet, saw room for improvement. This scepticism regarding the supervision of the execution of enforcement was expressed by different interviewees, for example in the following illustrative observations⁵³:

o25: Controlling the controllers who are controlling the building industry seems to be just another layer...

o34: Nevertheless, the [supervisory body] is still seen as a toothless tiger...

o14: The auditing is a joke!

o10: Teaching (...) would be a better approach than scaring...

o22: In the end it's all paperwork and paperwork doesn't say much about the quality of a building...

⁵³ Successively: an architect, a representative of the Master Builders Association, a municipal building surveyor, a private surveyor, and another architect.

11 Overview, conclusions and considerations

In the introduction, Chapter 1, I state a three-fold goal. Firstly, contribute to the understanding of building regulation and building regulatory enforcement. Secondly, contribute to more reliable and valid comparative research of policy instruments and regulatory regimes. Thirdly, contribute to an understanding of different building regulatory enforcement regimes and a competitive relationship between these.

In this final chapter I will start by presenting a brief overview of the main issues from Chapters 2 and 3. Then I will draw conclusions on the effectiveness, efficiency, equity and accountability of the different regulatory regimes analysed in Chapters 5 to 9; and I will draw conclusions on the competitive relationship that exists between these regimes. Finally, I will share some considerations.

11.1 A brief overview of Chapters 2 to 9

Regulatory enforcement regimes

In Chapter 2 I have introduced a wide range of classical and contemporary works from the studies of regulation. I have used four major debates from the studies of regulation for this introduction: the quality of the rules; enforcement strategies; enforcement styles and enforcement actors. Where possible, I have illustrated the debates and the works introduced with cases from research in the field of the built environment.

To summarise, in Chapter 2 we have seen that rules serve as guidelines for social action and interaction (Burns and Flam, 1987: 55). We have also seen that in order to make rules work, they have to be enforced (see also Giddens, 1984: 18; Weber, 1964 [1921]: 126-153). Finally we have seen that enforcement is often regulated and enforced, or 'overseen', itself (Cohen and Rubin, 1985; DeMarzo et al., 2005; May, 2007). These insights provide us with three levels of responsibility. Firstly, the responsibility to set rules; secondly, the responsibility to regulate and oversee enforcement; and thirdly, the responsibility to implement enforcement.

We have also seen that these three levels of responsibility are, to a certain extent, related to those four major debates introduced in Chapter 2. The responsibility to set rules can be related to the debate on the quality of law. The responsibility to regulate and oversee enforcement can be related to the debate on enforcement strategy. And the responsibility to implement enforcement can be related to the debate on enforcement style. That leaves us with one debate left: the enforcement actors.

In Chapter 2, it was illustrated that in contemporary regulatory literature it is considered that these actors can contribute to 'better' regulation and enforcement. Contrary to the traditional view in contemporary works on regulation and enforcement, it is advocated not to lay all responsibilities with

governmental actors; non-governmental actors can be given responsibilities as well. The overview of self-regulation showed us that in practice the mixing of policy instruments and actor responsibility takes place in different fields of policy. Comparative analysis of these mixes however proved to be difficult as regulatory literature lacks an analytical framework to do so. Existing frameworks are built from policy practice, which makes it difficult to use these frameworks when analysing other policy instruments and mixes of actor responsibility than the examples the frameworks were built on.

To overcome this issue, I have introduced an analytical framework for more reliable and more valid comparative research on regulatory enforcement regimes – the organisational arrangement of regulatory enforcement as illustrated in Chapter 3. This analytical framework is based on the three levels of responsibility. At each level, responsibilities are split between governmental and non-governmental actors. Shifting these responsibilities, level by level, from governmental to non-governmental actors resulted in a typology of regulatory enforcement regimes that shows a gradual shift from a total public to a total private regime. As we have seen in Chapter 3, the following regulatory enforcement regimes can be distinguished:

- a private regime in which the government is responsible for setting regulations, setting rules to enforce regulations, overseeing the implementation of enforcement, and implementing enforcement;
- a prescriptive co-regulation regime in which responsibility for the implementation of enforcement lies with non-governmental actors; the other responsibilities stay with the government;
- a conditioned co-regulation regime in which the government is responsible for setting regulations and only sets conditions to the setting of rules to enforce and oversee enforcement; the actual setting of rules to enforce, overseeing of enforcement and implementation of enforcement is left to non-governmental actors;
- a substitute co-regulation regime in which the government only has responsibility for setting regulations; all other responsibilities lie with non-governmental actors; and
- a private regime in which the government has no responsibility at all.

As we have seen from the illustrative examples in Chapter 3, all these regulatory enforcement regimes have been adapted worldwide to current building regulatory systems. We also found in Chapter 3 that most building regulatory systems consist of more building regulatory regimes – multi-tier systems. From literature on multi-tier systems it might be expected that multi-tier systems work better than single-tier systems, i.e. the use of only one regulatory regime (for an overview, see Doyle, 1997: 35-42). A subject in these studies on multi-tier systems that is studied less is the presence of a certain relationship between the regulatory enforcement regimes. When the regimes are imple-

mented in coexistence, these relationships can: support, complement, replace or compete (compare with Barnard, 1938: 101-102; Jordan *et al.*, 2005: 481). A competitive relationship seems to be of particular interest for further study as economic pressures due to competition might 'have a deleterious effect on the quality of inspections' (Baiche *et al.*, 2006: 280) and the overall accountability of the regime (e.g. Imrie, 2007; May, 2007).

The competitive relationship seems furthermore of interest for further study as competition and competitive enforcement is sometimes advocated as a means to overcome the issues that arise with traditional public 'monopolies' – command-and-control regimes. Landes and Posner (1975), for instance, developed a model for a competitive enforcement industry; and, based on their model, assumed that competitive private sector enforcement would lead to more compliance with less government cost. Their argument is as follows (*ibid.*: 5): the private sector enforcement industry has to detect breaches in regulations to generate income. But the number of offences declines as the chance to be caught rises – the authors follow the economic theory of deterrence. With a decline in offences, the enforcement industry, seeking income, will adapt its level of enforcement activity to find more offences. Osborne and Gaebler (1992: Chapter 3), in turn, advocate 'competitive government' as competition rewards innovation – improving quality, keeping down costs – thus becoming an incentive (*ibid.*: 82-92).

Empirical research

Since the 1990s in Australia, former public monopolies regarding building regulatory enforcement have opened up to private sector involvement. The federal government played a strong part in introducing private sector involvement through the implementation of the National Competition Policy (NCP). The federal government expected that private sector involvement would make the building regulatory regime more effective and efficient (PC, 2004). Different regulatory enforcement regimes have been introduced in the states and territories of Australia and coexist with the present public regime. All regimes have been introduced to generate a competitive relationship, i.e. competition between the regimes and competition between the private sector agents and agencies involved.

In Chapters 5 to 9, I have illustrated the formal set-up of building regulatory enforcement regimes in the states of Victoria, New South Wales, Queensland and South Australia and the Australian Capital Territory – the cases. I have introduced the experiences with these regimes as they were shared by a series of key-actors, representatives from the building control industry and the building industry, in a series of interviews. From these chapters, it became clear that in all cases analysed, slightly different systems of building regulatory enforcement are implemented. With the exception of the Australian Capital Territory, in all cases we have seen a two-tier system that consisted of

a public regime combined with a prescribed co-regulation regime or a conditioned co-regulation regime. In the Australian Capital Territory only a prescriptive co-regulation regime is implemented, but this regime has replaced the former competitive two-tier system. In all cases, nevertheless, the Australian Building Code is followed – meaning that the organisational arrangements of enforcement of a similar set of rules differ slightly. In Chapter 10 I have given an overview of the key-characteristics of these regimes.

11.2 Conclusion: evaluating the regimes

When evaluating the different regulatory enforcement regimes, as introduced in Chapter 3, I once more stress that I do so based upon empirical research of building regulatory enforcement regimes that stand in a competitive relationship. As noted in Chapter 3, one finds that there is not only competition between the regimes, but also competition within the regimes.

As stated in the introduction, I have chosen a restricted and uncontroversial set of evaluation criteria to evaluate the different building regulatory enforcement regimes. By doing so, I have based myself on other works of policy analysis (Bovens *et al.*, 2001: 25-32; Dunn, 2003: 258-268; Gunningham and Grabosky, 1998: 25-32; Rowe and Frewer, 2000; Runhaar *et al.*, 2006). I refer to effectiveness to indicate the policy instrument's contribution to compliance with building regulation; efficiency to indicate the policy instruments' contribution to compliance with building regulation at a minimum cost, administrative burden, or loss of time; equity to indicate the extent to which the policy instrument's costs and benefits are, in a broad sense, distributed equitably among different groups and accountability to refer to the policy instrument's reliability of checks and balances. I will first compare the different building regulatory enforcement regimes analysed for these criteria and then discuss specifically the competitive relationship between the different regimes. This will lead to some inevitable overlapping of conclusions.

Effectiveness

From the analysis of the regulatory enforcement regimes, both the formal setup and the daily practice, no clear indication was found that the introduction of subscribed co-regulation, as found in the states of New South Wales, Queensland and South Australia, or the introduction of conditioned co-regulation as found in the states of Victoria and the Australian Capital Territory, has led to an improvement in compliance with regulations. From additional questionnaires returned (see Appendix F) it was learned that most non-governmental participants involved in the interviews share the opinion that effectiveness has improved; yet, amongst governmental participants, opinion was divided. It is notable that during the interviews the interviewees did not

make reference to a decline in effectiveness due to the introduction of private sector involvement.

No additional data was found, such as records or reports of document construction-related incidents as the result of non-compliance, which might provide an insight into this criterion. Further research seems necessary to obtain more insight into this issue.

However, as most interviewees shared the opinion that private certifiers are able to provide a more specialised service, it seems plausible that effectiveness has improved due to private sector involvement, as specialised private certifiers are better able to specialise than their municipal counterparts and thus seem to be better suited to assessing complex building developments. Municipal building control officials often have a more general education and experience as they have to be able to assess a wide range of building developments. This conclusion is in-line with findings by Ayres and Braithwaite (1992: 104) that 'corporate inspectors are better trained and tend to achieve a greater inspectorial depth'; and findings by Baldwin and Cave (1999: 126) that corporate 'bodies can usually command higher levels of relevant expertise and technical knowledge than is possible with independent regulation'.

Furthermore, because of the competition that came with the introduction of private sector involvement, it seems the local Councils have also raised the standards of building assessment and provided a better service to be able to compete with the private sector, underpinning Barnard's (1938: 91) notion that organisations have to adapt to changing circumstances if they want to survive.

Efficiency

The analysis of the regulatory enforcement regimes, both the formal set-up and daily practice, showed that in all jurisdictions analysed, building assessment seems to have gained in efficiency due to private sector involvement. Most interviewees, both public and private participants, share this opinion.

Private certifiers are considered to be able to provide more efficiency in building assessment as they can provide services on demand, round-the-clock. Furthermore, private certifiers can be involved early on in the development process, for instance during the design stage, whereas their public counterparts get involved when certain stages have been concluded. This latter situation might lead to the time-consuming sending of building proposals to and fro in order to settle issues that have been found to be non-compliant. It is expected that involving private certifiers early on in the design process gives them the ability to notify the design team of any non-compliance early on in the process. These conclusions seem to underpin a notion by Gunningham and Graboskey (1998: 52): 'In principle, [co]-regulation offers greater speed, flexibility, sensitivity to market circumstances, efficiency and less government intervention than command and control regulation'. It also underpins Wil-

son's (1989: 168-171) notions on essential differences between public and private organisations. The first, 'private organisations must survive by attracting clients and contributors'; the second, 'private organisations face fewer constraints in using or disposing of capital and labour than public organisations'.

No difference in this gain of efficiency was found between the subscribed and conditioned co-regulation regime. However, from the South Australian case, it was learned that efficiency gains due to private sector involvement might be undone when the private certifiers' assessment does not lead to a building permit that gives the owner the legal right to start building. Results of private sector involvement then seem to be still strongly dependent on the local Council's processing time. In this case, building plan assessment is only a cog in a large governmental machine.

Furthermore, advantages due to private sector involvement might be undone because private certifiers are legally not allowed to advise their clients. Interviewees stress that advice early on in the building development process might be a key to gaining more efficiency in obtaining compliance with building regulations.

Equity

From the analysis, it was learned that all clients involved in building assessment appear to be treated in a similar way by both private certifiers and local Councils. Most interviewees share this opinion. Then, compared with the former single public regime in the cases analysed, private sector agents and agencies are considered to be more client-friendly than their (former) local counterparts. Governmental actors were sometimes considered to be more lax than their non-governmental counterparts because local officials can hide behind a large organisation when things go wrong, whereas private certifiers are personally liable. However, some considerations might be in place because the competitive two-tier systems have resulted in a 'natural' split in building assessment: commercial and large domestic development generally gets assessed by private certifiers, whereas minor developments – house alterations, fences, and the like – get assessed by local Councils.

The reason to choose between governmental or non-governmental involvement often seems to depend on the applicants' experience with the building regulatory enforcement regime. As such, professionals in the building industry prefer private sector involvement, as they are familiar with a certain private certifier and have built up a client-certifier relationship over the years. Furthermore, clients that built similar buildings in different local jurisdictions have the advantage that a private certifier only has to assess the building plan once to check that it complies with the regulations, whereas choosing local Council assessment would lead to a building plan assessment for each jurisdiction. Non-professionals, or ordinary citizens, prefer local Council involvement, as they are unfamiliar with private sector involvement with-

in the regime or share the opinion that local Councils will serve their interest better than private sector agents or agencies. As Baldwin and Cave (1999: 130) noted: 'The public are not liable to trust (...) or see them as legitimate'.

Costs of building assessment might also be an important reason. From the interviewees it was learned that, from the applicant's point of view, it is generally relatively cheap to have small building plans or construction work assessed by a public authority, whereas it is relatively expensive to have large building plans or construction work assessed by the same authority. Conversely, it is relatively cheap to have large building plans or construction work assessed by a private certifier, whereas it is relatively expensive to have small building plans or construction work assessed by a private certifier. As professionals in the building industry often supply more building assessment work, they have a strong point of departure when negotiating the private certifiers' fees, which might make the system liable to capture (compare with Baldwin, 2005: 129-130; Núñez, 2001: 210; Scholz, 1984: 401). The Councils, on the other hand, have to stick to legally set fees and therefore have little to no room for negotiating fees. The Councils, as Wilson (1989: 169) already concluded, 'must cope with a clientele not of their own choosing'.

It is therefore questionable whether clients involved in building assessment are really treated equally and whether the (level of) service is evenly available. As the 'natural' split might be brought about by the private regime itself setting fees, it seems the treatment given depends on the client's willingness or ability to pay for the service. In particular, in the case of non-professionals involved in minor development, the choice seems to be between relatively expensive private sector involvement, or relatively cheap local Council involvement. Assuming non-professionals lack experience to make a choice between 'client-friendly' or 'specialised' private sector involvement and 'ordinary' local Council involvement based on the service provided, the choice might very well be based on the cost aspect alone.

No differences in these equity issues were found between the subscribed and conditioned co-regulation regime.

Accountability

Accountability is an issue in all cases analysed (compare with DeMarzo *et al.*, 2005: 688; Gunningham and Grabosky, 1998: 52; May, 2007). Private certifiers are often considered to be subject to commercial pressure and conflicts of interest. The thin line between consulting is often crossed. These opinions are generally shared by most governmental participants in the interviews; amongst non-governmental participants, opinion was divided. The possibility for clients to shop around in order to find a private certifier that suits their needs seems to weaken both governmental and non-governmental participants trust in the regimes' accountability.

To guarantee the regimes' accountability in all cases analysed, the govern-

ment oversees the building regulatory enforcement regimes and sets entry and participation criteria, sometimes by referring to private regulation. Victoria is an exception as an independent organisation advises on setting these criteria and oversees the regime. This additional layer of oversight often implies that entry and participation criteria for private certifiers are set, registers of private certifiers are kept, complaints are investigated, audits are carried out and private certifiers get disciplined if found not to comply with the regulations. Yet, in all jurisdictions, this oversight, and especially auditing, is considered to be unsatisfactory.

In the present day, auditing agencies seem to lack the capacity, mostly due to funding, to carry out audits structurally. Audits are not carried out frequently, and when done, are almost never random and often have a focus on assessment procedures instead of content – for instance, the auditor checks if all signatures are in the right spot, but does not check if the building regulations are checked correctly in terms of content. This type of auditing does not seem to bring awareness to the industry and in all jurisdictions interviewees welcome the initiative to bring in more and stronger auditing (compare with Power, 2003a: 199). Non-governmental participants experience auditing as serving their own interest as it might force dodgy players out of the system and thus raise their branch's reliability.

'Private or public insurers may operate to control risks by imposing conditions on the supply of insurance cover and by using economic incentives, such as deductibles, to encourage proper risk-reducing behaviour' (Baldwin *et al.*, 2000: 9). This notion also appears to apply to the cases analysed. Private certifiers show they fear the measures the insurance industry can take. Measures taken are often an increase in the insurance premiums. This measure affects both individual private certifiers when an insurance company has to pay out because of her/his involvement in a job, thus raising the individual fee; and the sector as a whole when an insurance company is required to make regular pay-outs for a certain type of error, thus raising fees in general. Insurance fees therefore appear to be a strong incentive, maybe even a stronger incentive than audits. However, much criticism was expressed regarding the insurance industry's influence on building regulations and building regulatory enforcement. In all jurisdictions involved, the government has taken measures to regulate the statutory insurance needed to be allowed to carry out assessment as a private certifier; and in Queensland the state government even runs the insurance scheme.

The private certifier's obligation to enforce – and if necessary bring a non-offender to court – is found to be problematic in Queensland. An enforcement procedure is very costly and thus presents a high risk to the private certifier involved. As a result, private certifiers tend to set up contracts that allow room to leave the project before they have to take these enforcement measures. The other jurisdictions experienced a better set-up of their enforcement

regime as the government bodies in these jurisdictions take over the follow-up enforcement tasks, for example prosecution, if necessary.

Reference was furthermore made to governmental actors being better suited to enforcement tasks, such as issuing enforcement-orders and fines. Governmental actors are considered to be more objective than non-governmental actors. It appears, therefore, that non-governmental actors are well suited to carrying out enforcement tasks, such as building plans and construction work assessment – consultancy and control functions; but less suited when it comes to implementing harsher means of enforcement – the ‘policing’ tasks.

In terms of these accountability issues, the Victorian conditioned co-regulation regime was generally considered superior to the subscribed regimes found in the other jurisdictions. The Building Practitioners Board, which consists solely of non-governmental stakeholders, appears to offer a key advantage. Both private certifiers and the government profit from this independent board’s role. The former as they do not run the risks that come with these enforcement tasks, the latter as enforcement and oversight are carried out by a well organised body.

Firstly, the different independent boards and the Building Commission are treated by the private certifiers as ‘their’ representatives. It is believed that these organisations act in the private certifiers’ interest. They are experienced at backing the private certifiers when needed. This may have led to a better alliance between private certifiers and their supervisory body than in the other jurisdictions.

Secondly, interviewees in Victoria appear to be less sceptical regarding supervision of their regime than interviewees in other jurisdictions. Again, this might come from the alliance between private certifiers and the independent boards and the Building Commission. It might as well be that the independent boards and the Building Commission are more able to sense what is going on in the branch than their government counterparts in the other jurisdictions. As a result of the trust the independent boards and the Building Commission have gained amongst Victoria’s private certifiers, these might be more willing to share information. Or, as Baldwin and Cave (1999: 127) observe: ‘[Co]-regulators with their easy access to those under control, experience low costs in acquiring the information that is necessary (...) and enjoy the trust of the regulated group’.

Thirdly, the Victorian model was often referred to as strong as the Building Practitioners Board, through the Building Commission, has the authority to discipline both private certifiers and other players in the building industry. This has the advantage that private certifiers are backed up when addressing players in the building industry on non-compliance.

Fourthly and finally, as the Building Commission is a self-funding organisation, getting funding is a strong incentive – funding largely comes through the private certifiers. Case evidence suggests that employees of the Building

Commission are aware that the Building Commission needs the private certifiers to continue to exist.

Competition between the regimes

Competition between the regimes – which in the cases analysed means competition between a public regime and a prescribed co-regulation regime, or competition between a public regime and a conditioned co-regulation regime – has resulted in a number of issues. These are: a split between applicants who choose non-governmental and applicants who choose governmental involvement; a split between construction work that is assessed by non-governmental and governmental actors and the professionalisation of the governmental actors.

Firstly, non-governmental actors in the prescribed co-regulation regime and the conditioned co-regulation regime are able to charge lower fees; can provide a better and more client-friendly service; can carry out assessment work faster; are better able at an early stage of development to give advice on how compliance can be reached and can specialise better in certain types of development than their government counterparts in the public regime. Non-governmental actors appear to have a more competitive character than government actors, which has resulted in a preference for private certifiers. This preference is not a general applicants' preference though. Professional players in the development industry seem to value private certifiers higher than non-professionals – the ordinary citizens. The latter still seem to have some distrust in the non-governmental actors in the prescriptive or conditioned co-regulation regimes, or are not familiar with these regimes, which results in a situation where ordinary citizens look upon local Councils as the place to go for issues with building regulation.

The second issue is the 'natural' split. Although professional players in the development industry place considerable value on the qualities of private certifiers in the assessment procedures, the split in applicants that has occurred, apparently due to the competitive character of the two-tier systems analysed, might very well originate in the private certifiers charging 'market prices'. Fees that local Councils may charge for assessment work are regulated; fees that private certifiers may charge for the same work are not. Traditionally, in local Councils, the fees charged for assessing minor construction work do not cover the real cost of this type of work, i.e. this type of work is loss-making – losses are covered from 'profits' that are made from assessing major developments and losses are covered with government funds.

The introduction of competitive regimes has resulted in a situation in which the non-governmental actors can compete on fees. In daily practice, private certifiers appear to be able to charge lower, but still profitable, fees for assessing major development, than governmental actors can. Governmental actors have little to no room to negotiate on fees as the fees they have to

charge are regulated, whereas the non-governmental actors can negotiate on fees as the fees they may charge are not regulated. This might be a major reason why professional players in the development industry value non-governmental actors over governmental actors. Especially as, according to interviewees, professional players in the development industry only involve private certifiers or local Council officials because the law tells them to have their building plans assessed and they need a building or development permit before they are allowed to start construction work. The additional value of statutory building assessment appears to be undervalued by these clients.

Conversely, the fees may also help to explain the ordinary citizens' preference for local Council involvement in the building assessment process. In general, the fees Councils charge to assess minor construction work are lower than what private certifiers ask for the same work. As profit-seeking actors private certifiers cannot charge loss-making fees. Furthermore, a private certifier may refuse a job-offer, whereas Councils are statutorily obliged to process applications. A situation has arisen in which local Councils have lost the profit-making major development assessment works to private certifiers and have to carry out the loss-making minor development assessment works (compare with Wilson, 1989: 169).

A third and final issue arising with the competitive relationship is the professionalisation of governmental actors. To keep up with their competitive non-governmental counterparts, the local Councils appear to adopt the qualities that are ascribed to private certifiers: a move towards a better provision of assessment services can be perceived amongst local Councils in Australia since the introduction of private certification. This move is nevertheless also hindered by the introduction of private certification. In order to provide a better service, local Councils need to have better trained and experienced personnel. Yet, private sector organisations are able to provide better terms of employment, especially higher wages, than the government can (compare with Wilson, 1989: 169). Local councils appear to have become breeding grounds for cadets that make a move to private certification once they have all the education and experience needed to do so.

Competition within the regimes

Competition within the regimes only exists in the substitute and conditioned co-regulatory regimes. By analysing this particular form of competition, case evidence suggests concerns with the accountability of the regimes. Private certifiers are subject to commercial pressures. Clients are able to shop around and negotiate on fees, whereas the private certifier has to rake in assignments to keep its business running. The private certifier sometimes has to 'bite the hand that feeds it' when non-compliance is found in its clients' development proposal or construction work. Private certifiers have to serve both the public interest and their own private interests. This appears to lead to situations

where corners are cut, boundaries of the law are stretched, and differences of opinion rise on what complies and what does not – the performance-based structure of the Australian building regulations offer substantial ‘freedom’ of interpretation. It is generally agreed by the interviewees that oversight is needed to control the regulatory enforcement regimes’ accountability.

These findings emphasise again, as has been stressed so often by regulatory scholars (e.g. May, 2007: 23), the potential for regulatory capture. The private interests of the non-governmental actors that have responsibility for carrying out enforcement activities might ‘win over’ the public interest these actors have to serve.

Issues with accountability were found in all varieties of the prescribed regime and in the conditioned regime. The case evidence however suggests that oversight in the Victorian regime, conditioned co-regulation, with an independent board consisting solely of non-governmental stakeholders, appears to make the regulatory enforcement regime more accountable than the regimes in the other cases analysed, prescribed co-regulation. It was noteworthy that oversight in Victoria was considered by interviewees superior to oversight in South Australia, New South Wales and Queensland.

11.3 Final considerations

From this analysis it is clear that building regulation offers a wide variety of policy instruments, which makes building codes and statutory building assessment fertile soil for the study of regulation. For reasons unclear to me, building regulation is still virtually unexplored. In this book I have used instruments provided by the studies on regulation to join the few pioneers that went before me to explore this territory. As such, I hope to have accomplished my first aim: contributing to an understanding of building regulations and building regulatory enforcement.

The study of regulation also provided me with building blocks and a building structure that provided me with a framework for further comparative analysis of building regulatory enforcement regimes. By building this framework, drawing up a typology of regulatory enforcement regimes, and putting these into operation I hope to have accomplished my second aim: a contribution to more reliable and valid comparative research on policy instruments and regulatory enforcement regimes.

The empirical research presented on Australian building regulatory enforcement regimes provided insight into the public regime, the substitute co-regulation regime and the conditioned co-regulation regime. Furthermore, this research provided insight into the competitive relationship between these regimes as implemented in different Australian states and territories. From this empirical research, it became clear that private sector involvement in

Australia's building regulatory enforcement regimes does have both advantages and disadvantages. Case evidence suggests that competition between and within the regimes has raised standards – efficiency, specialisation, and client-friendliness; but brought in issues of equity and accountability – the 'natural' split in clientele, commercial pressure, conflicts of interest, and the fine line between controlling and consulting that is often said to be crossed. Issues of equity appear to have a close relation with competition between the regimes; issues of accountability appear to have a close relation with competition within the regimes.

Nevertheless, the Australian cases analysed show positive results, at least compared to the examples from England and Wales and New Zealand in the introduction to this paper. Private certifiers are clearly preferred, at least by the professionals in the Australian building industry, especially in the commercial and the higher end of the domestic building market. Among the cases analysed, private sector involvement in building regulatory enforcement is, at least partly, successful when it comes to private certifiers assessing professionals in the building industry, such as private developers. This preference comes, amongst others, from the private certifiers' ability to specialise and the level of service provided. As the specialised private certifiers take on the majority of building assessment, this might very well have led to an improvement in compliance, compared to the situation prior to the introduction of private certification. Also, the attention paid to structuring the layer of regulating and overseeing enforcement might very well be a reason why the Australian cases show more positive results than the examples from England and Wales and New Zealand set out in Chapter 3 in which this structuring appears to have been less thorough (Baiche et al., 2006; Imrie, 2004; May, 2003).

However, a point which appears to have been overlooked when introducing private certification in Australia is the impact a competitive relationship between the private and public sector would have on the local Council's building authorities. Local Councils still have to finance their building enforcement departments largely from fees paid by applicants, are still bound by legalised fees, and are still bound to paying legalised wages to their employees, as was the situation before the introduction of private certification. A loss of revenue and resources, due to the introduction of private certification, might in the long term erode the quality of the public regulatory enforcement regimes, which might endanger their ability to secure the public interest and serve the public. Changing the rules of the game by introducing a competitive two-tier system, but leaving the public regime as it was, appears to have put local Councils in a subordinated position. That a 'natural split' would occur could have been foreseen by the development sector's call for a better and faster service prior to the introduction of private certification. Accepting this 'natural split' and anticipating it by introducing a two-tier system of internally competing private sector agents – competing on service and costs – that sub-

stitute a trimmed-down, but sufficiently funded and qualified public regime might have led to a situation in which all parties involved would benefit from private sector involvement.

Case evidence suggests that the government still has an essential role in building regulatory enforcement. On a local level, governmental involvement is needed to fulfil a public task; building assessment and consultancy still needs to be facilitated to serve, at least, ordinary citizens – the non-professionals in the development industry. At a higher level, government involvement is needed to oversee non-governmental involvement and guarantee the different regime's accountability (compare with Cohen and Rubin, 1985; DeMarzo et al., 2005; May, 2007).

Insights that different forms of competition might lead to different advantages and disadvantages, stresses once more that different combinations of actors, their roles and their responsibilities in a 'policy mix' (Gunningham and Grabosky, 1998) have a substantial impact on the results of regulatory enforcement regimes. From the analysis presented in this paper, it was clear that attention should not only be paid to how to 'mix' the different 'proportions', but that it should also be paid to the relationships that might exist between regulatory enforcement regimes when co-existence is implemented. By presenting and analysing this data research, I hope to have accomplished my third aim: a contribution to the understanding of different building regulatory enforcement regimes and a competitive relationship between these.

It is questionable if competition, sometimes 'advised' as we have seen in Chapter 3 (e.g. Landes and Posner, 1975; Osborne and Gaebler, 1992), is the preferred relationship between different regulatory enforcement regimes. As has already been stressed, regimes prefer to work together than against each other: the regimes can at least support, complement or replace each other as well. A challenging topic for further analysis is if these kinds of other relationships contribute to 'better' regulation.

Taking all this together, I hope I have at least shown how a methodical approach can lead to a more structural analysis of different policy instruments and different organisational arrangements of building regulatory enforcement; and possibly in other fields of policy as well. I hope I have shown the value of building control to scholars in the studies of regulation and the value of the studies of regulation to scholars studying the built environment. I hope this work will assist policy makers in achieving a better understanding of the possible implications of future policy that have to be taken to rise to the challenges in our built environment. I furthermore hope this book will assist all those interested in (building) regulation and regulatory enforcement in any further exploration of the study of regulation to grasp the opportunities presented by the construction, maintenance and use of buildings.

Appendices

Appendix A Interview questionnaire Victoria

Introduction – 10 minutes (max)

1. What do you think about the quality of the building industry in VIC? To what extent is a certain development perceivable in the building industry (e.g. fragmentation of responsibilities, professionalization)? Why is building control needed in VIC?

System(s) of building control – focus on public and private player involvement – 40 minutes (max)

2. Preceding this interview I have send you a short overview, my perception, of the building control systems in VIC – see above. To what extent is this a proper description?
3. What was the reason for involving private surveyors in the building permit procedure? What changes occurred because of this involvement?
4. Do applicants show preference for either municipal or private surveyors? If so, why?
5. To what extent can local Councils interfere in the private surveyors control process? And to what extent do they?
6. What are the objectives of the different systems (public and private control)/what are the differences in objectives between the different systems?
7. Into what extent can acceptable evidence be found of the achievement of these objectives? Can I get insight in these sources evidence? Can I obtain these sources of evidence?

System(s) valuation – 20 minutes (max)

8. What is the most serious obstacle to achieving objectives? What is the second most serious obstacle to achieving objectives? Why?
9. To what extent is building control performed equitably among different groups (e.g. owner builder vs. professionals)?
10. To what extent is building control performed equitably by different actors (public vs. private actors)?

Internal system responsibilities – 15 minutes (max)

11. How does the State government supervise the building control system?
12. To what extent is the governmental supervision system realistic?
13. Which are the statutory responsibilities at building control level (for both municipal and private surveyors)?

Extra questions (if there is sufficient time)

System(s) of building control – focus on public and private player involvement

14. Do private surveyors have power to enforce? If so, which are these?
15. To what extent do local Councils delegate work to private surveyors?
16. To what extent are local Councils involved in the policy of Registered building practitioners?

17. What is the difference in the way public and private actors carry out their tasks – if any?
18. Which system of building control functions best according to you? Why?
19. Which system of building control shows best compliance? Why?
20. Which system of building control shows shortest process times?
21. Which system of building control has the lowest financial burden for citizens? Idem for private (building control) actors? Idem for public (building control) actors/government?
22. What actions are undertaken to make private building control attractive to applicants?
23. Where can I find information on the (yearly) amount of building permit applications processed in VIC, building controllers, building activities?

System(s) of building control – focus on objectives and valuation

24. What means (e.g. resources, guidelines, staff activities) are available to achieve objectives? To what extent are these sufficient?
25. Does building control lead to reaching the objectives stated in the Building Act?

Building control procedures

26. Which procedures for controlling permit applications, site controls and rounding off are used in daily practice?
27. What style of enforcement is used in daily practice (e.g. sanctioning, assisting, consulting)?
28. How is non-compliance sanctioned in daily practice? To what extent do subjects react on sanctioning?

Internal system responsibilities

29. Which are the responsibilities at State governmental level? Which at local governmental level? To what extent are the scopes of these governmental responsibilities realistic?
30. Which are the statutory responsibilities at building control level (for both municipal and private surveyors)? To what extent are these realistic? How are these responsibilities experienced? When and where do responsibilities end?
31. What are criteria to be allowed to participate as actor in the building control system? To what extent are participation criteria realistic (qualitative and quantitative)? To what extent are requirements to (potential) builders/owners sufficient?

Appendix B Interview questionnaire New South Wales

Introduction – 10 minutes (max)

1. What do you think about the quality of the building industry in NSW? To what extent is a certain development perceivable in the building industry (e.g. fragmentation of responsibilities, professionalization)? Why is building control needed in NSW?

System(s) of building control – focus on public and private player involvement – 40 minutes (max)

2. Preceding this interview I have send you a short overview, my perception, of the building control systems in NSW – see above. To what extent is this a proper description?
3. What was the reason for involving private certifiers in the building permit procedure? What changes occurred because of this introduction?
4. Do applicants show a preference for either municipal or private building control? If so, why?
5. Why was the building practitioners registration introduced? What changes occurred because of this introduction?
6. To what extent can local Councils interfere in the private surveyors control process? And to what extent do they?
7. What are the objectives of the different systems (public and private control)/what are the differences in objectives between the different systems?
8. Into what extent can acceptable evidence be found of the achievement of these objectives? Can I get insight in these sources evidence? Can I obtain these sources of evidence?

System(s) valuation – 20 minutes (max)

9. What is the most serious obstacle to achieving objectives? What is the second most serious obstacle to achieving objectives? Why?
10. To what extent is building control performed equitably among different groups?
11. To what extent is building control performed equitably by different actors?

Internal system responsibilities – 15 minutes (max)

12. How does the State government supervise the building control system?
13. To what extent is the governmental supervision system realistic?
14. Which are the statutory responsibilities at building control level (for both municipal and private surveyors)?

Extra questions (if there is sufficient time)

System(s) of building control – focus on public and private player involvement

15. Which additional tasks do local Councils have in the building control process?
16. Do private surveyors have power to enforce? If so, which are these?

17. To what extent do local Councils delegate work to private surveyors?
18. What is the difference in the way public and private actors carry out their tasks – if any?
19. Which system of building control functions best according to you? Why?
20. Which system of building control shows best compliance? Why?
21. Which system of building control shows shortest process times?
22. Which system of building control has the lowest financial burden for citizens? Idem for private (building control) actors? Idem for public (building control) actors/government?
23. What actions are undertaken to make private building control attractive to applicants?
24. Where can I find information on the (yearly) amount of building permit applications processed in NSW, building controllers, building activities?

System(s) of building control – focus on objectives and valuation

25. What means (e.g. resources, guidelines, staff activities) are available to achieve objectives? To what extent are these sufficient?
26. Does building control lead to reaching the objectives stated in the EP&A Act?

Building control procedures

27. Which procedures for controlling permit applications, site controls and rounding off are used in daily practice?
28. What style of enforcement is used in daily practice (e.g. sanctioning, assisting, consulting)?
29. How is non-compliance sanctioned in daily practice? To what extent do subjects react on sanctioning?

Internal system responsibilities

30. Which are the responsibilities at State governmental level? Which at local governmental level? To what extent are the scopes of these governmental responsibilities realistic?
31. Which are the statutory responsibilities at building control level (for both municipal and private surveyors)? To what extent are these realistic? How are these responsibilities experienced? When and where do responsibilities end?
32. What are criteria to be allowed to participate as actor in the building control system? To what extent are participation criteria realistic (qualitative and quantitative)?
33. To what extent are requirements to (potential) builders/owners sufficient?

Appendix C Interview questionnaire Queensland

Introduction – 10 minutes (max)

1. What do you think about the quality of the building industry in QLD? To what extent is a certain development perceivable in the building industry (e.g. fragmentation of responsibilities, professionalization)? Why is building control needed in QLD?

System of building control – focus on public and private player involvement – 40 minutes (max)

2. Preceding this interview I have send you a short overview, my perception, of the building control systems in QLD – see above. To what extent is this a proper description?
3. What was the reason for involving private surveyors in the building permit procedure? What changes occurred because of this involvement?
4. Why was the licensed builders system introduced? What resulted from this introduction?
5. Do applicants show preference for either municipal or private building certifiers? If so, why?
6. To what extent can local Councils interfere in the private building certifiers control process? And to what extent do they?
7. What are the objectives of the different systems (public and private control)/what are the differences in objectives between the different systems?
8. Into what extent can acceptable evidence be found of the achievement of these objectives? Can I get insight in these sources evidence? Can I obtain these sources of evidence?

System(s) valuation – 20 minutes (max)

9. What is the most serious obstacle to achieving objectives? What is the second most serious obstacle to achieving objectives? Why?
10. To what extent is building control performed equitably among different groups?
11. To what extent is building control performed equitably by different actors?

Internal system responsibilities – 15 minutes (max)

12. How does the State government supervise the building control system?
13. To what extent is the governmental supervision system realistic?
14. Which are the statutory responsibilities at building control level (for both municipal and private surveyors)?

Extra questions (if there is sufficient time)

System(s) of building control – focus on public and private player involvement

15. Do private surveyors have power to enforce? If so, which are these?
16. To what extent do local Councils delegate work to private building certifiers?

17. To what extent are local Councils involved in the policy of private building certifiers?
18. What is the difference in the way public and private actors carry out their tasks – if any?
19. Which system of building control functions best according to you? Why?
20. Which system of building control shows best compliance? Why?
21. Which system of building control shows shortest process times?
22. Which system of building control has the lowest financial burden for citizens? Idem for private (building control) actors? Idem for public (building control) actors/government?
23. What actions are undertaken to make private building control attractive to applicants?
24. Where can I find information on the (yearly) amount of building permit applications processed in QLD, building controllers, building activities?

System(s) of building control – focus on objectives and valuation

25. What means (e.g. resources, guidelines, staff activities) are available to achieve objectives? To what extent are these sufficient?
26. Does building control lead to reaching the objectives stated in the Queensland Development Code?

Building control procedures

27. Which procedures for controlling permit applications, site controls and rounding off are used in daily practice?
28. What style of enforcement is used in daily practice (e.g. sanctioning, assisting, consulting)?
29. How is non-compliance sanctioned in daily practice? To what extent do subjects react on sanctioning?

Internal system responsibilities

30. Which are the responsibilities at State governmental level? Which at local governmental level? To what extent are the scopes of these governmental responsibilities realistic?
 31. Which are the statutory responsibilities at building control level (for both municipal and private surveyors)? To what extent are these realistic? How are these responsibilities experienced? When and where do responsibilities end?
 32. What are criteria to be allowed to participate as actor in the building control system? To what extent are participation criteria realistic (qualitative and quantitative)?
 33. To what extent are requirements to (potential) builders/owners sufficient?
-

Appendix D Interview questionnaire South Australia

Introduction – 10 minutes (max)

1. What do you think about the quality of the building industry in SA? To what extent is a certain development perceivable in the building industry (e.g. fragmentation of responsibilities, professionalization)? Why is building control needed in SA?

System(s) of building control – focus on public and private player involvement – 40 minutes (max)

2. Preceding this interview I have send you a short overview, my perception, of the building control systems in SA – see above. To what extent is this a proper description?
3. What was the reason for involving private certifiers in the building permit procedure?
4. Do applicants show preference for either municipal or private certifiers? If so, why?
5. Why was the building practitioners registration introduced? What changes occurred because of this introduction?
6. To what extent can local Councils interfere in the private certifiers control process? And to what extent do they?
7. What are the objectives of the different systems (public and private control)/what are the differences in objectives between the different systems?
8. Into what extent can acceptable evidence be found of the achievement of these objectives? Can I get insight in these sources evidence? Can I obtain these sources of evidence?

System(s) valuation – 20 minutes (max)

9. What is the most serious obstacle to achieving objectives? What is the second most serious obstacle to achieving objectives? Why?
10. To what extent is building control performed equitably among different groups (e.g. owner builder vs. professionals)?
11. To what extent is building control performed equitably by different actors?

Internal system responsibilities – 15 minutes (max)

12. How does the State government supervise the building control system?
13. To what extent is the governmental supervision system realistic?
14. Which are the statutory responsibilities at building control level (for both municipal and private surveyors)?

Extra questions (if there is sufficient time)

System(s) of building control – focus on public and private player involvement

15. Why do local Councils delegate powers to authorised officers regarding controlling construction work? Are these authorised officers private actors?

16. To what extent do local Councils delegate work to private certifiers?
17. To what extent are local Councils involved in the policy of private certifiers?
18. What is the difference in the way public and private actors carry out their tasks – if any?
19. Which system of building control functions best according to you? Why?
20. Which system of building control shows best compliance? Why?
21. Which system of building control shows shortest process times?
22. Which system of building control has the lowest financial burden for citizens? Idem for private (building control) actors? Idem for public (building control) actors/government?
23. What actions are undertaken to make private building control attractive to applicants?
24. Where can I find information on the (yearly) amount of building permit applications processed in SA, building controllers, building activities?

System(s) of building control – focus on objectives and valuation

25. What means (e.g. resources, guidelines, staff activities) are available to achieve objectives? To what extent are these sufficient?
26. Does building control lead to reaching the objectives stated in the Development Act?

Building control procedures

27. Which procedures for controlling permit applications, site controls and rounding off are used in daily practice?
28. What style of enforcement is used in daily practice (e.g. sanctioning, assisting, consulting)?
29. How is non-compliance sanctioned in daily practice? To what extent do subjects react on sanctioning?

Internal system responsibilities

30. Which are the responsibilities at State governmental level? Which at local governmental level? To what extent are the scopes of these governmental responsibilities realistic?
31. Which are the statutory responsibilities at building control level (for both municipal and private surveyors)? To what extent are these realistic? How are these responsibilities experienced? When and where do responsibilities end?
32. What are criteria to be allowed to participate as actor in the building control system? To what extent are participation criteria realistic (qualitative and quantitative)?
33. To what extent are requirements to (potential) builders/owners sufficient?

Appendix E Interview questionnaire Australian Capital Territory

Introduction – 10 minutes (max)

1. What do you think about the quality of the building industry in ACT? To what extent is a certain development perceivable in the building industry (e.g. fragmentation of responsibilities, professionalization)? Why is building control needed in ACT?

System of building control – focus on public and private player involvement – 40 minutes (max)

2. Preceding this interview I have send you a short overview, my perception, of the building control systems in ACT – see above. To what extent is this a proper description?
3. What was the reason for involving licensed building surveyors/certifiers in the building permit procedure?
4. What are the objectives of the system? What are, if any, the differences in objectives between the ‘new’ and ‘old’ system?
5. Into what extent can acceptable evidence be found of the achievement of these objectives? Can I get insight in these sources evidence? Can I obtain these sources of evidence?

System(s) valuation – 20 minutes (max)

6. What is the most serious obstacle to achieving objectives? What is the second most serious obstacle to achieving objectives? Why?
7. To what extent is building control performed equitably among different groups (e.g. owner builder vs. professionals)?

Internal system responsibilities – 15 minutes (max)

8. How does the State government supervise the building control system?
9. To what extent is the governmental supervision system realistic?
10. Which are the responsibilities at governmental level? To what extent are the scopes of these governmental responsibilities realistic?
11. Which are the statutory responsibilities at building control level?

Extra questions (if there is sufficient time)

System(s) of building control – focus on public and private player involvement

12. What, if any, is the difference in the way the former ‘public’ and the present day private actors carry out their tasks?
13. Why was the licensed builders system introduced? What changes occurred because of this introduction?
14. Which system of building control (old/new) functions best according to you? Why?
15. Which system of building control (old/new) shows best compliance? Why?
16. Which system of building control (old/new) shows shortest process times?
17. Which system of building control (old/new) has the lowest financial bur-

den for citizens? Idem for private (building control) actors? Idem for public (building control) actors/government?

18. Where can I find information on the (yearly) amount of building permit applications processed in ACT, building controllers, building activities?

System(s) of building control – focus on objectives and valuation

19. What means (e.g. resources, guidelines, staff activities) are available to achieve objectives? To what extent are these sufficient?
20. Does building control lead to reaching the objectives stated in the Territory Plan/BA04?

Building control procedures

21. Which procedures for controlling permit applications, site controls and rounding off are used in daily practice?
22. What style of enforcement is used in daily practice (e.g. sanctioning, assisting, consulting)?
23. How is non-compliance sanctioned in daily practice? To what extent do subjects react on sanctioning?

Internal system responsibilities

24. Which are the statutory responsibilities at building control level? To what extent are these realistic? How are these responsibilities experienced? When/where do responsibilities end?
25. What are criteria to be allowed to participate as actor in the building control system? To what extent are participation criteria realistic (qualitative and quantitative)?
26. How does the government supervise the building control system? To what extent is the governmental supervision system realistic?
27. To what extent are requirements to (potential) builders/owners sufficient?

Appendix F Additional evaluation questionnaire

Some obstacles regarding the particular state or territorial system of building control were mentioned 'nation wide'. Based upon these some statements are presented below. Could you indicate the extent of your agreement or disagreement by placing a tick in the appropriate column (e.g. by typing a 'X')? As the obstacles, which were grounds for the statements, came forward in almost all interviews and were strongly judged, I've chosen to use a so-called 'forced

Statement	++	+	-	--	No opinion
1. Private certification and conflicts of interest go hand in hand due to commercial pressure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Municipal building control and conflicts of interest go hand in hand due to political pressure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Private certification made building regulations assessment more effective – compliance with regulations has improved	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Private certification made building regulations assessment more efficient – the process has sped up	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Private certification has not sped up building development as it is just a small private part in a large public system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Competition amongst private certifiers erodes standards	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Private certifiers are subject to clients will	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. The thin line between controlling and consulting gets crossed by private certifiers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Rivalry exists between private certifiers and local Council employees	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. Local Councils use planning regulations to regain grip on building control	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Private certifiers dislike small jobs such as assessing applications for alterations, house extensions and fences	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. In present, State supervision on private certifiers is a joke	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. In present, it is registration/licensing, complaint investigation and auditing that makes private certifiers comply with regulations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14. In present, it is the private certifiers business-like attitude that makes them comply with regulations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15. Private certifiers are more risk-averse than their local Council counterparts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16. Private certifiers prefer deemed-to-satisfy solutions to alternative solutions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
17. Performance based codes are difficult to control	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18. Local Council employees hide behind their public body, the local Council, when it comes to taking responsibility	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19. The introduction of private certification gave insurance companies too much influence on building regulations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20. The introduction of private certification gave insurance companies too much influence on building control	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

The symbols in the columns signify: ++ = strongly agree; + = agree; - = disagree; -- = strongly disagree

Replies on the additional questionnaire from participants related to governmental organisations¹

Statement	++	+	-	—	No opinion
1. Private certification and conflicts of interest go hand in hand due to commercial pressure	3	7			
2. Municipal building control and conflicts of interest go hand in hand due to political pressure	1	1	3	4	1
3. Private certification made building regulations assessment more effective – compliance with regulations has improved	1	3	4	2	
4. Private certification made building regulations assessment more efficient – the process has sped up	4	5		1	
5. Private certification has not sped up building development as it is just a small private part in a large public system	4		3	3	
6. Competition amongst private certifiers erodes standards	2	5	1	1	1
7. Private certifiers are subject to clients will		7	1		2
8. The thin line between controlling and consulting gets crossed by private certifiers	2	7	1		
9. Rivalry exists between private certifiers and local Council employees	2	5	1	1	1
10. Local Councils use planning regulations to regain grip on building control	1	5	1	2	1
11. Private certifiers dislike small jobs such as assessing applications for alterations, house extensions and fences	5	3		1	1
12. In present, State supervision on private certifiers is a joke	3	4		2	1
13. In present, it is registration/licensing, complaint investigation and auditing that makes private certifiers comply with regulations	1	5	1	2	1
14. In present, it is the private certifiers business-like attitude that makes them comply with regulations		7	1	1	1
15. Private certifiers are more risk-averse than their local Council counterparts		6	2	2	
16. Private certifiers prefer deemed-to-satisfy solutions to alternative solutions	1	1	2	3	3
17. Performance based codes are difficult to control	4	3	2	1	
18. Local Council employees hide behind their public body, the local Council, when it comes to taking responsibility	1	3	3	1	
19. The introduction of private certification gave insurance companies too much influence on building regulations			2	4	4
20. The introduction of private certification gave insurance companies too much influence on building control		1	3	4	2

choice scale'. If you do not hold an opinion regarding the topic because, for instance, you lack knowledge/experience, or if you do not want to make your opinion known, please tick the 'no-opinion' column. Note that the 'no-opinion' category does not correspond to a 'neutral', 'not taking sides' or likewise category.

As with the interviews, your opinion will be dealt with anonymously in a (draft) report (see previous page).

¹ This additional questionnaire has been sent to the key-persons – see Appendix G – that joined an interview.

57% of those interviewees responded; the ratio between participants related to governmental organisations and participants related to non-governmental organisations is one to two.

Replies on the additional questionnaire from participants related to non-governmental organisations²

Statement	++	+	-	--	No opinion
1. Private certification and conflicts of interest go hand in hand due to commercial pressure	2	4	2	8	
2. Municipal building control and conflicts of interest go hand in hand due to political pressure	3	3	4	5	2
3. Private certification made building regulations assessment more effective – compliance with regulations has improved	4	8	3	1	1
4. Private certification made building regulations assessment more efficient – the process has sped up	11	6			
5. Private certification has not sped up building development as it is just a small private part in a large public system		5	3	9	
6. Competition amongst private certifiers erodes standards	3	4	4	6	
7. Private certifiers are subject to clients will	3	2	4	7	1
8. The thin line between controlling and consulting gets crossed by private certifiers	2	6	6	4	
9. Rivalry exists between private certifiers and local Council employees	4	7	3	1	2
10. Local Councils use planning regulations to regain grip on building control	9	5	3		
11. Private certifiers dislike small jobs such as assessing applications for alterations, house extensions and fences	2	1	10	1	3
12. In present, State supervision on private certifiers is a joke	2	3	7	4	1
13. In present, it is registration/licensing, complaint investigation and auditing that makes private certifiers comply with regulations	3	4	7	1	1
14. In present, it is the private certifiers business-like attitude that makes them comply with regulations	3	7	3	1	3
15. Private certifiers are more risk-averse than their local Council counterparts	3	9	3		2
16. Private certifiers prefer deemed-to-satisfy solutions to alternative solutions	1	7	6	1	2
17. Performance based codes are difficult to control	3	6	6	1	1
18. Local Council employees hide behind their public body, the local Council, when it comes to taking responsibility	6	8	1	1	
19. The introduction of private certification gave insurance companies too much influence on building regulations	3	3	7	3	1
20. The introduction of private certification gave insurance companies too much influence on building control	3	3	8	3	

² This additional questionnaire has been sent to the key-persons – see Appendix G – that joined an interview. 57% of those interviewees responded; the ratio between participants related to governmental organisations and participants related to non-governmental organisations is one to two.

Appendix G Interviewees

number	Organisation	Position
001	Umow Law & Associates Pty Ltd	Manager
002	Building Commission	Practitioner Compliance representative
003*	Phillip Chun & Associates Pty Ltd	Manager
	Australian Institute of Building Surveyors	Past National President
004	Reddo Building Surveyors	Manager
005	Building Commission	Sustainability representative
006	City of Melbourne	Municipal Building Surveyor
007	Irwinconsult Pty Ltd	Manager
008	Building Commission	Regulatory Development representative
009	Building Commission	Practitioner Compliance representative
010	Phillip Chun & Associates Pty Ltd	Manager
011	Building Practitioners Board	Building surveyors representative
012	Building Commission	Regulatory Development representative
013	Building Commission	Practitioner Compliance representative
014	Municipality of Dandenong	Municipal Building Surveyor
015	Building Practitioners Board	Consumers representative
	Australian Property Institute	Past President
016*	University of Melbourne, Faculty of Architecture Building and Planning	Senior Lecturer
017*	University of Technology Sydney, School of the Built Environment	Lecturer
018	Sydney City Council	Senior Building Surveyor
019	Sydney City Council	Specialist Planner
020	NSW Department of Planning	Member Building Professionals Board
021	NSW Department of Planning	Member Building Professionals Board
022	SJB Planning	Manager
023	Sydney City Council	Councilor
024	Collard Maxwell Earnshaw PTY LTD	Royal Australian Institute of Architects representative
025	Caroline Pidcock Architects	Manager
026*	University of Technology Sydney, Centre for Local Government	Associate Professor
027*	Australian Institute of Building Surveyors	Manager
028	Australian Institute of Building	Past NSW Chapter President
029	Australian Institute of Building	Chapter President
030	Napier and Blakely	Manager Building Regulations
031*	Queensland University of Technology, Built Environment and Engineering Faculty	Professor
032*	Queensland University of Technology, Built Environment and Engineering Faculty	Professor
033	Building Codes Queensland	General manager
034	Master Builders Association	Manager Housing Services

number	Organisation	Position
035	Catchpole Building Services	Building Surveyor and Building Consultant
036*	Building Codes Queensland	Sustainable Unit representative
037	Australian Institute of Building Surveyors	Chapter President
038	PDT architects	Architect
039*	Building Codes Queensland	Plumbing representative
040*	Queensland University of Technology, School of Management	Research Fellow
041	Building Codes Queensland	Building Standards representative
042*	Building Codes Queensland	Building Fire Safety representative
043	S2F	Architect
044	Queensland University of Technology, Built Environment and Engineering Faculty	Lecturer
045	Housing Industry Association	Manager
046	Queensland Fire and Rescue Service	State Community Safety Unit representative
047	Building Service Authority	Research and Review representative
048	S2F	Architect
049	Queensland University of Technology, Built Environment and Engineering Faculty	Senior lecturer
050	Australian Institute of Building Surveyors	Past National President
051	Katnich Dodd building surveying consultancy	Building surveying consultant
052	Planning SA	Building Policy Branch representative
053	Adelaide City Council	Building surveying official
054	Adelaide City Council	Building surveying official
055*	Adelaide City Council	Environmental Services representative
056*	Adelaide City Council	Building Assessment representative
057*	Australian Institute of Building Surveyors	Representative
058	University of South Australia, Centre for Building and Planning Studies	Representative
059	Australian Building Codes Board	Representative
060	Master Builders Association of the ACT	manager
061	ACT Planning and Land Authority	Policy and Legislation representative

* Not interviewed following the interview questionnaire – see Appendices A-D

Appendix H Codes used to analyse data in Atlas.ti

0 - public	insurance policy	set lowest common
1 - private	insurance power	denominator
2 - semi public	introduction private sector	specialization
accountability	introduction trouble	suburbs/countryside
accreditation/licensing/ registration	investigate complaints	supervision
additional information	less good	supply information
additional planning	liability	top down
regulations	likewise	unclear
alternative solutions	line design/consult	Victoria
auditing	lodge complaints	
bottom up	loss public info/ experience	
changes after permit	minor construction work	
cheaper	more expensive	
client binding	most serious	
client focus	natural split	
client shopping around	negative	
commercial pressure	obstacle	
commercial/large domestic	ordinary citizens	
competition	perceived development in industry	
conflict of interest	personal responsibility	
consistency planning/ building	political pressure	
contact private actor	preference	
continual professional development	private interest	
contractor advises control	private sector	
council interference	public interest	
cut costs	public monopoly	
deskilling	public sector	
difference public private	public/client understanding of system	
effectiveness	quality building control	
efficiency	quality building industry	
enforcement	quote	
enforcement power	realistic?	
equity	regulations	
execution	responsive regulation	
experience	risk averseness	
generally good	rivalry public/private	
get what you pay for	role government	
good	second most serious	
independent	self-regulation	
insurance industry	service	

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Globally the private sector is becoming increasingly involved in regulation and regulatory enforcement – often mutually competing or, as a sector, competing with traditional government departments. This book provides insight into this trend in a specific policy area: the built environment. Building on from general notions in regulatory literature, a methodical approach is introduced for comparative analysis of such privatization.

The book then continues by an in-depth analysis of building regulatory enforcement regimes in Australia. Here private sector involvement made its entry in the early 1990s as a competitive alternative to existing public sector involvement. Yet, each Australian State and Territory introduced a slightly different regime. The differences amongst the regimes provide an unique opportunity to gain insight into how combinations of policy instruments produce diverse policy outcomes.

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