

# INDEPENDENT REVIEW OF THE BUILDING PROFESSIONALS ACT 2005

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## Glossary

ABCB: Australian Building Codes Board

AS: Alternative Solution

BASIX: Building Sustainability Index

BCA: Building Code of Australia

BC: Building Certificate

BP Act: Building Professionals Act

BPB: Building Professionals Board

BRAC: Building Regulations Advisory Committee

CA: Certifying Authority

CoC: Compliance Certificate

CC: Construction Certificate

CPD: Continuing Professional Development

CDC: Complying Development Certificate

DA: Development Approval

DCC: Development Completion Certificate

DFSI: Department of Finance, Services and Innovation

DPE: Department of Planning and Environment

Dts: Deemed to satisfy

EP&A Act: Environmental Planning and Assessment Act

FRNSW: Fire and Rescue NSW

FT: NSW Fair Trading

NCC: National Construction Code

PCA: Prescribed Certifying Authority

PII: Professional Indemnity Insurance

PIN: Penalty Infringement Notice

OC: Occupation Certificate

RFS: Rural Fire Service

SEPP: State Environmental Planning Policy

StC: Strata Certifier

SuC: Subdivision certifier



## Foreword

In undertaking the role of the independent reviewer I must confess to not fully appreciating the complexity and scope of the exercise at the outset, despite my best efforts at due diligence. This was very soon rectified by the advice and assistance of a wide range of persons, including internal and external stakeholders, members of the industry, those who attended the public hearings and provided feedback both through submissions and those responding to the two surveys that were conducted as part of the review. I express my appreciation to all those who have provided input to the review.

The staff of DPE and BPB, have all been generous with their time and advice and I wish to place on record my appreciation for their assistance. Particular acknowledgement is given to the following who have generously given of their time in discussing the complex range of issues, participation in the consultation process and assisting with the compilation of data, amongst other matters.

- Building Policy Unit, DPE: Stephen Durnford, Alan Host, Michael Marks, Helen Ting
- e-Business Branch, DPE: Andreas Reiz, Veronica Kearney
- Building Professionals Board: Gabrielle Wallace, Tanya Briggs, Alanna Clifton, Donna Quinn, Jose Sevilla, Mary Attuquayefio, Jonathan Lynch, Sean Fagan, Anthony Grey
- Community and Stakeholder Engagement Branch of DPE: Rochelle Trimnell-Ritchard, Alexis Starkey, Lachlan McKenzie
- Codes and Development Guides team, DPE: Lynne Sheridan
- Office of Fair Trading: John Tansey

Suffice to say any errors or omissions are solely my responsibility and do not reflect the efforts of those who have helped.

## How to have your say

You are encouraged to read this draft report carefully and then provide a submission via:

- Email: [policy@bpb.nsw.gov.au](mailto:policy@bpb.nsw.gov.au)
- Post: BP Act review, GPO Box 39, Sydney NSW 2001

The closing date for submissions is 21 September 2015.

Once the submissions have been considered, a final report will be prepared and submitted to the Secretaries of the Department of Planning and Environment, and the Department of Finance, Services and Innovation.

The final report will also include the outcomes of an independent cost-benefit analysis currently being undertaken on the proposals in this draft report. The final report is scheduled for completion by 31 October 2015.

## Executive summary

### Purpose of review

The purpose of the review is to assess the effectiveness of the Building Professionals Act (BP Act) and the broader issue of the effectiveness of the building regulation and certification system that applies in NSW and to make recommendations to improve the operation of the Act and of the overall system.

### What is building regulation and certification?

In Australia, as in most advanced economies, there is a system that sets requirements for the safety, health, amenity and sustainability of buildings. In Australia this involves three key elements:

- national building standards that are developed with the involvement of all Australian governments through the Australian Building Codes Board and the Building Ministers' forum
- processes for checking that building plans and construction are undertaken in accordance with the building standards and building controls (called building certification in NSW) controls
- licensing both builders and other trades, as well as accrediting those undertaking the certification process to ensure that those undertaking the work have adequate qualifications and expertise.

### Scope of the review

The terms of reference for the review have been deliberately drawn broadly to require the review to assess the full building regulation and certification system and not just the BP Act and the role of the Building Professionals Board. The reason for this broad scope is that it is not possible to review the role and performance of certifiers and certification, including the role of the BPB, without taking into account the broad context within which certifiers and the certification system operates. This includes the provisions of the Environmental Planning and Assessment Act both in respect to planning and building controls, the role of local government with development approvals, compliance and record keeping processes and the role of Fair Trading and the Home Building Act in the licensing and oversight of builders and other building trades.

### Why regulate the building industry?

There is broad regulation that applies across industries relating to such matters as consumer protection, product safety and work health and safety matters. The issue is why is there regulation specific to the building industry and is this justified?

The Productivity Commission has identified a number of characteristics of the building industry which justify efficiently designed regulation, these being:

- complex, highly technical, major investments for residential dwelling consumers who do not have the information or experience to be expert consumers
- external effects (or externalities) that can negatively impact on the broad community, such as unsafe and poor quality buildings, including inadequate fire safety systems and defective or dangerous materials
- environmental and social concerns including energy and water efficiency.

The first factor justifies consumer protection measures while the other two factors justify regulatory intervention more broadly directed at the safety and quality of the building product.

The NSW building industry is a substantial part of the NSW economy, contributing about \$25 billion per annum to the State economy and employing about 250,000 employees or nearly 10% of the labour force.

### **How has the review been undertaken?**

There have been a significant number of reviews of aspects of the NSW building and construction industry and building regulation over the last decade or so as well as reviews by the Productivity Commission and reviews in various other States. These were all assessed for relevance to this review.

A survey was undertaken of the building regulation and certification system in each Australian state and territory as well as New Zealand. This was supplemented with a review of the approach followed in various European countries. The purpose was to identify areas of different practice to see if these were worth considering in NSW.

In addition, meetings were held with an extensive number of internal and external stakeholders to identify and assess areas of concern and suggestions for improvement.

Following these meetings a discussion paper was prepared setting out the purpose of the review, relevant background information and the identification of possible problem areas and reforms that could be used to address these problems. Linked to the discussion paper were two questionnaires: one for the general community and one for certifiers, private and council employed.

The discussion paper was advertised and released in May 2015, following which public hearings and meetings with councils were held in nine locations across the state. In response to the consultations 78 submissions were received and 490 general questionnaires and 306 certifier questionnaires were submitted.

Drawing upon this extensive input, the draft report has been prepared and will be placed on public exhibition for 28 days, with further submissions invited. A final report will be presented in October 2015.

### **How similar or different is the approach in NSW to other jurisdictions?**

All States and Territories have a broadly similar approach; adhering to national building standards, licensing building practitioners and using certifiers to assess adherence to the building standards. All States and Territories use private certifiers, with only private certifiers involved in the two territories.

NSW differs in its approach in a number of areas:

- NSW has a relatively fragmented administrative structure, with building regulation undertaken in three separate areas of the Department of Planning and Environment (DPE), within Fair Trading NSW and by the Building Professionals Board (BPB). In addition, Fair Trading undertakes the licensing of building trades while BPB accredits certifiers
- NSW is the only jurisdiction not to have a separate Building Act, with building regulation included in various parts of the Environmental Planning and Assessment Act (EP&A Act) and the Home Building Act

- NSW only licences builders for residential building work, not commercial building work, in contrast to all other jurisdictions which licence all builders
- NSW accredits a narrower range of skills to act as certifiers, with the most noticeable absence being building and critical systems design and the installation and commissioning of critical building elements for complex buildings
- the resourcing of the building regulation and certification process is significantly lower than either of the major States, Victoria and Queensland, and there is less reliance in NSW on industry funding of the function
- in NSW building approvals are not provided, unlike other jurisdictions, but rather the building is certified as to whether it will conform to the building standard. The practical difference is that certification as practised in NSW can only certify or not certify and not, except under very restrictive circumstances, impose conditions unlike a building approval issued in other jurisdictions
- in NSW certifiers certify both development consent conditions and building standards, whereas in a number of other jurisdictions certifiers only assess against building standards.

While the differences are interesting, they are not necessarily a problem.

### **What are the major identified problems with the current system?**

A number of significant problems have been identified with the current building regulation and certification system which reduce the effectiveness of regulation and hence the quality of the building product. These problems have been identified in a number of earlier reviews.

While comprehensive information is not regularly collected on building defects, the available data does indicate that the incidence of building defects is significant and the incidence appears higher in NSW than in the balance of Australia. Recent incidents in NSW provide some indications that all is not well: the Bankstown apartment block fire with resulting death and injury; the Lane Cove balcony collapse and resulting injuries; and the Macquarie Park failure of a high level balustrade and resulting death. Beyond the human tragedies, building faults inflict a significant economic cost on the community.

The key underlying problems identified in this review are as follows:

- complex, hard to understand or navigate, prescriptive and inflexible legislation, regulation and codes, including the complying development codes. This makes it difficult for the industry, including certifiers, to understand and apply the regulations and produces a disconnect with best practice, given the difficulty of changing the regulatory approach:
  - one illustration of this problem is in the area of complying development where the successive governments have sought to increase the proportion of developments treated as complying developments. The industry is indicating that the current complying development policy framework is too complex and difficult to interpret and hence does not provide a robust and reliable framework at present suitable to expand the coverage of complying developments.
- fragmented and under-resourced administration of building regulation creating confusion and dissatisfaction in the industry and for consumers. It also negatively

impacts on the efficiency and effectiveness of regulation, and results in poor development outcomes. This includes a lack of adequate funding for councils to effectively undertake a building compliance role

- a largely paper-based building approval and certification information system which is inefficient, inaccessible and does not provide the data needed to monitor and assess the performance of the system and inform the development of sound policy
- a lack of clarity about the roles, responsibilities, functions and accountability of certifiers, which is clearly a major deficiency given the importance of the role of certifiers for the functioning of the regulatory system
- a less than ideal working relation between private certifiers and councils, at least in the metropolitan areas of the State, with a particular problem being confusion about respective roles in compliance and enforcement
- a building certification process for individual developments that has well documented deficiencies and requires a redesign along the lines set out in Chapter 8 of *A new planning system for NSW white paper* (Planning White Paper). These deficiencies contribute to poor development outcomes, consumer dissatisfaction and increased rectification costs:
  - one area that needs to be highlighted is the system for assessing fire safety systems for commercial buildings and apartment blocks. There is no certification process in place to properly assess fire safety systems and, while Fire and Rescue NSW has legislated responsibility to undertake a review role, it has neither the resources nor the technical capability to undertake this role, which in any case should not be its responsibility. There is clear evidence of non-compliant and hence unsafe fire safety systems in new and existing buildings.
- due to the under-resourcing of the system, complaints about certifiers can involve long delays to finalise, often of the order of six months to over one year. In addition there is inadequate training, education and support for certifiers
- the career of a certifier is not attractive under current conditions which are well documented from the certifier survey. There is the risk that the retiring certifiers over the next few years will not be replaced due to the lure of competitive professions, unclear role definition, lack of support and perceived liability. This will place increased pressures on the cost of development as well as remaining certification providers, including councils. A comprehensive strategy is needed to attract and retain certifiers with the right skills and values.

### **How to make the system work effectively?**

A number of themes have emerged from the review, which need to be taken into account in the design of any reforms.

First, a clear distinction needs to be made between the requirements of consumer protection, planning and building regulation. These have been conflated in the current system.

Building regulation is broader than and complementary to consumer protection in that it seeks to analyse and improve the functioning of the building industry and the resultant building product.

Planning and building regulation need to work in an integrated way in terms of process, with planning setting the strategic framework within which building operates. There is no suggestion to move away from an integrated planning and building regulation process. However, an apparent paradox is that integrating planning and building regulation in the one agency and in the one Act diminishes the effectiveness of and the focus on building regulation and hence reduces the effectiveness of the integrated planning and building regulation process.

Second, the key need is to ensure proper accountability and responsibility throughout the building industry, enhancing the accountability of certifiers to act as regulatory agents in the public interest but not to consider certifiers as the sole mechanism for accountability. Builders and all building practitioners need to be fully responsible for their work.

Third, it is vital to develop certification as a profession, with its own code, values and culture. Unlike builders and other building practitioners, certifiers have a regulatory role and need to act in the public interest. This can be assisted by creating the ethos and culture of a profession.

Fourth, the system of building regulation needs to be fully transparent and accessible, generating data that enables its performance to be assessed and the system revised and improved based on clear evidence. It is particularly important that there are clear objectives and measurable outcomes for assessing the performance of the system.

Fifth, there needs to be a broadening of the range of activities that are subject to accredited certification. In the area of building certification too much reliance and responsibility is placed solely on the building certifier. There is a case for allowing building certifiers to draw on specialist accredited certifiers in the area of town planning and, in the case of complex buildings, on certification of building design and the design, installation and commissioning of critical building elements and systems.

In regard to the terms of reference for the report, it is concluded that:

- it would be highly desirable to include a statement of objectives in the Act, but these would need to vary from those used for the review to reflect the broader role proposed for the BPB
- accordingly, as detailed in the report, the current provisions of the Act will need to be varied both to reflect a broader role and to address various concerns identified with the current provisions.

The remainder of the Executive Summary summarises the recommendations of the report and the targeted outcomes that are sought to be achieved.

The proposed reforms which are detailed in Chapter 17 can be summarised as follows:

1. Establish a clear principles-based legislative framework and a more flexible and responsive regulatory approach:
  - create a Building Act that is a principles-based framework, written in plain English, covering the subject matter of the building control provisions of the EP&A Act and the Home Building Act, with the detail of the regulatory approach covered in regulation and codes. If a separate building Act is not favoured, the existing building control provisions in the EP&A Act should be consolidated into one part of the Act and re-written on a principles basis.

- rewrite in a form suitable for use by the building industry the Complying Development SEPPs, in full consultation with the Office of Building Regulation and the industry
  - provide the flexibility for improvements in the regulatory approach in a timely manner as information is generated on the functioning of the system.
2. Consolidate and the building regulation function:
    - establish an Office of Building Regulation, consolidating in one area the currently three separate areas of DPE dealing with building regulation, the Home Building Services' building regulation functions and the building certification policy function currently undertaken by BPB. There is no need for a statutory authority to have this role
    - combine the licensing of building practitioners with the accreditation of certifiers under the responsibility of a statutory authority, supported by the Office of Building Regulation so that one area can handle the function, including addressing complaints
    - the Office of Building Regulation and the BPB report to a Minister for Building Regulation
    - Reconstitute the Building Regulation Advisory Committee as the industry body advising the Minister for Building Regulation.
  3. Development and implementation of an information systems strategy directed at generating data on the performance and outcomes achieved, involving standardisation and digitalisation of all building regulation instruments, greater access to and transparency of information and more efficient processing of building approvals
  4. Enhance the accountability of certifiers to act in the public interest
  5. Establish a partnership model between the State and local government, with full consultation and involvement with industry, to oversight an effective working relationship on building regulation, with two key priorities:
    - develop, implement and monitor a protocol governing the relation between private certifiers and councils, including roles and responsibilities with respect to compliance and enforcement. It would be advisable, in the light of the work already undertaken by BPB and local government representatives in developing a Framework in this area, to progress this in conjunction with the Practice Guide and ahead of the formal partnership agreement.
    - develop and implement an Information Strategy for building regulation.
  6. Establish a best-practice building regulation and certification process, drawing on the proposals set out in Chapter 14, with prioritisation of reform of the fire safety regulation system and certification of waterproofing, with the approach based on the following principles:
    - holistic approach, addressing each stage of the building process, covering design and approval; construction; completion and maintenance
    - risk based, placing most focus and responsibility on the areas of higher risk
    - accountable, placing proper accountability on those responsible for building work



- transparency, ensuring that there is full information against which to assess the performance of the certification system.
7. Progress the professionalisation of certifiers through an improved education and training program, enhanced support for the “in the field” work by certifiers and improved access to traineeships and an enhanced career path.
  8. Refocus of the complaints handling process for certifiers on identifying and dealing with the underlying consumer and community concerns in a timely manner and applying a broader range of possible sanctions on non-performing certifiers, including penalty infringement notices and demerit points.
  9. Enhance the coverage and sustainability of professional indemnity insurance for certifiers by introducing an industry scheme with approved insurers, run-off cover and an active risk management scheme.
  10. Adequately resourcing the Office of Building Regulation, the BPB and local government with respect to building compliance in order for those organisations to be able to undertake their designated roles effectively, with an appropriate mixture of funding from general revenue, fines and industry funding.

### **Targeted outcomes**

The reforms set out above are directed at achieving a range of important community and economic benefits which are further elaborated in Section 17.2, including:

- **evidence based approach**

An integral part of the proposed reforms is to create and maintain a data base that provides the evidence against which to assess the performance of building regulation and guides adjustments of the approach to ensure that a best practice approach is attained and maintained. The data base will track activity in the building sector and how building applications are being processed and how projects are progressing but it does more than that. The key target outcomes to be achieved as set out below will be measured and tracked over time.

- **improved quality, safety and amenity of buildings**

The improved certification process and the increased accountability of certifiers for acting in the public interest will improve the quality of the building product, to the benefit of the community and the economy in general.

Key initiatives to drive this improvement include the requirement for building plans for Class 2 to 9 buildings to be prepared and certified by accredited persons; the requirement for the design, installation, commissioning and maintenance of critical building systems and elements to be undertaken and certified by suitably accredited persons; a completely revised approach to the design, installation, commissioning, certification and maintenance of fire safety systems in complex buildings, giving greater confidence in the integrity and effectiveness of fire safety systems; greater accountability, support and consistency in the undertaking of the certification process for all buildings; and Peer Review Panels to review higher risk building systems and elements.

In the area of strata and community title buildings, where there is evidence of a higher than acceptable level of building defects, the reforms will seek to improve the

certification process during construction rather than waiting to the stage of consumer complaints and defect rectification. There will be a more active involvement by the BPB in the appointment of certifiers for strata and community title buildings and a more active audit program of the certification and building process.

- **providing a robust foundation for the expansion of complying developments**

The Government has a commitment to expand the range and level of developments that can be handled as complying developments. The objective is to reduce the costs and delays in proceeding with developments, while ensuring conformity with planning and building requirements. However, the effectiveness of this initiative is vitally dependent on the effectiveness and integrity of the certification process leading to the issue of the CDC. The evidence is that the system is not as effective and thorough as needed to have confidence in the outcomes generated through the Complying Development process.

A precondition to expanding the Complying Development program and having confidence in the quality of the developments that are undertaken through this process is to rewrite the Complying Development SEPPS so that there is full clarity by builders, owners and certifiers about what is required. In addition the certification process needs to be strengthened and focussed on the public interest. The reforms proposed in this report will achieve these aims and hence facilitate the Government's objective of increasing the range and proportion of developments handled as Complying Developments.

- **achieving both greater confidence in and greater take up of alternative building solutions**

The National Construction Code, which sets out building standards, is performance based. This means that you can conform to the standards, which is "deemed to satisfy" the performance standards or else you have the ability to develop and implement alternative solutions to the standard which need to demonstrate that they meet the performance requirements. The alternative solution both encourages innovation in building design and approach and potentially improves productivity and lowers costs.

However, there is a higher risk attached to alternative solutions and a higher technical requirement to evaluate them. Under the current approach there is not full confidence that alternative solutions are being properly evaluated and installed and there is a lack of information on what alternative solutions are in place and their maintenance requirements. The proposed reforms to address these deficiencies include creating a Peer Review Panel approach to assess complex and higher risk alternative solutions; expanding the range of certifiers with the appropriate expertise to support building certifiers in assessing certification of critical building elements and systems; including in the building manual, which is required to be established for all complex buildings, information on alternative solutions and their maintenance requirements; and greater dissemination of information on alternative solutions that have been reviewed and found to be effective.

The reforms will provide a more robust review process for alternative solutions, giving greater confidence in the effectiveness of those solutions; provide readily accessible documentation on the alternative solutions in buildings; and disseminate information more widely on alternative solutions, thereby encouraging their take up.

- **a more informed community**

At present there is a lack of understanding and a level of frustration in the community about developments and the role of builders versus certifiers. In addition, where private certifiers are involved in developments, councils, at least in metropolitan areas, tend to avoid getting involved in compliance and enforcement activities. Members of the community are not aware of who is the responsible party for a development, how to seek additional information and to whom to complain, be it to the builder, the certifier, the BPB, Fair Trading or the council.

The reforms include a protocol to be agreed between councils and certifiers as to the responsibility for first actions where there are non-compliant matters regarding developments. In addition, it is proposed that there will be an online community notice board that provides information on all developments in the community, the details of the developments, the builder and certifier and contact details; and the contact persons for more information or for lodging complaints. Allied to these reforms will be a simplified and accelerated complaints handling process.

## **Conclusion**

There is broad industry support for the reforms set out in this report and a certain level of fatigue and frustration at the number of reviews undertaken and the lack of progress in addressing the well - documented problems.

The consequences of inaction will not necessarily be apparent for some time but there is a significant level of risk in the system that will, at some time, manifest itself in a major negative event. In such circumstances the worst of all worlds is to have a regulatory system that is ineffective and has been acknowledged as such.

## **Part A. Introduction and approach**

Part A describes the purpose and background to this review and, more specifically, the objectives of the *Building Professionals Act 2005*.

It also summarises the methodology of the review which included documentation review, face-to-face and written feedback and evaluation of the information gathered to date, noting that a further phase of consultation will be taking place through release of the draft report.

# 1 Purpose of the review and feedback on draft report

A review of the *Building Professionals (BP) Act 2005* must be completed before the beginning of December 2015 to comply with Section 97 of the BP Act.

The BP Act establishes the Building Professionals Board (BPB) to accredit and investigate private and council certifiers. These certifiers issue various types of certificates and conduct inspections to confirm that they are satisfied that development meets legislative requirements.

A requirement of the legislation is that the responsible Minister is to review the BP Act, with a report on the outcome of the review to be tabled in each house of parliament.

Supplementing the standard requirement for an Act review, the then Assistant Minister for Planning, now the Minister for Planning, the Hon. Rob Stokes MP, established a broad terms of reference for the review to consider the Act within its broader context of building regulation. The terms of reference states that that the review recommendations should cover the validity or not of the current policy objectives of the BP Act and its provisions and, where relevant, building regulation generally.

Since certification is only part of the system governing the construction industry and because the overall approach to regulating that industry impacts on the effectiveness of the certification process, the review takes into account the broader context of planning and building regulation. Accordingly, in response to the broad terms of reference, the review has considered the following matters that go beyond the specific confines of the BP Act:

- the legislative and policy framework within which certifiers operate including such legislation as the Environmental, Planning and Assessment (EP&A) Act, the Swimming Pool Act, the Home Building Act, the various associated regulations, relevant State Environmental Planning Policies and the National Construction Code
- the process that needs to be followed by certifiers in undertaking their role and responsibilities and the degree to which there is a lack of clarity with the requirements or questions about the effectiveness of the regulatory process
- how the role and operation of the BPB relates to other agencies involved in the building regulatory process and whether there is merit in reconfiguring the administrative structure to improve the efficiency and effectiveness of building regulation.

The appointment to conduct this review was made in September 2014. The terms of reference (**Appendix 1**) require completion of the report and submission to the responsible Minister by 31 October 2015. It should be noted that during the undertaking of this review responsibility for the BPB and the BP Act transferred from the Minister for Planning to the Minister for Innovation and Better Regulation. As this report covers the broad area of building regulation which impacts on both Ministers and indeed other Ministers, this report is submitted to the two Ministers.

Extensive consultation has been undertaken as required by the terms of reference, including meetings with key stakeholders, public hearings across NSW and meetings with regional and metropolitan councils. Supporting the public consultation was the

release in May 2015 of a discussion paper which provided necessary background, canvassed the issues and identified a range of possible reform options. The consultation program has been supplemented by the release of two questionnaires, one linked to the discussion paper which was available for all interested parties to respond to and a second questionnaire which was directed to accredited certifiers.

As required by the terms of reference this draft report has been released for public comment and feedback.

## 2 Objectives of the Building Professionals Act

Like several other operationally focused Acts of Parliament, the objectives of the BP Act are not explicitly stated within the Act<sup>1</sup>. However the policy objectives of the Act were clearly stated by the Government at the time of the introduction of the Bill, most importantly through the Second Reading speech for the Building Professionals Bill 2005.

In summary the policy objectives of the BP Act, as stated in the second reading speech, appear to be as follows:

1. create a simpler regulatory system (including by establishing a single, independent government authority to accredit all certifiers in NSW)
2. establish a uniform and robust accreditation scheme
3. promote and maintain standards of independence and professionalism in certification
4. provide for the BPB to have strong investigative, disciplinary and emergency powers to protect the safety and property of the public
5. improve the quality and safety of all building work
6. promote public confidence in the certification system.

Section 77 of the BP Act gives the BPB several functions to achieve these objectives:

- a) the accreditation of persons for the purposes of the *Environmental Planning and Assessment Act 1979* and the regulations under that Act
- b) the promotion and maintenance of standards of building and subdivision certification and design in New South Wales
- c) the investigation of complaints against accreditation holders
- d) the taking of disciplinary action against accreditation holders
- e) the investigation of certifying authorities, accredited certifier directors and building professionals
- f) the prosecution of offences against this Act or the regulations, or any offence under the *Environmental Planning and Assessment Act 1979* or the regulations under that Act that relates to accredited certifiers, certifying authorities or building professionals
- g) the review of the accreditation schemes under this Act
- h) the investigation of matters referred to it by the Minister for advice and report in relation to accredited certifiers and building professionals and the accreditation of accredited certifiers and building professionals
- i) the provision of advice to the Minister with respect to any other matter in connection with the administration of this Act
- j) such other functions as are conferred or imposed on the Board by or under this Act or any other Act.

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<sup>1</sup> Other Acts that do not contain objectives (but state functions and powers) include *Fair Trading Act 1987*, *Home Building Act 1989*, *Skills Board Act 2013* and *Safety, Return to Work and Support Board Act 2012*.

The terms of reference for this review require that an assessment be made of whether the current policy objectives continue to be valid, which of the policy objectives are no longer valid, whether the current provisions of the Act are appropriate for securing those policy objectives and whether new or additional policy objectives should be pursued or adopted.

However, success in achieving the underlying policy objectives, existing and any new ones, and assessment of their validity is contingent on factors beyond the BP Act. For instance, the BP Act deals with the certification profession but improving the quality and safety of building work also draws in the role and powers of certifiers under the *Environmental Planning and Assessment Act 1979* which regulates what certifiers can do on land use planning and building approval and compliance matters. Another important factor is the strong link between the role of the certifier and the roles and responsibilities of other parties within the construction and land subdivision process, in particular home builders regulated by NSW Fair Trading.

Notably, the terms of reference state that the review can make recommendations relating to building regulation generally.

## 3 Methodology for the review

### 3.1 Introduction

The approach followed in this review can be summarised as following a four stage process:

1. **Review:** undertaking a review of the relevant NSW legislation and the regulatory approach and administrative structures in both NSW and other relevant jurisdictions as well as the relevant reviews undertaken of the building regulation approach in NSW and other relevant jurisdictions.
2. **Obtaining Input:** meetings were held with internal and external stakeholders, industry, the general public and local government councils on how the system is operating, what is working well and what needs to be improved, how and why. This was supplemented, as noted earlier, by two questionnaires, one for the general community and one for certifiers.
3. **Evaluation:** an assessment was undertaken of the approach to building regulation and certification in NSW against the benchmark of good regulatory practice and administrative structures, the approach in other relevant jurisdictions and the objectives set for the BP Act and building regulation in general. This required an assessment of how to most effectively address the identified problems of the current system.
4. **Summation:** drawing conclusions and making recommendations.

Each of these stages in the overall review is explained in the remainder of this chapter.

### 3.2 Details on the methodology

#### Review

All the relevant legislation and regulation relevant to building regulation and certification have been reviewed, principally:

- the Building Professionals Act 2005 and Regulation 2007
- the Building Professionals Board Accreditation Scheme
- those parts of the Environmental Planning and Assessment Act and related Regulation dealing with building regulation and control
- State Environmental Planning Policies, including Infrastructure 2007 and Exempt and Complying Development Codes 2008
- Home Building Act 1989 and Regulation 2014
- Swimming Pools Act 1992 and Regulation 2008
- Draft practice guide prepared by the BPB Reference Group
- Draft policy papers prepared by the BPB Local Government Reference Group on framework for relations between Local Government and Private Certifiers.

In addition, information was obtained on relevant policies and practices that are undertaken.

All reviews relating to the regulation of the NSW building industry over the period since 2000 were assessed for relevance to this review and any relevant reform proposals considered. These reviews and their key findings are summarised in Chapter 6.



As part of the review process information was also obtained on the approach to building regulation and certification in other Australian jurisdictions and New Zealand. This was used as part of a benchmarking exercise in stage 3 and is reported in Chapter 8.

### **Obtaining additional input**

In the second stage information was sought from key government stakeholders and external stakeholders on how the system was perceived to operate areas where improvements should occur and views on possible reforms that could address the concerns. The processes for obtaining as wide an input as possible included the following:

- meetings were held with the parties charged with the responsibility for the administration of the building regulation and certification schemes in order to understand how they are administered, what outcomes are achieved and to identify ways in which administration could be improved
- meetings were held with all identified external stakeholders at which the issues identified to date were outlined and stakeholders invited to provide their views on these and any other issues they considered relevant. The list of stakeholder meetings is set out at Appendix 2
- a discussion paper was publically released which provided relevant background to the review and set out the identified issues, outlined possible solutions to those issues and posed questions as to the suitability of the solutions and sought more general comments. The discussion paper was released on the BPB website with a questionnaire which could be responded to by mail or online. In addition to this questionnaire, which was directed at the community in general, a second questionnaire was released for council and private certifiers to provide information on their approach to the role and feedback on relevant issues
- Public Hearings were scheduled in both Sydney and major regional centres throughout NSW. The meetings were preceded by the release of the discussion paper and were advertised in the press. In addition to the public hearings, at a number of regional centres meetings were arranged with various local councils. A list of the public hearings is provided in Appendix 2
- in addition to the two questionnaires, submissions were invited from the industry, interested parties and the general community. A list of submissions received is provided at Appendix 6
- the release of this draft report marks the next step in the process by providing the opportunity for further comment and input.

For this stage and each subsequent stage issues were divided into a number of categories in order that like or related matters could be considered together. These categories are as follows:

1. Governance structure of building regulation and certification
2. Use of e-technology to improve access to information, processing of transactions and management of systems

3. Building regulation and certification process, dividing issues into the following stages of the development process:

- planning and design approval
- certification to allow commencement of building work
- building construction
- completion
- building safety maintenance

In addition specific attention was given to two more general areas that transcended particular development stages, namely fire safety systems assessment and subdivision and strata certification.

4. Supply, accreditation, accountability, disciplining and oversight of certifiers

5. Resourcing and funding arrangements for building regulation and certification.

## Evaluation

In the third stage of the review, after considering all the input, the identified issues were assessed against the following considerations:

- the objectives of the BP Act
- the broad objectives and rationale for building regulation and certification
- the practices followed in other jurisdictions assessed in terms of efficiency effectiveness and appropriateness
- the broad characteristics of best practice regulatory approach and the extent to which current practice may diverge from best practice
- principles of good administrative structure.

In addition an independent cost benefit analysis has been commissioned that will assess the benefits likely to accrue from reforms against any costs imposed by those reforms. The results of that analysis will inform the final report.

## Summation

Once the earlier stages had been completed and the information assessed, both the issues and the reforms were grouped into a number of themes and were prioritised. In particular priority was given to reforms that would have a broad positive impact on the effectiveness of the overall building regulation system and building outcomes. It is important that any reforms are assessed in terms of not only the benefits that they would generate but also in respect to any costs that may arise. As noted above, work is underway on a cost benefit assessment of the proposed reforms and the results will be incorporated in the final report.

Finally, a process for staging the reforms was developed, noting that it is not possible or indeed desirable to implement the reforms all at once but instead they need to be staged. A number of the reforms require more detailed consultation to test and refine the detail.

## **Part B. Background**

Part B provides a description of the NSW building and construction sector (Chapter 4) as well as an overview of the approach followed in NSW in the regulation of building and certification (Chapter 7).

It also identifies and assesses the rationale for building regulation, which is addressed in Chapter 5, along with the identification of what are generally considered from the literature to be good practice attributes for the design and operation of regulatory systems. These attributes or characteristics are drawn in Chapter 10 in Part C to assess the current building regulation and certification system.

A notable feature of the building sector in NSW is the number of reviews that have been conducted over the last fifteen years. While the terms of reference direct that the review takes into account a number of these reviews, it is in fact common sense to examine all past reviews to draw on the assessments made. This is reported in Chapter 6.

It is desirable to assess the building regulation system against comparable systems applying elsewhere. Accordingly, a survey has been undertaken of the operation of building regulation and certification in each Australian state and territory as well as New Zealand. In addition, a selective examination was undertaken of the building regulation system in a range of European countries to assess whether there were significantly different approaches adopted in other developed economies. This is reported in Chapter 8.

## 4 An overview of the NSW building and construction sector

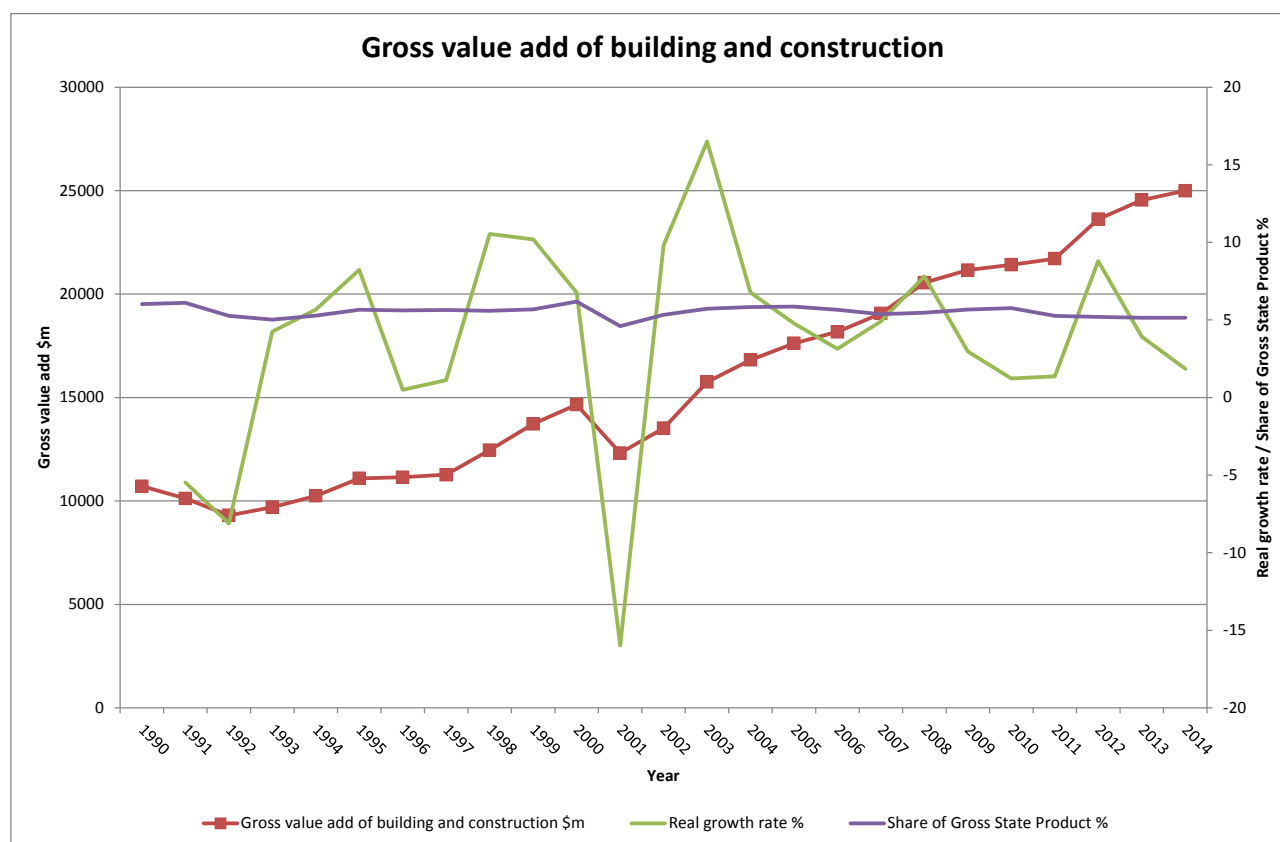
### 4.1 Introduction

The NSW building and construction industry employs broadly 255,000 persons on a full time equivalent basis which is about 9.9% of the total state labour force. In 2013-14, the latest year for which this data is available, the building and construction industry generated over \$25 billion in gross value added which accounted for 5.1% of the Gross State Product. The higher share of the labour force than the share of Gross State Product reflects the labour intensive nature of the industry.

### 4.2 Trends

The trend in the level of gross value add, which measures the industry's contribution to Gross State Product, is shown in Figure 4.1, both in constant dollar terms and in terms of growth over the previous year. While in real terms the value of the contribution of the building and construction industry has risen steadily over the period since 1990, it has remained broadly constant, at 5%, as a share of Gross State Product. The line showing the year to year growth rate of value add in real terms demonstrates the quite cyclical nature of the industry.

Figure 4.1



Source: Australian Bureau of Statistics, gross value added by industry

There is also data available that measures building approvals, both in number of approvals and the value of approvals. Unlike gross state product data this measures not the actual level of expenditure as it occurs but rather the level of building approvals as they are approved. The benefit of using building approval information is that it provides a forward indication of the activity level of the industry and also allows for a dissection of the activity level by types of buildings and by location.

The value of approvals (the sum of development approvals and complying development approvals) in 2013-14 was \$28.7 billion up 17% on the previous year in value terms it has grown by 11.4% per annum over the period 2009-10 to 2013-14.

**Table 4.1 Number and value of approved DAs and CDCs by financial year**

	Number 2009/10	Number 2010/11	Number 2011/12	Number 2012/13	Number 2013/14	% change 2013/14 compare d 2009/10	Value 2009/10 \$m	Value 2010/11 \$m	Value 2011/12 \$m	Value 2012/13 \$m	Value 2013/14 \$m
Residential - Alterations and additions	34752	32808	28665	27262	30182	-15.1%	2,209	2,340	2,292	2,442	2,834
Residential - Single new dwelling	17139	16597	16278	16767	19583	12.5%	4,648	4,968	5,013	5,141	6,054
Residential - New second occupancy	1511	2159	2411	2867	4818	68.6%	443	592	593	659	1,149
Residential - New multi- unit	922	1002	1089	1535	1120	17.7%	1,359	2,220	3,056	4,278	3,804
Residential - Other	3391	3420	3343	3269	3718	8.8%	1,360	996	1,133	1,518	1,333
Tourist	287	286	274	279	277	-3.6%	202	195	88	182	134
Commercial / retail / office	10155	10242	9162	9524	8758	-16.0%	3,171	3,753	3,761	3,732	3,486
Mixed	476	437	457	565	469	-1.5%	1,057	1,633	2,400	2,574	4,742
Infrastructure	343	286	264	283	299	-14.7%	219	117	131	324	194
Industrial	1692	1781	1618	1469	1462	-15.7%	809	1,027	964	1,074	1,413
Community facility	1959	1037	923	961	808	-142.5%	2,047	919	1,069	757	1,026
Subdivision only	3030	3058	2827	2598	2778	-9.1%	208	278	306	620	551
Other	7040	6556	6082	6744	7464	5.7%	802	601	730	967	969
Non-standard category	1195	1478	1087	752	2423	50.7%	103	227	585	219	996
<b>Total</b>	<b>83892</b>	<b>81147</b>	<b>74480</b>	<b>74875</b>	<b>84159</b>	<b>0.3%</b>	<b>18,637</b>	<b>19,866</b>	<b>22,121</b>	<b>24,487</b>	<b>28,685</b>

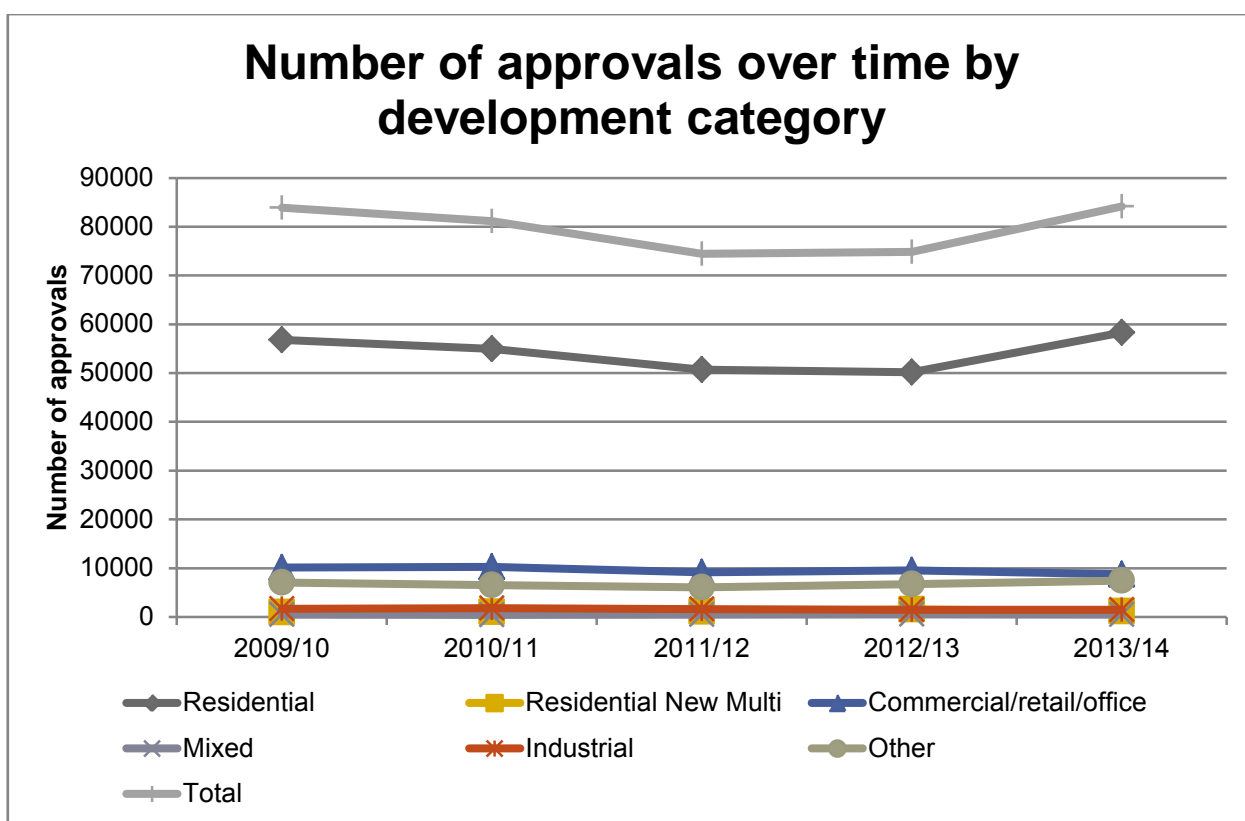
Source: Local Development Performance monitoring data, DPE

It should be noted that there is evidence of systematic underestimation of the value of building development reported to councils given that there is a financial incentive for owners and developers to underestimate the value of building work so as to minimise the DA fee payable.

The largest component of building approvals is for residential construction which in 2013-14 accounted for 47.4% of the total value of approvals. The other significant categories of approvals in 2013-14 were commercial/retail/offices which was 12.2% of the total, mixed developments which was 16.5% and industrial which was 4.9%.

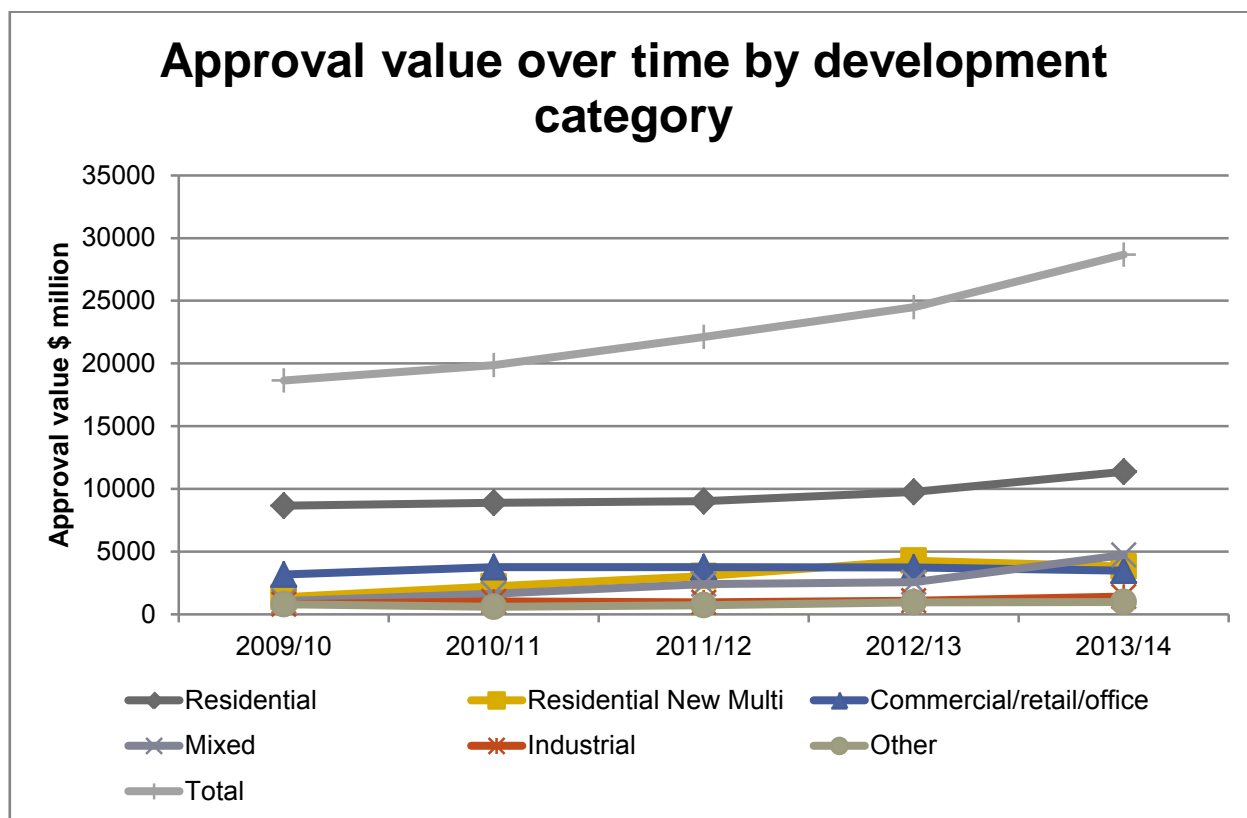
The trend in the share of the total by category is shown in Figures 4.2 (by number), and 4.3 (by value). Residential building applications by number and value are the predominant form of building approved under development applications and complying development approvals. There has been significant growth in the value of residential multi-unit developments over the period.

Figure 4.2



Source: Local Development Performance Monitoring data, DPE

Figure 4.3



Source: Local Development Performance Monitoring data, DPE

Set out in Table 4.2 is the value of approvals split between development approvals and complying development consents.

**Table 4.2 Value of Approvals DA and CDC**

YEAR	DA Value \$m	CDC Value \$m	% share DA versus CDC
2009/10	15657	2979	84: 16
2010/11	18040	1827	91: 9
2011/12	19878	2242	90: 10
2012/13	21458	3028	88: 12
2013/14	24259	4427	85: 15

Source: Local Development Performance Monitoring data, Department of Planning and Environment

Over the five year period there has been little change in the split between DAs and CDCs, though there has been growth in the relative size of the CDC component in the last two years. CDCs increased in value terms in the two years to 2013-14 by 97%. With the expansion in 2014 in the categories of developments that were classified as complying developments, it is likely that this trend will continue.

Most of the development occurred in the Sydney Region, accounting for 75% of DAs and CDCs by value in 2013-14 approvals. Each of the other regions account for between 5% and 7% of the value of building approvals.

**Table 4.3: Number and value of DAs + CDCs by region**

REGION	2009/10		2010/11		2011/12		2012/13		2013/14	
	Number	Value	Number	Value	Number	Value	Number	Value	Number	Value
NSW Total	83,892	\$18.6 b	81,147	\$19.8 b	74,480	\$22.1 b	74,875	\$24.5 b	84,159	\$28.7 b
Hunter	10,397	\$1.7 b	10,058	\$1.6 b	9,503	\$2.1 b	9,511	\$2.1 b	10,167	\$1.9 b
Murray / Murrumbidgee	7,266	\$0.9 b	6,287	\$1 b	5,801	\$0.8 b	5,665	\$0.9 b	6,185	\$1.1 b
Sydney	42,346	\$11.9 b	43,042	\$13.4 b	39,815	\$15.8 b	40,424	\$17.9 b	46,869	\$21.5 b
Western	8,114	\$1.2 b	6,992	\$1.1 b	6,659	\$1 b	6,852	\$1.3 b	6,868	\$1.3 b
Southern	7,703	\$1.5 b	7,495	\$1.6 b	6,610	\$1.2 b	6,525	\$1.2 b	7,298	\$1.5 b
North Coast	8,066	\$1.3 b	7,273	\$1 b	6,092	\$1 b	5,898	\$1 b	6,772	\$1.2 b
Wollongong	3,013	\$0.6 b	2,801	\$0.6 b	2,360	\$0.3 b	2,442	\$0.3 b	3,022	\$0.5 b
Newcastle	7,612	\$0.3 b	7,589	\$0.3 b	7,153	\$0.6 b	7,244	\$0.4 b	7,837	\$0.5 b

Source: Local Development Performance Monitoring data, DPE

### 4.3 Building quality and defects

There is much anecdotal evidence cited in the press that would indicate that there is a significant issue with the level of building defects. The use of the term building defects is used to refer to buildings and their elements not functioning to plan or specification rather than simply referring to poor workmanship. However, a significant amount of the data on building defects is self-reported, being complaints based data and hence it is not possible to extrapolate from that to broader conclusions about the state of the building stock. This section reviews what evidence is available on defects, which includes both complaint data and a number of surveys that have been undertaken.

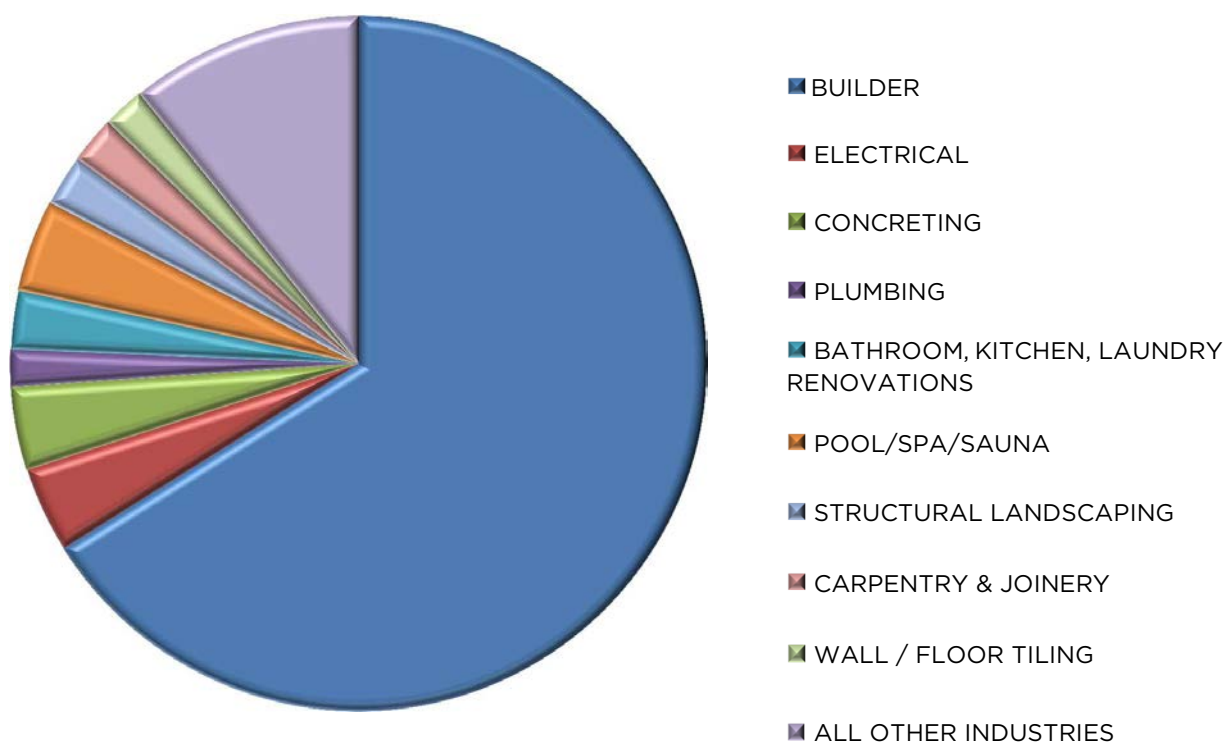
In NSW, Fair Trading records complaint data to capture information both on the level of complaints and what concerns generate the complaints. It needs to be noted that the data is self-reported and does not reflect any investigation and assessment by Fair Trading. Further, the data only relates to residential housing given that is the only sector subject to consumer protection. Nevertheless it gives an indication about the nature of concerns by consumers about recent home building work. For the latest period, 2014-15, there were 1829 house construction complaints lodged.

The great bulk of home building complaints, some 66% in 2014-15, concern the builder and the balance of the complaints is relatively evenly spread over a number of professions and trades. This is not surprising given that the builder undertakes the role of principal contractor and coordinates the overall project.



**Figure 4.4: Home Building Complaints By Industry**

Industry	2013-14	2014-15
BUILDER	62.20%	66.09%
ELECTRICAL	6.14%	3.98%
CONCRETING	3.76%	3.87%
PLUMBING	2.82%	1.73%
BATHROOM, KITCHEN, LAUNDRY RENOVATIONS	3.00%	2.72%
POOL/SPA/SAUNA	2.42%	4.29%
STRUCTURAL LANDSCAPING	1.57%	2.35%
CARPENTRY & JOINERY	1.79%	2.20%
WALL / FLOOR TILING	1.57%	1.94%
ALL OTHER INDUSTRIES	14.73%	10.83%

**2014-15 Financial Year**

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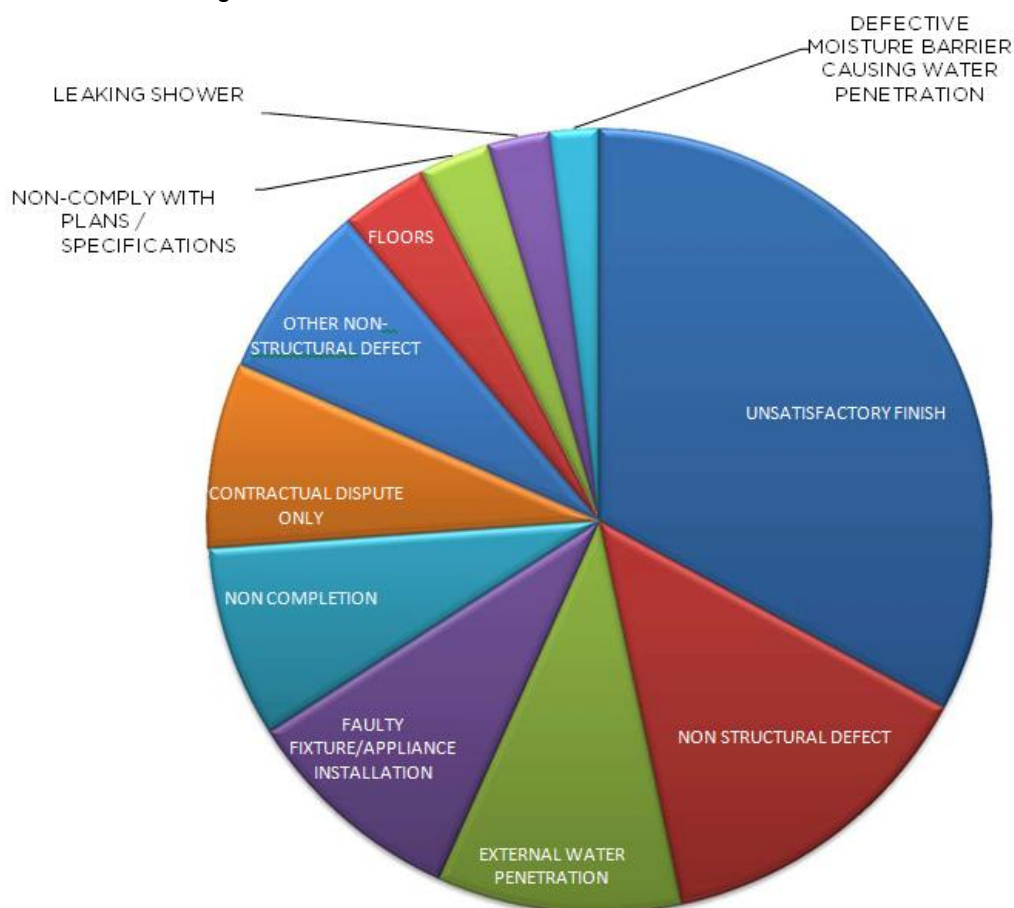
Source: Residential buildings defects data (NSW Fair Trading, Department of Finance, Services and Innovation)

In terms of the nature of the defect, about 30% relate to the quality of the finish and a further 13% to other non-structural matters. Water penetration is another significant problem area accounting for 11% of defects.

**Figure 4.5: Home Building Complaints By Defect**

Defect	2013-14	2014-15
UNSATISFACTORY FINISH	29.24%	30.25%
NON STRUCTURAL DEFECT	13.21%	13.03%
EXTERNAL WATER PENETRATION	9.00%	10.68%
FAULTY FIXTURE/APPLIANCE INSTALLATION	7.70%	4.87%
NON COMPLETION	7.43%	6.28%
CONTRACTUAL DISPUTE ONLY	6.72%	7.17%
OTHER NON-STRUCTURAL DEFECT	6.31%	5.55%
FLOORS	2.96%	2.67%
NON-COMPLY WITH PLANS / SPECIFICATIONS	2.15%	2.93%
LEAKING SHOWER	2.42%	2.35%
DEFECTIVE MOISTURE BARRIER CAUSING WATER PENETRATION	2.55%	0.68%
ALL OTHER DEFECTS	11.89%	13.55%

**2014-2015 year to date**



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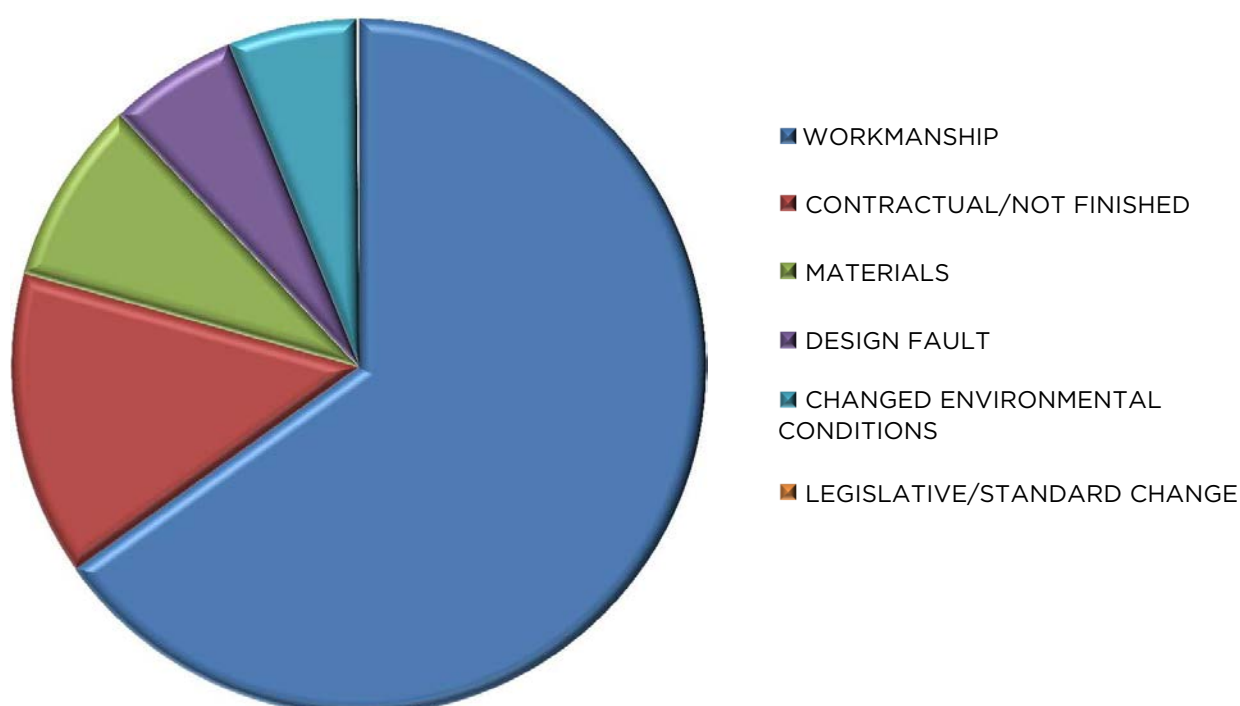
Source: Residential buildings defects data (NSW Fair Trading, DPE)

The major cause of complaints is, not surprisingly, workmanship which in 2014-15 accounted for 65 % of complaints with defects in materials accounting for 9% and design faults accounting for 6% of complaints.

**Figure 4.6: Home Building Complaints By Cause**

Cause	2013-14	2014-15
WORKMANSHIP	63.8%	65.1%
CONTRACTUAL/NOT FINISHED	14.1%	14.2%
MATERIALS	10.8%	8.6%
DESIGN FAULT	6.4%	6.0%
CHANGED ENVIRONMENTAL CONDITIONS	4.6%	6.0%
LEGISLATIVE/STANDARD CHANGE	0.2%	0.2%

### 2014-15 Financial Year



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Source: Residential buildings defects data (NSW Fair Trading, DPE)

A broader based survey is the Australian Consumer Survey 2011, undertaken in June 2011 on behalf of all Australian Governments<sup>2</sup>. The survey was based on a sample of 5315 consumers selected at random and stratified to reflect the broad population. The survey identified that nationally 28% of consumers who had purchased in the building/renovation sector in the last two years (2980 persons from the survey) had experienced problems, with 63% relating to poor workmanship. The incidence of problems in NSW was slightly higher than the national average at 30%. This is broadly consistent with the complaints data from Fair Trading but in this case it is derived from a sample and hence does not suffer the self-selection bias of complaints based data.

City Futures Research Centre at the University of NSW undertook a survey of strata owners, managers and peak bodies with the results published in May 2012<sup>3</sup>. The survey focussed on strata title properties and covered governance and the concerns of strata owners. The reason for the focus on strata title was the growing importance of strata living which at the time of the report accommodated more than three million people nationally, with the most located in NSW. Involved in the survey were 1550 individuals, including 1020 strata owners, 413 executive committee members, 106 strata management agents and 11 peak body representatives. The survey was sent to a randomly selected 10,000 strata owners across NSW. The responding 1020 were compared with owner occupiers as per the ABS census and were shown to have broadly similar demographic characteristics. Building defects were identified as a major concern by strata occupiers, with 72% of all respondents and 85% of respondents in buildings built since 2000 indicating that they had identified two or more building defects. For owners of schemes built since 2000 that had defects, 75% said there were still defects that had not been fixed. Most common of the defects were internal water leaks, cracking to internal and external structures and external water penetration. This survey, while based on a sample of the population of strata owners, is subject to a degree of self-selection bias.

Most recently Queensland's Griffith University has undertaken a national survey of strata-titled property. The owners identified poor building quality and construction problems as the top concern of owners while it was ranked in the top five problems by resident building managers. The details of the survey will be released in September 2015.

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<sup>2</sup> Australian Consumer Survey, 2011, June 2011, the Australian Government

<sup>3</sup> City Futures Research Centre, UNSW, Governing the Compact City: The role and effectiveness of strata management, Final Report, May 2012

## 4.4 Conclusions

The NSW building industry is a significant generator of economic activity and a major employer, both in the metropolitan areas and regionally. The residential sector, both single and multi-unit, is the largest sector in the industry, with the most significant trend in recent years being the growth in multi-unit construction.

Data on building defects is not systematically collected and where collected, either in the form of complaints or from surveys, tends to focus on residential buildings. This reflects the view that the commercial sector is qualitatively different from the residential sector in that it reflects contractual arrangements between experienced and expert owner/developers and commercial, large scale builders. The data that is available in respect to defects in the residential sector indicates a significant incidence of defects, reflecting workmanship and the role of the builder.

## 5 Rationale for building regulation and characteristics of best practice regulation

### 5.1 Introduction

This chapter is concerned with identifying the rationale for government regulation in the building industry and the form such regulation should take. The key questions to be addressed are as follows:

- Is there a rationale for government regulation of the building industry?
- If there is a rationale for government regulation, what form should it take?
- What are the broad characteristics of best practice regulation?
- To what extent is building regulation in NSW “fit for purpose” and conform to principles of best regulatory practice?

The first three questions are addressed in this chapter and the fourth question is part of the assessment reported in Chapter 10.

### 5.2 Rationale for regulation of the building industry

In market economies there is a general presumption that the most efficient and effective way to deliver goods and services that are private in nature and do not have the characteristics of public goods<sup>4</sup> is through the operation of the market mechanism. Governments have a role in intervening where a market mechanism will not be fully effective owing to some level of market failure or due to broader social and environmental considerations that are not captured in the market.

In its review of building regulation, focussing on the work of the Australian Building Codes Board (ABCB) and its work with the National Construction Code (NCC), the Productivity Commission identified a number of characteristics of the building industry which could justify a level of government intervention in the form of regulation, though within the context of a competitive, market based industry. These characteristics relate to the complexity of the building process and the long timeframe over which buildings provide services. The key factors which could justify some level of regulation are set out below.

#### 1. Complex and asymmetric information in the building industry

Buildings are complex, diverse, require major investments and provide long term services. In certain sectors of the building industry, typically the residential sector, the consumer or owner does not have extensive knowledge of the industry, building standards and techniques or the quality of the builders. Further, the consumer infrequently participates in the industry but when the consumer does it is usually a major expenditure item relative to net worth. Within the strata title multi-unit

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<sup>4</sup> By public good is meant a good that is both non-excludable and non rivalrous, that is an individual cannot be effectively excluded from the use or benefit of the good and the use by an individual does not reduce the availability to others. Classic public goods are defence, national security, flood control and street lighting.

residential sub sector, the ultimate owners of the development are not present at the time of the planning, commissioning and construction stages. Instead the developer, who may also be the builder, is the owner at these stages. There is no reason why there would be complete alignment between the interests of the builder/developer and that of the ultimate owner of the units.

For individual residential consumers it is a major investment, perhaps the largest investment they will make in their life. The relative infrequency of making a decision to commission a new residential building or acquire a new residential unit and the complexity of the planning and building processes act as significant barriers to effective decision making and control by the residential consumer. This is even the case where a consumer, wisely, commissions an adviser such as an architect to oversight the project. However, most consumers do not avail themselves of this assistance.

Aspects of buildings which can be subject to significant information gaps include the following:

- quality and use of materials
- structural soundness and safety
- effectiveness of fire protection
- ability to withstand storms and high winds
- thermal and water proof standard
- safety of electrical systems and energy efficiency
- trade-off between capital cost and maintenance.

There are different segments of the building industry such as the commercial, retail and industrial sectors where the consumer/owner/developer may have extensive knowledge and experience and is a fully informed, expert consumer. In such cases there is reasonable balance in the level of knowledge, and experience between the two sides of the transaction. In such sectors there is less of a case for market intervention to protect the consumer but nevertheless there is still a case for regulation based on other considerations such as safety.

There are market based mechanisms for seeking to address information asymmetry such as contracting experts or undertaking research of a builder's track record and professional standing or using insurance to cover the financial consequences of risk. However, the reality is that consumers, and in particular residential sector consumers, do not generally avail themselves of such protections or are not aware of how to access and effectively use such protections. Where insurance is used as a mechanism to ensure appropriate building standards are met, such as in France, there is still regulatory intervention in the form of both establishing the building standards and also mandating the requirement for building insurance and what the insurance is to cover.

The special circumstances of building and in particular of the residential sector are the reason that in NSW and many other jurisdictions there is legislation in place with the objective of assisting and protecting consumers in the residential building sector.

## 2. Spill-over or external impacts

Spill-over impacts, which are often called externalities, can be either positive or negative and relate to benefits (a positive spill-over or externality) or costs (a negative spill-over or externality) that accrue to people without either paying for it (a positive spill-over) or being compensated for the cost (a negative spill-over).

The erection of high quality buildings in an area has a positive spill-over effect on property values of buildings in reasonable proximity. The opposite effect is true in the case of the erection of poor quality buildings. The Productivity Commission identified as another positive spill-over building research which, with full reliance on the market, would tend to be underinvested in as the full benefits cannot be captured by an individual investor in research. This is because the investor in research could find it difficult to prevent others in the industry from copying the new approach or technique. This can lead to under investment in research. This tendency is compounded by the characteristic of the industry having a large number of small to medium builders operating in a competitive market who do not have the scale to justify undertaking research. This can result in government funding investment in research which is made available generally to the industry. The operation of the ABCB is an example of this through ABCB funding research and embodying the results in the NCC, which is freely available to the industry.

Negative spill-over effects include unsafe and poor quality buildings which can be a danger to users, be they residents or workers or pedestrians. A classic example of a negative spill-over is a building having a defective fire protection system which, potentially, can mean that a fire is not contained, impacting on those in the building, spreading to adjoining buildings and impacting on the nearby community. Another classic case of a negative spill-over or externality is the use of unsafe materials such as asbestos or flammable material.

## 3. Environmental and social policy concerns

The third factor that could justify regulatory action is government environmental and social policy. Examples include requiring suitable access for the disabled, providing accommodation for those on low incomes and establishing environmental and sustainability requirements for buildings, including energy and water efficiency. These factors need not justify regulation as the form of government intervention though that is typically the approach used in regard to access requirements. In regard to accommodation for low income persons, this can be achieved through income and rental assistance though it has also been achieved in Sydney with the affordable housing initiative which provides regulatory incentives for the provision of affordable housing.

In recent years, at least in developed economies, there has been a noticeable trend towards sustainable and environmentally friendly building requirements. This is a major trend in European building regulations and standards, which is being driven both at the centre, by EU, as well as by individual countries.

Establishing a case for regulation is only the first step. It is then necessary to determine whether it is the most effective intervention mechanism to address the identified problem and then whether the net benefits of regulation are positive.



If regulation is assessed as the most appropriate form of intervention and it generates a positive net economic benefit, it is still necessary that it be designed in an economically efficient manner and possibly rely on market based incentives.

### 5.3 Appropriate forms of building regulation

Given the identified rationale for government regulation in Section 5.2, the question is what form of regulation would be justified by such factors? The answer is that regulation that is cost effective and economically efficient and proportionate to the issue being addressed would be justified to achieve the following:

- establish minimum acceptable building standards and standards for critical elements in a building
- establish requirements for building materials
- license building professionals to ensure that they have an appropriate level of skill and experience for the role undertaken
- establish a suitable mechanism to ensure buildings meet the minimum required building standard
- provide education and advice to consumers about the purchase of buildings
- establish standard building contracts with suitable disclosures and consumer protection
- provide some level of consumer protection at least for housing purchases and construction to resolve disputes in an efficient manner.

The first four activities above regulate the form that the building activity takes while the last three activities concern regulation of the contractual relations between the consumer and the service provider.

While there has not been general assessment of the costs and benefits of all forms of building regulation in Australia, a cost benefit analysis was undertaken by International Economics Consulting of the national building standards. That study concluded that national building standards generated a net economic benefit of \$1.1 billion per annum.

### 5.4 Characteristics of best practice regulation

There are numerous guides to best practice regulation, including the following:

- Council of Australian Governments, Best Practice Regulation: A function for Ministerial Councils and National Standard Setting Bodies, October 2007
- OECD Recommendations of the Council on Regulatory Policy and Governance, 2012
- OECD Best Practice Principles for Improving Regulatory Enforcement and Inspection, August 2013
- Guide to Better Regulation, NSW Department of Premier and Cabinet, November 2009
- New Zealand Treasury, Best Practice Regulation: Principles and Assessment, February 2015
- IPART, Reforming licensing in NSW, Regulatory Review Issues Paper, October 2012.

These various guides and others have been drawn on to produce a set of regulatory best practice principles which are set out in Table 5.1. These have been set at a

relatively high level. While regard has been had to all the above documents, particular attention has been given to the New Zealand Treasury and IPART documents. The New Zealand Treasury set of principles has been used to assess all New Zealand regulatory schemes and hence has been tested on a wide range of regulatory schemes. The IPART report is one of two IPART documents to which the terms of reference explicitly refers to consider the implications of the report for the review. The IPART report of reforming licensing includes a draft framework prepared by PWC to assess licensing arrangements. This has been drawn upon in developing the best practice principles set out in Table 5.1.

The principles have been divided into two parts: part one sets out what are termed prior principles, which are the requirements or preconditions for establishing the case for regulation while part two is design principles, setting out the broad features or characteristics which regulatory systems should follow.

**Table 5.1: Best Practice Regulatory Principles**

Attribute	Principle	Desired Characteristics
<b>Part 1: Prior Principles</b>		
Scoping	A case for action should be established and all feasible options assessed, including all non-regulatory options	Define and assess the problem Identify and assess all feasible options to address the problem
Net benefit maximisation	The approach that generates greatest net benefit for the community should be selected	The assessment of net benefits is fully transparent and accountable
Consultation	Full and effective consultation with all affected stakeholders during the regulatory design stage and thereafter throughout the regulatory cycle	All relevant stakeholders are identified and the input obtained and assessed Feedback is provided to stakeholders and the opportunity provided to comment on the draft approach
<b>Part 2: Design Principles</b>		
Market compatible	Every effort should be made to utilise market mechanisms and incentives and to avoid distorting the economy and markets	The impact of the regulatory regime on the economy and markets is assessed and every effort taken to minimise adverse economic impacts
Proportional	The scope and burden of regulatory rules and their enforcement should be proportional to the benefits that are expected to be generated	Risk based, cost benefit framework is utilised for rule making and enforcement
Flexible and adaptable	The regulated entities have the scope to adopt least cost and innovative approaches to meeting their regulatory obligations and the regulatory system has the capacity to evolve and	Regulatory approach is performance based and is administered in a responsive and flexible manner Non regulatory approaches such as self-regulation are used wherever possible Feedback systems are in place to assess

Attribute	Principle	Desired Characteristics
	refine its approach over time	how the system is operating The system is fully up to date with technological and market change and societal expectations
Certain and predictable	Regulatory entities have certainty and clarity about their obligations and there is predictability and consistency in the action of the regulator	Clear and available information and advice for regulated parties Clear and transparent decision making criteria with certainty and consistency of process and outcomes
Transparent, accountable and evidence based	The development and implementation of regulatory rules and enforcement should be evidence based and fully transparent	All regulated entities and stakeholders have full information on the regulatory system Regulators justify decisions and are subject to public scrutiny
Capable regulators	The regulator must have the right resources, skills and systems to operate an efficient and effective regulatory approach	The capacity of the system against demands on it is regularly assessed and resources are adjusted accordingly Skills and knowledge of the regulator and its agents is upgraded on an ongoing basis
Outcomes focussed	The performance of the regulatory system should be assessed against the objectives set for the system and based on measurable outcomes	Regular reporting of outcomes and against objectives

Source: IPART, *Reforming Licensing in NSW, Regulatory Review Issues Paper, October 2012*

## 5.5 Conclusions

There is a solid case for undertaking an appropriate level of regulation in the building sector, directed at addressing in an efficient and effective manner the areas of externalities or spill-over costs and benefits identified in this chapter that characterise the building and construction sector. A set of prior and design principles has been identified against which to assess the regulatory approach applied in NSW to the building sector. This is addressed in Chapter 10.

## 6 Recent relevant reviews

### 6.1 Introduction

The terms of reference require a review of reports relating to building regulation reform or certification of building work produced since the BP Act was assented to. In addition there is an explicit requirement in the terms of reference to consider the following reports:

- the 2002 report by the Joint Select Committee on the Quality of Buildings
- Building Certification and Regulation-Serving a New Planning System for NSW, George Maltabarow
- IPART draft report, Local government compliance and enforcement, October 2013
- IPART Issues Paper, Reforming licensing in NSW, October 2013
- Draft Home Building Regulation 2015 and associated Regulatory Impact Statement

Set out below is a summary of all relevant reviews that have been undertaken over the last fifteen years, arranged in chronological order from earliest to latest.

### 6.2 Joint Select Committee on the Quality of Buildings: Report Upon the Quality of Buildings: 2002 (the “Campbell Report”)

#### Review scope

The review was focussed on the NSW home building industry and its regulatory framework to assess the capacity to deliver a quality product.

The remit of the Inquiry was to investigate:

- whether the system ensured “consumers are guaranteed that their new homes are safe, properly certified and built to satisfactory standards”
- the certification process created under the EP&A Act, including whether it needed tightening; monitoring of the qualifications, experience and conduct of certifiers; and whether regulatory powers over certification processes were sufficient to deal with non-compliant buildings
- the adequacy of disciplinary procedures available in the certification process
- the adequacy of current minimum building standards, particularly in regard to waterproofing, thermal and noise insulation
- the extent to which issues such as inappropriate building standards and issues with the certification system put pressure on the home warranty insurance scheme
- the builders’ licensing scheme established under the *Home Building Act 1989*, including qualifications, experience and conduct required for the licensing of residential builders and adequacy of checks and balances in the builders’ licensing scheme
- the role of the Department of Fair Trading and the Consumer, Trader and Tenancy Tribunal in dispute resolution under the Act.

## Findings and recommendations

The Inquiry concluded that the building regulatory system in NSW was complex, poorly coordinated, poorly understood and lacking in professional rigor.

The Inquiry recommended a “package of improvements directed at consolidating building regulatory functions; increasing the accountability of industry participants; improving industry education and consumer awareness; improving the planning and certification process; and making the system more proactive in preventing problems and dispute systems more effective and timely”.

The more significant and relevant of the recommendations were as follows:

- a Home Building Commission be established to oversight home building regulation in NSW, separate from Fair Trading and incorporate builder and other practitioner licensing, discipline and auditing, including for certifiers; handling consumer complaints and disputes; policy advice and development; and ensuring the maintenance of high level of practitioner skills and qualifications
- a formal information exchange protocol be developed between local councils and Fair Trading; and between Planning, Fair Trading and the Consumer, Trader and Tenancy Tribunal with respect to building professionals
- a Guide to choosing a PCA be developed and be a mandatory attachment to all Council DA forms and a guide to strata purchases be developed and be a mandatory attachment to the sale of strata unit contracts
- establishment of a standard home building contract
- the PCA be appointed by the property owner rather than the builder and when the property owner is a developer, the appointment and activities of the PCA will be monitored through a ‘close relationships’ auditing system undertaken by the Commission
- mandatory critical stage inspections be required to be undertaken by the PCA which should include at a minimum the following: prior to placing a footing; on completion of the framework; prior to placing a reinforced concrete structure; on completion of waterproofing; and on completion of building work
- there be on-site display of builder and PCA contact details and the PCA be required to notify adjoining and affected property owners in writing of their appointment, contact details, role and complaint procedures
- Occupation Certificates include the requirement that the building be consistent with the development consent and the Construction Certificate.

The review had a relatively limited scope of review as it was focused on the home building sector and it recommended a future broader review to encompass the full building industry.

### **6.3 NSW Home Warranty Insurance Inquiry (the “Grellman” report) final report 30 September 2003**

#### **Review scope**

The background to the review was that the home warranty insurance scheme, which it was compulsory for builders, owner-builders and developers to take out cover under, was under pressure with the private insurers threatening to exit from the scheme as insurers.

There was a joint announcement in March 2002 by the NSW and Victorian Governments of changes to the scheme made in response to the concerns expressed by insurers about the future viability of the scheme. The changes that were put into effect in NSW were as follows:

- Monetary threshold for work requiring cover raised from \$5000 to \$12000
- 6 year cover for structural defects and 2 years for minor defects, replacing the previous 7 year limit
- Cap on claims for uncompleted work
- Payout on the policy only to be a last resort once action against the builder/developer exhausted

The inquiry was given the remit to examine the following matters:

- the effectiveness of the legislative framework governance home warranty insurance in NSW
- the potential for additional entry of insurers into the scheme
- other options for the scheme, including having the government as insurer or underwriter and identify the preferred model

#### **Findings and recommendations**

The report recommended the continuation of a private insurance model but with revised governance and regulatory arrangements. The recommendations were as follows:

- introduce a revised scheme board and advisory council
- introduce a system to regulate insurers with guidelines for premium determination and claims handling
- create an industry deed setting out, amongst other things, the basis for underwriting and participation by insurers
- creating an independent licensing function within Fair Trading for insurers with a strengthened licensing process and enforcement of licensing conditions
- excluding high rise residential developments from the scheme but with mandatory certification for the construction of high-rise projects by approved certifiers.

## 6.4 Productivity Commission Research Report, Reform of Building Regulation, November 2004

The report seeks to assess the contribution that reform of building regulation has made and could further make to the productivity of the building and construction industry and in particular the contribution of the ABCB.

It found that the reforms undertaken by ABCB under the intergovernmental agreement have delivered greater certainty and efficiency to the building industry as well as benefits to the broader community. The biggest impact was assessed to have been through encouraging skill acquisition, reducing costs and encouraging enabling innovation.

A number of concerns were identified, including:

- too much focus on the deemed to satisfy provisions of the BCA and not enough articulation of the performance based requirements
- tendency for local government and jurisdictions to develop their own standards rather than working on refining and developing the national standard.

The report set out a number of recommendations with the more significant ones being:

- the objectives of the ABCB should be revised to remove conflict, overlap and imprecision
- enhance efforts to make performance based requirements in the BCA more effective, including creating measurable criteria
- ensuring that deemed to satisfy provisions in the BCA offer an equivalent level of building performance to that required by the performance requirements
- documentation of those building maintenance requirements that are to occur over the life of a building and making certain they are readily available for owners and occupiers
- ABCB should assess the feasibility of referencing more than one standard in the code as deemed to satisfy where multiple standards satisfy the performance requirement
- enhance access by building practitioners to the BCA
- make clear all mandatory building requirements and ensure that all are included in the BCA
- determine whether the BCA should contain property protection measures with respect to fire and, if so, resolving differences in the levels set across jurisdictions
- seek to reduce the extent of inappropriate erosion of national consistency of building regulations by local government through their planning approval processes
- ABCB to provide a forum for jurisdictions to work on reaching agreement on the best way for enforcing maintenance requirements
- ABCB to develop a best practice model for compliance and enforcement of the BCA
- the Australian Government to review the issue of access to standards referenced in legislation and regulation.

## 6.5 Fire Protection Systems Working Party Report: October 2010

### Review scope

The NSW Government's Fire Protection Systems Working Party (FPSWP) was established in 2006 to investigate concerns raised by industry with the Government regarding fire protection systems, and later, regarding fire safety Alternative Solutions under the Building Code of Australia (BCA). The FPSWP was chaired by NSW Fair Trading.

The investigations involved release of a stakeholder consultation report during 2008 and subsequent consideration of submissions from industry and other interested groups. A final FPSWP report was issued in October 2010.

### Findings and recommendations

The FPSWP advised in its Final Report that *"as a result of its investigations and consultation it is of the view that there is evidence of potential issues with the current controls and current industry practice relating to the design, approval, installation, certification and maintenance of fire protection systems, and fire safety Alternative Solutions which warrant further investigation"*. The issues identified were described as including:

- quality/adequacy of some fire protection system designs
- some non-complying fire protection installations and the non-detection of same as part of the certification process
- some fire protection systems not being properly maintained
- design, approval, implementation and maintenance of Alternative Solutions involving fire safety matters
- adequacy of communication of fire protection system and important Alternative Solution information to end users (i.e. the fire authorities, maintenance contractors, owners and occupiers, current and prospective)
- some fire safety practitioners with insufficient up to date technical knowledge with respect to fire safety systems, and insufficient understanding of the legislative framework which regulates buildings in NSW.

These issues cover a broad range of matters relevant to not only assuring what is built is fire safe, but also remains fire safe after commencement of occupation/use.

The Final Report included comment on contributing factors and actions planned or underway at that point in time. It also included a total of twenty recommendations. Three related specifically to NSW Fair Trading, two to industry education and two to industry national competencies and training. Addressing the remaining thirteen recommendations required action under the planning system since this system plays a major role in the regulation of building fire safety in NSW.



In summary, the remaining recommendations included:

- a review of the processes for the approval of fire protection system designs and the checking of system installations
- a review of the role of the NSW Fire Brigades (now FRNSW) in the approval of fire protection system designs, checking system installations and auditing system maintenance
- a review of what constitutes “building work” under the EP&A Act – to ensure that installation/modification of required fire protection systems meet standards;
- clarification of the extent of independence required of those certifying fire protection system designs and system installations
- examination of the need to introduce additional critical stage inspections;
- the Department of Planning to complete its scoping exercise and commence its review of the legislation relating to the ‘maintenance of essential fire safety measures’
- steps to be taken to improve the communication of building fire protection system information to end users (designers, installers, authorities, maintenance contractors, owners/occupiers, prospective owners/occupiers) including information regarding the extent, capability, basis of design and maintenance of these systems
- the Department of Planning to continue with and complete its review of whether any improvements are required to the NSW Planning System to ensure the adequacy and ongoing integrity of alternative solutions under the BCA.

The majority of the above recommendations did not offer specific solutions to the problems identified but were rather dependent on further work.

NSW Fair Trading handed lead responsibility for addressing the recommendations in the FPSWP Final Report to the Department of Planning and Environment in 2010. The Department subsequently undertook work on formulating specific solutions to the issues identified and these were to be the subject of stakeholder consultation by the Department, but as a result of the planning reforms this work was integrated into Chapter 8 of the Planning White Paper.

## **6.6 Building Professionals Board, Better Buildings Model: 2012**

### **Remit and scope**

During 2012 the BPB undertook in-depth industry consultation on potential improvements to the building certification and accreditation system.

Meetings were held with stakeholder organizations and statewide consultations conducted to provide an opportunity for comments to be raised on the major issues affecting building regulation and certification.

The consultation explored the potential to develop an expanded certification system for NSW, along with the potential to develop an integrated agency to oversee the operation of the system. Background papers and accompanying surveys for stakeholders were prepared on a number of proposed changes to the EP&A Regulation.

## Findings and recommendations

The industry consultation indicated that stakeholder organizations were positive about the findings from the consultation sessions, including the proposal to develop a model for an expanded certification system. In addition, stakeholders were, in principle, supportive of the idea of establishing an integrated agency for building regulation in NSW.

Following the consultation, the BPB developed a draft model for expanding the building certification and accreditation systems.

Key features of the proposed Better Buildings Model include:

- improving the design, approval and certification of critical building elements, including fire safety and waterproofing
- introducing a broader range of qualified persons who can be accredited by the BPB to provide specific certification services
- introducing standardised reports and checklists to improve consistency between development applications (DAs), construction certificates (CCs) and the final development
- improving the critical stage inspection process
- adding rigour to installation certificates
- ensuring better compliance with BASIX, the Codes State Environmental Planning Policy (SEPP) and the Commonwealth's Premises Standards
- better linking plans and designs for structural, hydraulic, geotechnical and stormwater engineering with built outcomes
- bringing greater impartiality to the certification of buildings.

The development of the model was eventually subsumed as part of the Planning Review work on building certification and informed the content of Chapter 8 of the 2013 Planning Review Planning White Paper.

## 6.7 NSW Building Regulation Working Party Report: January 2012

### Review scope

The NSW Building Regulation Working Party was a cross-agency group established in April 2012 at the invitation of the then Minister for Planning and Infrastructure to review issues associated with the current regulatory, policy, systems and departmental responsibilities for building regulation in NSW. The Working Party was ultimately tasked with providing recommendations to the NSW Government by the end of 2012 on possible actions to improve the efficiency and effectiveness of building regulation.

### Findings and recommendations

The work undertaken by the group included:

- commissioning an issues paper on matters relating to building regulation and consulting a range of stakeholders in developing the paper
- identifying a number of case studies to highlight the issues involved and how they were resolved, and conducting a workshop with stakeholders to discuss the case studies

- preparing a diagram to depict the stages in building regulation and existing corresponding requirements
- identifying a number of options for the Government to consider in relation to improving the coordination of building regulation across NSW.

The Final Report of the Working Party identified the following options for consideration by the Government:

- do nothing
- establish a Building Commission or other integrated agency
- agencies to work together cooperatively
- reinvigorate the Building Industry Coordination Committee or a similar committee
- establish a mechanism to which consumers can refer when problems arise
- establish a building adjudicator
- increased jurisdiction of the Consumer, Trader and Tenancy Tribunal
- introduce a retention fund for certain buildings to cover the cost of rectifying defects (which are not subject to home warranty insurance)
- establish an independent review into building regulation in NSW, as foreshadowed in the *A New Planning System for NSW – Green Paper*.

## **6.8 Collins Report: Final Report of the Independent Inquiry into Construction Industry Insolvency: November 2012**

### **Review scope**

In August 2012 the Government established an inquiry into insolvency in the building and construction industry, headed by Bruce Collins QC. The main terms of reference were as follows:

- assess the extent and cause of insolvency in the construction industry
- consider payment practices affecting subcontractors, as well as existing protections for subcontractors and the impacts of insolvency on subcontractors
- consider legislative or other policy responses that can be taken to minimise the incidence and impact of insolvency in the building industry.

The Inquiry was established to help safeguard the interests of subcontractors in the construction industry. The Inquiry looked into how initiatives such as insurance schemes, trust arrangements, compulsory contract provisions or other mechanisms could help safeguard the interests of subcontractors.

### **Findings and recommendations**

While the Report contains forty three recommendations, there were four significant reforms proposed:

- subject to a cost/benefit analysis, the creation of a single statutory authority known as NSW Building and Construction Commission, absorbing the roles, in part or whole, of up to 10 existing agencies
- the creation of a licencing system for all commercial builders and construction contractors, which would then limit participation in industry to only those projects with a value for which they have demonstrated financial backing and licensed accreditation

- the requirement for statutory construction trusts to be established on all private and public sector construction projects valued over \$1 million, with laws governing the payment of all subcontractors prior to the head contractor accessing the trust
- a bolstered security of payments scheme.

## 6.9 Planning White Paper: April 2013

### Review scope

The NSW government commenced a comprehensive review of the NSW planning system in July 2011 with the intention to create a new planning system that is more strategic and streamlined and promotes sustainable economic growth. The process started with an Independent Review undertaken by the Hon Tim Moore and the Hon Ron Dyer. This was followed by the Government's release of a Green Paper in July 2012 and the Planning White Paper on 16 April 2013, along with two draft Exposure Bills.

### Findings and recommendations

The Planning White Paper outlined how it was intended to transform the planning system. It also outlined proposed changes to building regulation and certification intended to provide a more robust, consistent and transparent building regulation system – and some changes to improve subdivision certification. The latter reforms were described in general terms in Chapter 8 of the Planning White Paper.

The Planning White Paper and Exposure Bills were open for comment over a 10 week period until 28 June 2013. Consultation feedback indicated that overall, there was support for many of the key directions of the proposed new planning system however a number of issues and concerns were also raised. In relation to the Chapter 8 proposals the feedback indicated general support for a better building regulation system and improvements to certification. However, a number of submissions sought further detail on the reform proposals.

The Planning Bill 2013 and the Planning Administration Bill were introduced into NSW Parliament in October 2013 but failed to proceed past the upper house.

The proposals described in Chapter 8 of the Planning White Paper were based on previous work undertaken in relation to formulating solutions to issues identified and confirmed by the NSW Government's Fire Protection Systems Working Party, The NSW Building Regulation Working Party Report and issues identified by the Building Professionals BPB (BPB) when undertaking consultation on its 'Better Buildings Model'. They were also a response to issues raised in various other forums over time. The Planning White Paper presented the opportunity to bring all of this previous work together.

Generally, key issues and areas of concern in respect to building regulation included a reported increase in construction defects (largely in the single and multi-unit residential sector), a perception of inappropriate or corrupt influence by builders over private certifiers, confusion regarding roles and responsibilities, an increase in unauthorized work, inconsistent levels of compliance, fire protection system failures, inadequately checked and controlled building and use changes and inadequate maintenance of fire protection systems and alternative solutions.

There were also concerns about process and procedure inconsistencies and inefficiencies. In particular, there was concern about inconsistencies between the DA/CC and CDC approval paths, disproportionate and unreasonable upgrade demands from consent authorities when approving changes to existing buildings, fire safety maintenance regulation inefficiencies and that most system transactions remained paper-based and thus inefficient and inaccessible.

Furthermore, there were concerns about matters such as the inability to hold to account others relied upon to verify the compliance of specific matters, the cost and availability of professional indemnity insurance for certifiers and future supply of skilled and committed certifiers.

Due to the nature and number of issues, formulation of the proposals in Chapter 8 involved consideration of the complete building regulation part of the planning system. The proposals were based on the understanding that the building regulation system not only serves to assure planning expectations are met, but also those of the public in terms of built environment safety and quality - and in relation to the latter, not only on day one, but throughout the life of a building. Also, an important consideration was that the building regulation system comprises various measures which must work together to deliver effective and efficient building regulation for NSW. The proposals therefore covered matters beyond simply the certification of development.

In summary, some of the key proposals in Chapter 8 were:

- new overarching objects in the new Planning Act for building control. New objects were included in the draft exposure Planning Bill that was publicly exhibited with the Planning White Paper
- better and more transparent building regulation processes and procedures for new buildings; alterations, additions and changes of building use for existing buildings; and the regulation of ongoing building safety maintenance. The overall aim was to improve effectiveness, efficiency and consistency of regulation;
- refocussing DAs on planning matters by relieving them of building considerations and addressing building standards at the certification stage
- improved documentation (level and quality) and other information at all phases of approval, construction and ongoing use and management. More specific changes proposed included: better CDC/CC application information; better plans; mandatory submission of plans for critical building elements for commercial buildings; improved CDC/CC content; and the requirement for a 'building manual' for commercial buildings. The 'building manual' would contain information important to ongoing building safety compliance and management;
- revised mandatory inspections during the construction phase
- mandatory certification for critical aspects of work (design, installation, commissioning)
- accreditation of additional occupations to certify aspects of design, systems, and elements of building work
- a more focussed and streamlined role for FRNSW under the planning system that better provides for its operational needs
- limiting a council's ability to impose higher standards than those imposed by the BCA

- replacement of the fire safety schedule with a compliance schedule (now proposed to be a building safety schedule), the former being no longer needed if the building manual was adopted. The schedule would gather information during approval/construction phases for the manual
- combine the current roles of certifying authority and principal certifying authority (and do the same for subdivision certifiers) in order to improve project compliance coordination
- clearer definition of roles and responsibilities for all key players under the building regulation system in terms of approval/certification of development, assessing alternative solutions, enforcement, and other matters
- clarification of the role of the OC, its scope of application and the tests for its issue. In addition it was proposed to provide an alternative to the OC for building work that will not be occupied, and providing for the ability to issue an OC even when inspections are missed or work has been carried out contrary to the approval or without approval
- increased support and guidance for certifiers
- a system of peer review for certain alternative solutions and other complex matters
- improved auditing of the work of certifiers
- improved collection of data and better monitoring of the building regulation system
- expansion of the role of private certification in subdivision and strata subdivision approvals.

## **6.10 Maltabarow Report: Building Certification and Regulation-Serving a New Planning System for NSW: May 2013**

### **Review scope**

In early 2013, George Maltabarow, now president of the BPB, was appointed by the then Minister for Planning to review and recommend ways to improve and refine the building certification system in NSW.

### **Findings and recommendations**

The resulting 'Maltabarow report', *Building certification and regulation - serving a new planning system for NSW*, was presented in May 2013. It examined the current system of building certification to identify improvements to support the new planning system (which was still progressing as the Planning White Paper/ Planning Bill at the time) with a robust certification system. The review examined key aspects of the interface between certification and building regulation, including the responsibilities of the various parties and the appropriate fit with proposed new planning legislation.

In addition, it examined the current functions and structure of the BPB, together with its operational processes. The Maltabarow report made twenty main recommendations for building certification and regulation.

The Maltabarow report was exhibited from 23 December 2013 to 4 April 2014. Most submissions were in support of the recommendations, particularly:

- defining certification scope, roles and responsibilities, supported by guidance and education campaigns

- making process changes to building approval arrangements to improve the level of awareness of certifier responsibilities on the part of applicants
- establishing reference groups in order to develop a practice guide for certifiers, create a framework and approach for better cooperation between certifiers and councils and addressing problems with professional indemnity insurance for certifiers reviewing the legislative provisions requiring a written contract for certification work
- making the industry more sustainable by streamlining regulation and addressing liability issues
- restructuring the secretariat of BPB, introducing a proper governance arrangement and increase the resources available to the BPB to at least the level of those commensurate with Victoria and Queensland.

Some recommendations were considered contentious, including:

- separating the enforcement and certification roles in councils, where possible;
- councils focusing more on enforcement and less on providing certification services
- allowing professions other than building surveyors to act as the principal certifying authority.

## **6.11 IPART Regulation Review: Local Government Compliance and Enforcement: October 2013**

### **Review scope**

IPART was asked to examine local government compliance and enforcement activity including regulatory powers, conferred or delegated under NSW legislation and provide recommendations that will reduce regulatory burdens for business and the community.

The review undertook a survey of all regulatory functions undertaken by local government and created a data base of these. It found that at the time of the draft report that councils have 121 regulatory functions involving 309 separate regulatory roles, emanating from 67 State Acts which are administered by approximately 31 State agencies.

An economic consultant, Centre for International Economics (CIE), was commissioned to conduct a cost benefit analysis of the recommendations from the review.

### **Findings and recommendations**

The broad finding was that significant community gains can be achieved through enhanced:

- interaction and coordination between State Government agencies and local councils, both at the regulatory development stage and with “on-the-ground” implementation
- council regulatory capacity and capability with reduced delays, greater consistency across and within councils and less prescriptive and traditional approaches allowing for greater innovation
- collaboration between councils to maximize economies of scale, improve consistency and share expertise
- sharing of ideas and leading practices amongst councils.

It was estimated by CIE that the implementation of the reforms could generate annual net benefits to the community of about \$220 million. Of this total about \$36 million was generated from building and construction reforms and \$19 million from planning reforms.

There were an extensive number of recommendations but the key relevant ones for this review were as follows:

- subject to a cost benefit analysis, DPE and EPA should engage in a partnership model with local government to enhance the capacity and capability of councils to undertake their regulatory functions
- the NSW Government should maintain the register of local government regulatory functions to manage the demands on local government and avoid duplication and overlap
- the Local Government Act should be amended to remove any impediments to shared regulatory services such as the current restrictions on delegation
- DPE to identify which development consent conditions may be applied consistently across local government areas and then develop for these a standardised and consolidated set of development consent conditions
- DPE to enable building owners to submit annual fire safety statements online to councils and to FRNSW
- subject to a cost benefit analysis, create a single regulator, the Building Authority, containing at a minimum BPB and the building trades regulation aspects of NSW Fair Trading
- BPB to create a single register that enables consumers to check a certifier's accreditation and any disciplinary actions
- councils seeking to impose conditions of consent above those of the BCA must conduct a cost benefit analysis justifying the additional requirements and seek approval of an independent body such as IPART
- certifiers should be required to inform council of builders' breaches if they are not addressed to the certifier's satisfaction within a fixed time period and councils should be required to respond to the certifier in writing within a set period of time
- BPB should incorporate into current PCA signage requirements information setting out contact details for specific complaints, onsite and off site
- Office of Local Government should develop a model risk based program to assist councils in developing their own programs under the Swimming Pool Act 1992 and provide a series of workshops on how to implement and comply with their new responsibilities under the Act.

In April 2015 IPART announced that it had been commissioned by the Government to undertake a review of reporting and compliance burdens on Local Government and to report by April 2016.



## **6.12 Strata and community Title Law Reform Position Paper: November 2013**

The Position Paper sets out the Government's approach with respect to strata and community title law reform. The paper notes that there are more than 72,000 strata schemes in NSW with a total of about \$350 billion in assets. Further, there is a trend to people increasingly being accommodated or working in strata title buildings with projections that within 20 years half of the State's population will be living or working in strata or community title schemes. A considerable part of the position paper reform proposals, while important for strata and community title properties, are not central to the subject of this review including such matters as governance surrounding decision making, budgets, levies, by laws and managing disputes. There are a number of matters covered in the position paper on managing the built environment which are directly relevant to this review.

A central concern has been the level of defects in strata and community title buildings and the absence of home warranty insurance under the Home Building Act for multi-unit strata developments over three storeys high. Unlike other types of buildings, strata and community title buildings do not have the participation of the ultimate beneficiary of the development present at the time of design, construction and completion. Rather, the developer of the building is the owner during this period and only later, when strata titles are sold, is there participation by the ultimate owners at which time defects are often identified.

One of the major proposals in the position paper is to create a defects bond. Statutory warranties under the Home Building Act expire two years after the building work is complete except for major structural defects which expire after six years. Many strata schemes only pursue a defects claim at the end of this period, when it can be difficult to determine the cause of the problem and when there is often contested expert reports produced by various parties. Under the proposal the developer of a high rise strata building will pay a bond or arrange a bank guarantee equal to 2% of the value of the development that will be held by an independent third party such as Fair Trading. The developer/builder and the owners' corporation will agree on a suitable expert to undertake a defects inspection of the building which will be paid for by the developer/builder and conducted between 12 and 18 months after the issue of the OC. If the parties cannot reach agreement on a suitable expert, the appointment will be made by Fair Trading. The bond or what remains of the bond after defects have been addressed will be released once the independent defects inspector agrees that the identified defects have been rectified.

It is also proposed to require the builder/developer to prepare a maintenance schedule to assist the owner's corporation to understand their obligations and the likely costs associated with maintaining the common property.

## 6.13 Review of the complaints, Investigation and Disciplinary Functions of the BPB: May 2014

### Remit and scope

In early 2014, the Building Professionals BPB commissioned an independent review into the BPB's complaints, investigations and disciplinary systems and procedures.

Mr Walmsley produced the report *Review of the Complaints, Investigation and Disciplinary Functions of the Building Professionals BPB* in May 2014 outlining findings and recommendations for system improvement.

### Findings and recommendations

The review found that the BPB's internal procedures and templates were efficient, professional and met all statutory and common law requirements. While complaints can take a long time to be resolved, this is due to the need to ensure fairness, including the right for certifiers to have their case reviewed.

The following recommendations were made:

- BPB appoint a person as a 'gatekeeper' for complaints as they are received. This person would have delegated authority to dismiss unsubstantiated, misdirected or vexatious complaints, facilitate conciliation, or issue a Penalty Infringement Notice if appropriate
- a smaller Disciplinary Committee be formed, with an experienced lawyer as chair, and at least one accredited certifier chosen from a panel according to his/her expertise as it relates to the matters being considered
- where appropriate, an external person with specialist expertise could be given the authority to conduct investigations on behalf of the BPB
- changes be made to statutory instruments that are not administered by the BPB, to clarify requirements for certifiers and minimise potential errors.

Finally, the report considered the demerit points system that operates in Queensland and the ACT for occupational licencing. It noted the lack of firm evidence that such a system leads to behaviour change and recommended the BPB not introduce a demerit system for certifiers at this time.

## 6.14 Draft Home Building Regulation 2014 and Regulatory Impact Statement July 2014

The regulation repeals and remakes with some changes the 2004 Home Building Regulation which has an expiry date. The changes incorporate the results of the review of the Act and incorporate changes proposed by IPART in its licensing report. The main provisions in the regulations are the following:

- exclusion of certain minor work such as evacuations, fencing and gates and cleaning of structures from the definition of residential building work
- increase in the threshold amount of cost of work involved in residential building before the Act comes into operation from \$5000 to \$20,000
- allow homeowners to do work on their home of a value less than \$10,000 without an owner-builder permit, up from \$5000

- increase the threshold for when owner-builders are required to undertake an owner builder course from \$12,000 to \$20,000
- require all owner-builder applicants to prove that they have undergone the existing base work health and safety training as a pre-requisite to apply for a permit
- increase the minimum value of residential building work to which the Act applies from \$1000 to \$5000, so that a licence would only be required for work above \$5000 in value
- transition to a single fire protection plumbing category
- transfer of proceeding regarding building claims from court to CAT
- exempt cabinetry work from home warranty insurance requirements when undertaken as a genuine standalone project and various other insurance changes
- align the definition of 'storey' and 'rise in storeys' with the NCC definition.

## **6.15 IPART Final Report, Reforming Licensing in NSW, Review of Rationale and Design: August 2015**

The NSW Government has a target of achieving a reduction in red tape directed at generating economic benefits of \$750 million per annum by 2015. The review of licensing by IPART is directed at contributing to that exercise.

As part of the review IPART undertook a survey of State agencies and councils to identify all current licenses, their design, form of administration and scope. Total license types administered by state agencies totalled 776 while those administered by councils totalled 50. Of the 776 license types administered by the state, 269 are significant and represented 95% of licences by volume and 99% of licence revenue.

The main focus of the review was on licences administered by the State given that local government compliance and enforcement review addressed council licences.

The report assessed that improvements to the design and administration of the 269 significant licence types could produce gross economic benefits of at least \$320 million per annum. Further the benefits of undertaking the top10priority reforms would produce gross annual benefits of at least \$181 million. The net benefit of reforming the licences, taking account of the cost of reform was estimated at between \$108 million and \$129 million per annum.

A framework was developed to review the licences which involved assessing at four levels the licences to determine whether:

- licensing is an appropriate approach
- the licence is well designed
- the licence is administered effectively and efficiently
- licensing is the best response to address the identified objective or issue.

The key draft recommendations relevant to this review are as follows:

- government agencies should ensure their licences are reviewed using the framework developed for the study as part of any statutory requirement to review legislation and, where there is no legislative review requirement, at least every10years and apply the framework when considering the development of new licences

- NSW Government review the top thirty two licences
- Fair Trading remove the mandatory Continuing Professional Development requirements for the Home Building licence and certificate holders, allowing for the development of voluntary programs
- Fair Trading raise the value threshold for both requiring a Home Building licence and for an Owner Builder permit to \$10,000 and then to \$20,000 within three years and thereafter index at least every five years
- Fair Trading abolish the air conditioning and refrigeration licences
- NSW government commission a review by an independent body of the training and CPD conduct rules for all occupational licences to ensure they are the minimum necessary.

A number of these recommendations have been acted on, principally those involving action by Fair Trading.

## 6.16 Conclusions

Three conclusions emerge from the review of the reports and other related documents on the building industry that have been surveyed in this chapter.

First, there have been a substantial number of reviews commissioned and undertaken on aspects of building regulation in NSW over the last decade and a half, which indicates that there have been sufficient concerns by a range of different governments to commission the reviews.

Second, there is a broad consistency in the conclusions in the various reports that identify significant problems in the current approach to building regulation that need to be addressed. This is fully consistent with the feedback from the public hearings, stakeholder meetings and surveys undertaken as part of this review.

Third, while there have been various changes effected following certain of the reports, these changes were narrowly based and did not address the overall system. Further in recent years there has been no, substantial reforms taken despite a number of reports identifying serious concerns with the current operation of the building regulation and certification system.

## 7 Building regulation and certification in NSW

### 7.1 Introduction

This chapter provides an overview of the NSW building regulation and certification system, covering the national building codes and the state legislative and administrative structure.

Section 7.2 provides a brief history of, and explains the approach to, the national building codes which have been adopted by all Australian states and territories.

Section 7.3 sets out the legislative and administrative structure that applies in NSW in respect of building regulation which is broadly divided between three areas of government: DPE is responsible for the design of building regulation and interacts at the national level with respect to the national building codes; Fair Trading handles consumer protection, including licensing building practitioners, administers the Home Building Act and, from 1 July 2015, oversees the BPB; and local government acts as a consent authority for buildings, undertakes local planning and the building regulation compliance function and acts as the building data custodian.

Section 7.4 provides information on the structure and operations of the BPB while Section 7.5 explains the building certification process.

In this chapter and report the term building regulation covers the activities of setting and enforcing building standards, the design and implementation of building regulation policy, including the design of the building certification system and ensuring compliance with building consents (the latter includes conformity with planning requirements and is often referred to as building control).

### 7.2 National building codes

Today all jurisdictions have adopted and are committed to national building and construction standards. The evolution to this stage has proceeded through three major reform phases.

The first phase was the development of a single national technical building code. The first version of the BCA was released in 1988 and was adopted by all jurisdictions by 1993. The following year, 1994, the Australian Building Code Board was established as the vehicle to progress the further development of national building standards and reforms.

The second phase of reform was the introduction of a performance based building code in the 1990s which facilitated greater innovation in building approaches within the context of allowing innovative approaches that achieved defined performance requirements. The first version of a performance based BCA was in 1996.

The third stage of reform was the integration of plumbing and construction into what became the National Construction Code (NCC) in 2011.

Most recently the ABCB has provided free online access to the NCC. The NCC refers to relevant standards which include the Australian standards. The main gap in access to information is the lack of free online access to Australian standards which are referenced in the NCC but are obtained from Australian Standards on a commercial fee basis.

The NCC provides the minimum necessary requirements for safety, health, amenity and sustainability in the design and construction of buildings throughout Australia. The NCC consists of three volumes:

- Volume 1 primarily applies to Class 2 to Class 9 buildings which are commercial, industrial and multi-residential buildings
- Volume 2 primarily applies to Class 1 and Class 10 buildings which are houses, sheds and carports
- Volume 3 applies to plumbing and drainage for all classes of buildings.

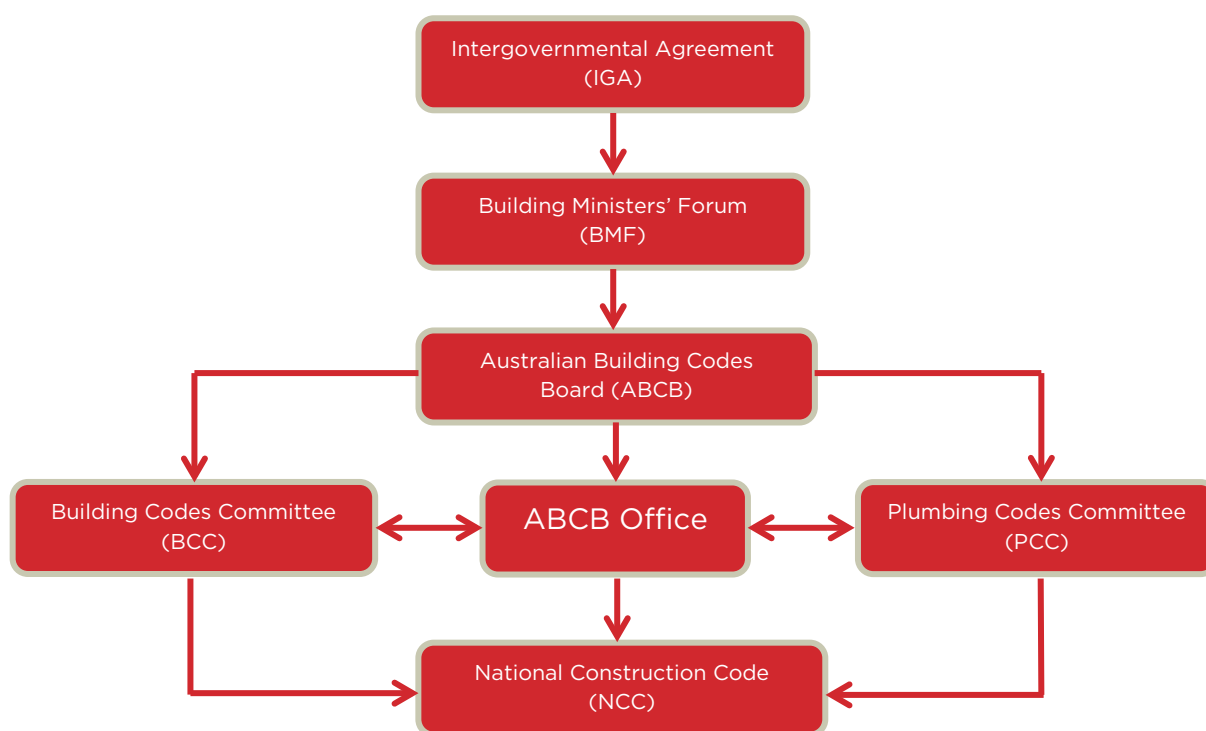
The NCC is a performance based code which allows for flexibility in how the code is applied in order to encourage innovation, provided the mandatory performance requirements are met. The Code is available online free of charge from February 2015.

In addition to the NCC there are a substantial number of other resources that are available from the ABCB, including the International Fire Engineering Guidelines and climate zone maps.

The Code has been developed in recognition of the significant economic and social importance of the construction sector as a way of improving the productivity and innovation of the industry. A 2012 report by the Centre for International Economics (CIE) found that the then planned building regulatory reforms implemented progressively will deliver \$1.1 billion per annum in economic benefits with a further \$1.1 billion per annum in benefits if the scope of reform was extended. Of the assessed annual benefit to date it was estimated that broadly \$800 million was due to the introduction of a performance based building code.

The National Building Control Framework is set out in Figure 7.1:

**Figure 7.1 National Building Control Framework**



Source: DPE

The national building control framework is a joint initiative of all three levels of government and was established by an intergovernmental agreement (IGA) signed in 1994, with a series of reviews of the IGA subsequently occurring and a revised IGA taking effect in April 2012. A further revision to the IGA is currently being considered. The management and development of the NCC is the responsibility of the Australian Building Codes Board (ABCB), operating under the Australian Building Ministers' Forum. ABCB has an independent chair, a representative from each State and Territory, a representative of the Australian Local Government Association and representatives of the building and construction industry.

Compliance with the NCC's performance requirements can be achieved by either complying with Deemed-to-Satisfy (DtS) provisions or by formulating an Alternative Solution (AS) which complies with the performance requirements or can be shown to be at least the equivalent to the DtS provisions or by a combination of the two approaches. The DtS provision means that the development, by conforming to the relevant NCC, is deemed to satisfy the performance standards. The ability to develop Alternative Solutions is to ensure the NCC does not inhibit innovation in building approaches.

The next steps in the building regulatory reforms planned to be undertaken by the ABCB are as follows:

- quantifying the NCC's performance measures to facilitate greater uptake in the use of Alternative Solutions and hence facilitate greater innovation and use of cost effective solutions to building design and construction. At present the performance measures are qualitative in nature and hence there is not complete clarity about whether the performance standard has been met. By establishing quantitative performance measures this uncertainty will be reduced or removed
- seeking to achieve a reduction in the departures by States and Territories from the NCC and to achieve a consistent approach to building regulation
- limiting the imposition of higher prescriptive requirements for building design and construction than those agreed nationally by local government;
- continued expansion of the NCC to cover all on-site building regulations into a single source document
- increase awareness of and adherence to the NCC through communication and education initiatives
- moving from a one year to a three year amendment cycle for the NCC in order to create a higher level of stability in the content.

The ability to pursue Alternative Solutions has the aim to both encourage innovation and achieve cost efficiencies. There has been significant growth in Alternative Solutions nationally since performance based BCA was released.

## 7.3 Building regulation in NSW

### 7.3.1 Overview of legislative and administrative structure

The legislation supporting building regulation in NSW can be divided into three categories:

- planning and building framework legislation which includes the EP&A Act, the Local Government Act and the BP Act, which creates a framework for planning and building regulation across the state and across the full building sector
- specific building industry regulation and occupational licensing legislation, which is covered by the Home Building Act 1989 and Swimming Pools Act 1992
- consumer protection and market regulation, which is addressed in the Consumer, Trader and Tenancy Tribunal Act 2001, Fair Trading Act 1987 and Building and Construction Industry Long Service Payments Act 1985 and Work Health and Safety Act 2011.

Certain of the above Acts are particular to the building and construction sector or parts thereof, namely the Home Building Act, Swimming Pools Act, Building Professionals Act and Building and Construction Long Service Payments Act, while the balance are more general legislation that apply beyond the building and construction sector, principally the consumer protection and Work Health and Safety legislation.

The legislative framework, relevant administrative agencies and responsible Minister are set out in Table 7.1:

**Table 7.1: The NSW building industry regulatory framework**

Legislation	Administrative Agency	Responsible Minister
<b>Framework legislation</b>		
Environmental Planning and Assessment Act 1979	Department of Planning and Environment	Minister for Planning and Assistant Minister for Planning
Local Government Act 1993	Office of Local Government	Minister for Local Government
<b>Industry and occupational regulation</b>		
Building Professionals Act 2005	Building Professionals Board	Minister for Innovation and Better Regulation, effective from 1 June 2015
Home Building Act 1989	NSW Fair Trading, within the Finance, Services and Innovation portfolio	Minister for Innovation and Better Regulation Minister for Finance, Services and Property
Plumbing and Drainage Act 2011	NSW Fair Trading, within the Finance, Services and Innovation portfolio	Minister for Innovation and Better Regulation Minister for Finance, Services and Property
Swimming Pools Act 1992	Office of Local Government	Minister for Local Government
<b>Consumer protection and market regulation</b>		
Building and Construction Industry Long Service Payments Act 1986	NSW Fair Trading	Minister for Innovation and Better Regulation Minister for Finance, Services and Property



Legislation	Administrative Agency	Responsible Minister
Civil and Administrative Tribunal Act 2013	Department of Justice	Attorney General
Fair Trading Act 1987	NSW Fair Trading, within the Finance, Services and Innovation portfolio	Minister for Innovation and Better Regulation Minister for Finance, Services and Property
Strata Schemes Management Act 1996	NSW Fair Trading, within the Finance, Services and Innovation portfolio	Minister for Innovation and Better Regulation Minister for Finance, Services and Property
Work Health and Safety Act 2011	WorkCover Authority of NSW	Minister for Finance, Services and Property

There are three core items of legislation, the EP&A Act, Home Building Act and BP Act and two key agencies that regulate the building industry:

- DPE, which administers the EP&A Act, and undertakes the building regulation function for the state in a number of administrative units including the Building Policy Unit, and represents NSW at inter-governmental building forums
- Fair Trading which administers the Home Building Act and related occupational and trades licensing, provides support for the BPB as from 1 June 2015 and undertakes the consumer protection function for the home building sector and more broadly.

In addition, local government acts as the consent authority for most development approvals, undertakes the building compliance and enforcement function and acts as custodian for building information.

It should be noted that the scope of involvement in the building industry differs between the two agencies, with the DPE covering the full industry, both residential and commercial while the focus of Fair Trading has been on the residential buildings, given the consumer protection focus on Fair Trading. However, the Finance, Services and Innovation portfolio does now include oversight of BPB, the Architects' Board and licenses plumbers, electricians and trades across the full building sector, while licensing only residential builders.

There are a larger number of agencies involved and these are summarised in Table 7.2:

**Table 7.2 Organisations involved in Regulation of the NSW Building System as from 1 July 2015**

Organisation	Relevant Legislation	Role in building regulation
Department of Planning and Environment	Environmental Planning and Assessment Act 1979	<p><b>Building Policy Unit</b></p> <p>Advises on an effective and efficient building control and regulation system for NSW and its alignment with the planning system and the National Construction Code</p> <p><b>E-Business Branch (including BASIX)</b></p> <p>The Branch is seeking to develop with councils an online system for the electronic lodgement of development applications and extending that to building certification.</p> <p>The BASIX unit administers residential sustainability requirements under the Act through the Building Sustainability Index (BASIX) scheme.</p> <p><b>Assessment Policy (Codes), Assessment Systems and Strategies Unit</b></p> <p>Administers the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 and the other complying development SEPPs.</p>
NSW Fair Trading - Department of Finance, Services and Innovation	<p>Home Building Act 1989</p> <p>Fair Trading Act 1987</p> <p>Building Professionals Act 2005</p>	<p>Manages consumer protection laws, provides advice and assistance to businesses and traders with respect to fair and ethical practices and administers the Home Building Act 1989 including occupational and trade licensing and regulation.</p> <p><b>Building Professionals Board</b></p> <p>Regulates and supports accredited certifiers</p>
Office of Local Government	Local Government Act 1993	State oversight of local government including administering and advising on the Local Government Act

Organisation	Relevant Legislation	Role in building regulation
	Swimming Pools Act 1992	Establishes the standards for swimming pool safety
Local Government councils	Environmental Planning and Assessment Act 1979 Local Government Act 1993          Swimming Pools Act 1992	Undertake the key building and planning regulatory function in local areas that are not exempt or complying developments. Are the principal building control authority for their respective LGAs.  Undertake key planning functions (strategic, policies and as a consent authority). Undertake certain building regulatory functions exclusively (such as local approvals) and compete for certification work.  Currently have an effective monopoly on subdivision certification work.  Maintain certification records for their LGA.  Requires councils to undertake certain compliance functions with respect to swimming pools safety
NSW Treasury Self Insurance Corporation	NSW Self Insurance Corporation Act 2004	Sole home warranty insurer in NSW
WorkCover NSW - Office of Finance, Services and Innovation	Workers Compensation Act 1987	Administers work, health and safety, injury management, return to work and workers compensation across all industries
NSW Architect Registration Board	Architects Act 2003	Registers architects and maintains a register of architect corporations permitted to operate in NSW
Civil and Administrative Tribunal	Civil and Administrative Tribunal Act 2013	Handles disputes between consumers and businesses in general and in this context between consumers and builders not resolved through mediation processes provided by NSW Fair Trading.

### 7.3.2 EP&A Act and the Department of Planning and Environment

#### Legislation

Prior to the introduction of the EP&A Act in 1979, planning was regulated under the Local Government Act 1919<sup>5</sup>. The enactment of the EP&A Act sought to create a more consistent framework across the State for land use planning and approvals and give greater prominence to environmental considerations in land use planning. Part 3 of the Act introduced a three tiered structure of environmental planning instruments for strategic planning: Local Environment Plan (LEP), Regional Environment Plan (REP) and State Environment Planning Policy (SEPP). Primary responsibility for local planning was in the main devolved to local government, with the State focussed on State and regional planning.

While the Act has been amended many times, a particularly significant set of amendments occurred in 1997. Part 4 of the Act was reconfigured to become Development Assessment, introduced the three fold classification of development as development not needing consent; development needing consent; and prohibited development and introduced several new categories of development, namely, state significant development, exempt development and complying development. State significant development was introduced to make the Minister for Planning the approval authority for projects declared to be of state significance. Exempt development was introduced to simplify the assessment process for small scale, routine developments. Complying development requires consent but which can be progressed by addressing specified, predetermined development standards.

Particularly noteworthy in the 1997 amendments was the transfer of the building and subdivision controls from the Local Government Act to become Part 4A of the EP&A Act, Certification of Development. This part allowed for the issue of a number of certificates that could be used by certifying authorities, namely:

- Compliance Certificates (CoC) that evidence that work was carried out in accordance with specified plans, codes or standards
- Construction Certificates(CC) which specify that work completed in accordance with specified plans and specifications will be in accord with the development consent and the requirements of the Building Code of Australia
- Occupation Certificates(OC) which authorise the occupation and use of a building
- Subdivision Certificates (SuC) which authorise the registration of a plan of a subdivision under the Conveyancing Act.

In addition Section 85A of the EP&A Act provides for a Complying Development Certificate (CDC) which permits the construction of certain specified structures without requiring development applications through council, provided the structure complies with specified development standards. Finally, Strata certificates (SC) are allowed for

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<sup>5</sup> The discussion of the EP&A Act draws on the publication, NSW Planning Framework: History of Reform, e-brief, NSW Parliamentary Library Research Service, 10/2010

under the Strata Schemes (Freehold Development) Act and the Strata Schemes (Leasehold Development) Act.

The amendments also included the then Parts 4B and 4C which dealt with the accreditation of certifiers and was subsequently replaced with the BP Act, which is addressed in Section 7.4.

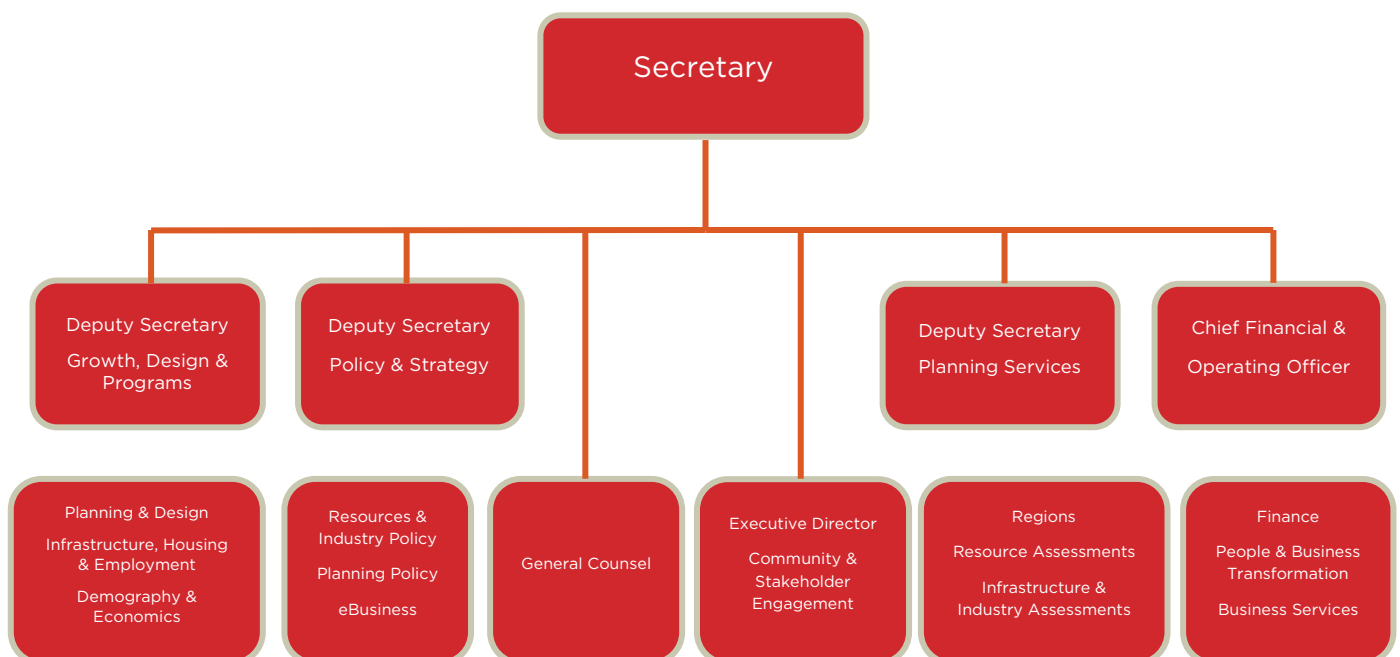
The EP&A Act is a very complex piece of legislation and the building regulation component within it was originally transferred from the Local Government Act. From the perspective of the building industry it is difficult to navigate the provisions of the EP&A Act and many of its provisions need to be revised to reflect what would be now regarded as regulatory best practice. Chapter 8 of the Planning White Paper identified the need for an extensive array of reform in the area of building regulation which would require an extensive rewrite of the relevant parts of the EP&A Act and Regulation. It is noted that while concerns were expressed about aspects of the Planning White Paper planning reforms, there was general support for the reforms proposed with respect to building regulation and certification. These proposals have been updated and elaborated on in Chapter 14 of this report.

The EP&A Act does not acknowledge that it contains building regulation and there is no relevant statement of objectives relating to building regulation. Further, the treatment is very fragmented and lacks completely a unifying structure. It reflects the origins of the provisions in the Local Government Act followed by numerous amendments over the years as new issues or processes have been incorporated.

### The Department of Planning and Environment

The structure of DPE is provided in Figure 7.2:

**Figure 7.2: Organisation Structure of the Department of Planning and Environment**



Source: DPE

There are three areas in DPE which undertake in part or whole a building regulation function:

- Building Policy Unit
- Assessment Policy, Assessment Systems and Strategy Unit
- BASIX, located in the e Business Branch

All three areas report to the Deputy Secretary, Policy and Strategy.

Up until 1 June 2015 the Building Professionals Board was within the Department and was oversighted by an Executive Director (who also oversighted the BPU) who reported to the Deputy Secretary Policy and Strategy.

### **NSW Building Regulations Advisory Committee (BRAC)**

BRAC is a committee that advises the government on building regulation, acting through the head of the BPU of DPE. The Committee consists of representatives of both government agencies and industry organisations that are relevant to the building regulation function and provides advice on matters pertaining to the ongoing development and reform of building control from both a state and national perspective. Organisations represented on the Committee are as follows:

- DPE
- FRNSW
- NSW Rural Fire Service
- BPB
- Government Architects Office, NSW
- Public Works
- NSW Ministry of Health
- Land and Housing Corporation
- Local Government NSW
- City of Sydney Council
- Housing Industry Association
- Master Builders Association
- Property Council of Australia
- Australian Institute of Building Surveyors
- Australian Institute of Building
- Engineers Australia
- Australian Institute of Architects

### **Building Policy Unit**

The Building Policy Unit is within the Policy and Strategy Division.

The Building Policy Unit has as its key objective the delivery of an effective and efficient building control system for the State which provides for acceptable levels of health, safety, amenity and sustainability of buildings, which meet stakeholder expectations and align with the State's planning system. In seeking to achieve this objective the unit undertakes the following functions:

- ongoing development and reform of Building Codes and Standards and the building control components of the EP&A Act and regulations

- provision of policy and technical advice to the Department and Minister on building control issues
- research, investigation and responding to building control issues, such as the recent aged care fire sprinklers matter
- provision of education and advice to a broad range of internal and external stakeholders on building control.

An important part of the work of the unit is supporting NSW in its participation in delivering nationally uniform building control outcomes which is outlined in greater detail in Section 7.2. In this regard BPU handles building standards and represents NSW on the ABCB. In addition the unit has played a leading role in assessing and proposing reforms to the NSW building control system. These reforms were identified in Chapter 8 of the Planning White Paper and are concerned with the following key matters:

- strengthened, more streamlined and effective building regulation processes, including building, subdivision and fire safety systems
- improved documentation and information at all stages of the building “life cycle”
- clearer roles and responsibilities of key participants in the building area including increased building practitioner accountability and increased guidance and support for certifiers
- improved regulation of building and building use changes, alternative solutions, unauthorised building work and other complex matters
- better monitoring and review of the performance of the building regulation system.

The Unit has total staffing of seven.

Many of the matters dealt with by the unit are of vital importance to the BPB and the certification system in general. Accordingly, it was sensible that recently the unit and the BPB were brought under the oversight of a single department executive. However, the transfer of BPB to Fair Trading could adversely affect this linkage.

Given the role of the Unit it appears under-resourced. In addition there is an unnecessary fragmentation within DPE in a lack of formal linkage between BPU and the two other areas working in the area of building regulation. This fragmentation extends beyond DPE to the existence of two areas in government handling building regulation, BPU handling building regulation in general and Home Building Services, within Fair Trading, handling building regulation in so far as it relates to residential buildings.

### **Complying development**

Complying development policy and consultation is undertaken within the Assessment Policy, Assessment Systems and Strategy Unit, Policy and Strategy Division.

Complying development is a class of development that can be addressed by specified predetermined development standards. A CDC is issued under Part 4, Division 3 of the EP&A Act and constitutes development consent for a complying development. The certificate states that the proposed development will comply with all relevant development standards and regulatory requirements and is able to be issued by an accredited building certifier. As such a complying development does not require a Development Application to be assessed by a local council.

In addition to the EP&A Act and Regulation, the regulatory requirements for complying developments are set out in four State Environmental Planning Policies:

- State Environmental Planning Policy (Exempt and Complying Development Codes) 2008
- State Environmental Planning Policy (Affordable Rental Housing) 2009
- State Environmental Policy (Infrastructure) 2007
- State Environmental Policy (Three Ports) 2013

The most comprehensive of the SEPPs is the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, which contains nine complying development codes including General Housing Code, Housing Alterations Code, Commercial and Industrial Alterations Code, General Development Code, Rural Housing Code, Demolition Code, Fire Safety Code and Subdivision Code.

The NSW Government has a general policy to increase the amount of development handled by the complying development process in order to facilitate timely development.

Complying development can be seen as having both a planning and building policy dimension. The planning dimension is largely concerned with the choice of the development area to be targeted as a complying development. To date most of the areas designated for complying development are characterised as ones which are relatively straight forward and hence the objective would appear to be to simply accelerate development rather than address a specific planning priority area. The one exception would appear to be affordable housing which is seeking to encourage development to address a social need. Complying development is thus an alternative to the normal development approval process, directed at accelerating development generally and in certain cases seeks to alter the pattern or nature of development. It is important that there is full building sector and building regulation input at the stage of developing complying development policies, given that it is these parties that will be responsible for the implementation process. The past history does not evidence such input being sought and as a consequence there has been considerable concerns expressed by industry and certifiers about their ability to interpret the policies. This is evidenced by the high level of industry queries made to the unit responsible for the policies. This deficiency needs to be rectified by full industry and building regulator involvement in the formulation of complying development SEPPs, including the rewrite of the existing SEPPs.

It is noted that recently DPE has initiated development education and communication material and a online facility in regard to complying development, directed at councils, certifiers and the building industry.

### **e-Business Branch**

The e-Business Branch undertakes the development of the e Planning project and is located within the Policy and Strategy Division. It was established to implement a digital registration system for CDCs. It is now working with councils to explore the implementation of a federated digital system whereby each council establishes on a common basis the digital recording of development applications and approvals with DPE having direct access to this information. It is possible to further extend this federated data base to capture certificates issued at each stage of a development, from



the issue of construction certificates and complying development certificates through to occupation and completion certificates.

In Victoria such a system is in place and in fact has been extended so that the State acts as an intermediary between the councils and the Australian Bureau of Statistics (ABS) and captures all the building statistical information required by the ABS and passes it on in a suitable form. In NSW the ABS captures this information from individual councils.

## **BASIX**

BASIX is the Building Sustainability Index scheme which is administered by e-Business Branch. BASIX aims to achieve efficiencies in water and energy use and hence improve the environmental sustainability of dwellings. The requirement to obtain a BASIX certificate applies to all residential buildings (Classes 1, 2 and 4) and is implemented under the EP&A Act. BASIX is assessed online using the BASIX assessment tool.

BASIX is part of the development approval process and hence assesses at a planning stage which need not be the same as what occurs at the construction stage. Once the design plans are complete it is necessary to obtain a BASIX certificate which must be submitted with the DA or CDC. Based on the data collected an assessment is made of the impact of the scheme.

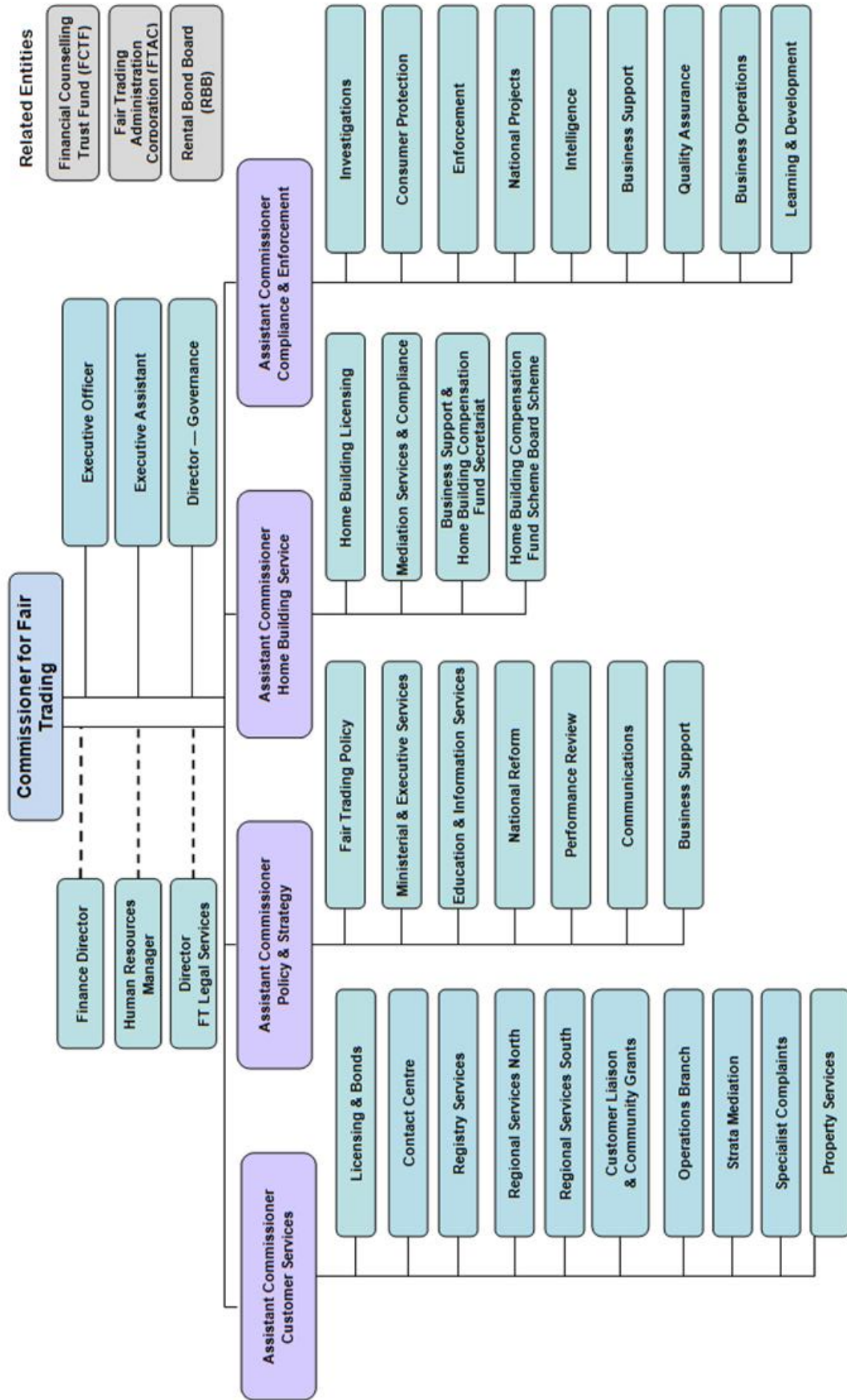
At the national level there is an energy efficiency standards built into the NCC which applies to all classes of buildings. It has a “six star” rating for building envelope (thermal comfort) requirements which is higher than BASIX but it is not as broad or flexible as BASIX in respect to overall energy efficiency and does not cover water efficiency though it is broader in terms of coverage of classes of buildings.

It would seem desirable for NSW and the ABCB to work together to combine the best features of each scheme into a single national scheme.

### **7.3.3 Fair Trading**

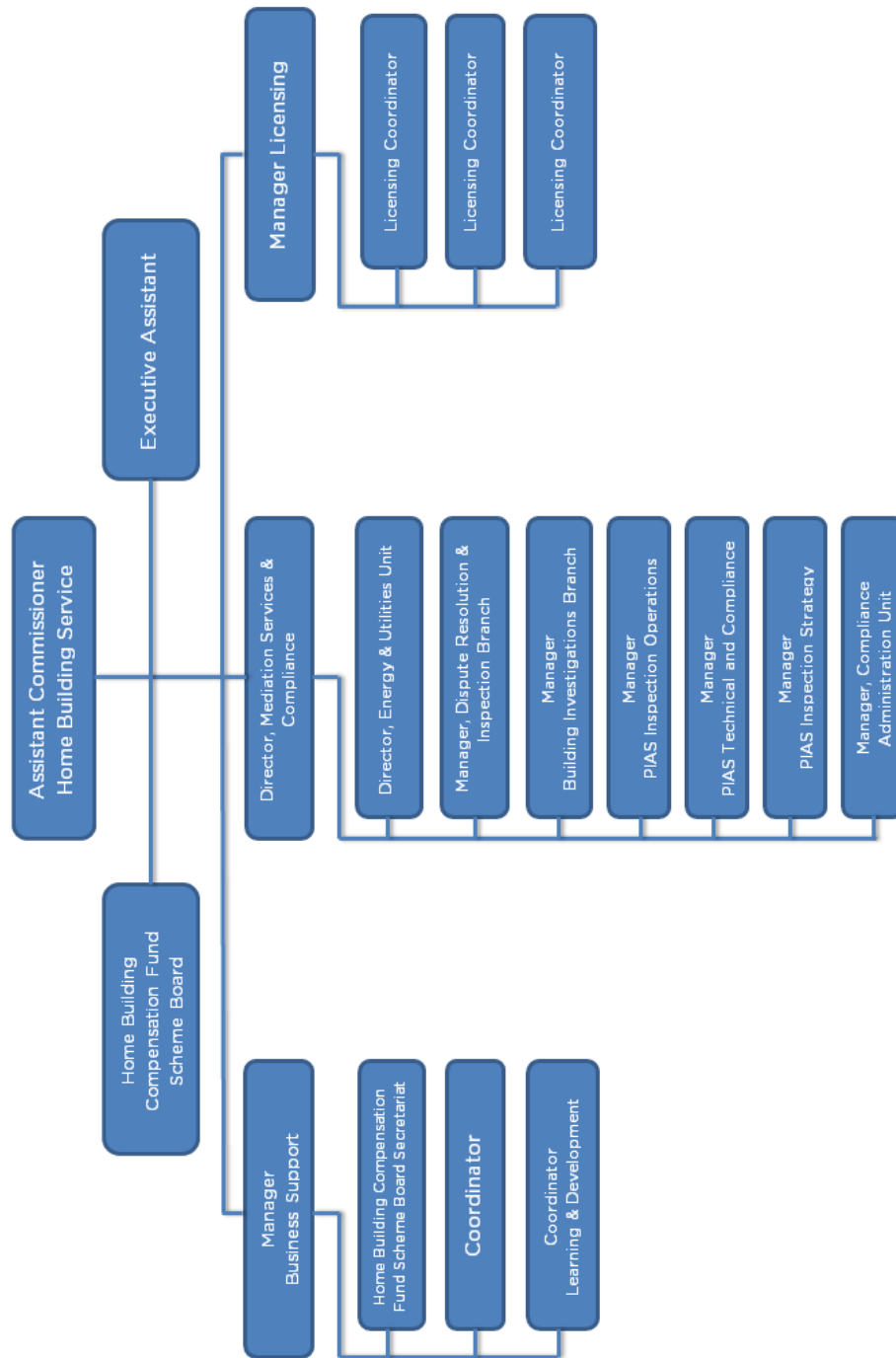
Fair Trading is a division of the NSW Department of Finance, Services and Innovation and has the broad role of providing consumer protection, advising businesses on fair and ethical market conduct and practice and regulating specific business matters and occupations. Within Fair Trading, Home Building Services advises on and administers the Home Building Act. The organisation structure of Fair Trading is set out in Figure 7.3 while Figure 7.4 shows in greater detail the structure of the Home Building Services part of Fair Trading.

Figure 7.3: Organisational Structure for NSW Fair Trading



Source: Department of Finance, Services and Innovation

Figure 7.4: Organisation Structure for Home Building Services



Source: Department of Finance, Services and Innovation

The key functions undertaken by Fair Trading are as follows:

**The customer services group:**

- handles all customer inquiries and complaints and business and trader inquiries
- operates a mediation and disputes resolution service
- provides education and information services to enable consumers and businesses to understand their rights and responsibilities
- manages rental bonds
- manages property and business licences.

**Home Building Services**

Home Building Services undertakes licensing, mediation and compliance functions with respect to residential building sector, fulfilling the following functions:

- undertakes the licensing, regulation and compliance with respect to certain occupations in the residential building industry, namely building, electrical, plumbing, drainage and gas fitting, air conditioning and refrigeration
- administers the Home Warranty Insurance Scheme and supports the Home Warranty Insurance Board
- undertakes mediation and compliance activities with respect to the licensed occupations and trades, including providing dispute resolution services and undertaking compliance and technical investigations
- advises on the Home Building Act .

**Compliance and enforcement**

Compliance and Enforcement has an across Fair Trading role in ensuring proper conduct and practice including:

- assess market practice information to identify and seek to address at risk trading and market practices
- conduct investigations of individual businesses and market practice
- undertake legal actions
- administer legislation in respect to product safety, including consumer electrical and gas appliances.

**Policy and strategy:**

Policy and Strategy has an across Fair Trading role including:

- supports the five advisory councils of Fair Trading (Fair Trading, Motor Vehicle Industry, Property Services, Home Building and Retirement Villages) as well as the Rental Bond
- coordinates involvement of Fair Trading in the national reform agenda
- undertakes performance evaluation of the activities of Fair Trading
- undertakes strategic policy projects.

Fair Trading administers the Home Building Act 1989 which establishes rules of conduct and minimum standards for residential building work and provides a framework designed to balance consumer protection and industry interests.

## Home Building Act 1989

The Home Building Act regulates residential building work and incorporates various forms of consumer protection. All residential building work must be undertaken by licensed contractors and the Act establishes the basis for licensing builders and associated trades. In addition, the form of the building contract is regulated other than for small jobs. The Act sets out all statutory warranties that are to be included in contracts. The warranty period is six years for a major defect and two years for all other defects. Provision is made for resolving building disputes and building claims, with powers to investigate and make orders, and the role of the Civil and Administrative Tribunal in this area is set out.

Arrangements are also established for insurance under the Home Building Compensation Fund.

The key features of the Act are as follows:

- establishes education, competency and supervision standards for those working within the home building industry in NSW
- sets contractual and disclosure requirements for those entering into contracts for residential building work
- provides statutory warranties which create legally enforceable, minimum standards for the quality of building work
- establishes mechanisms for the resolution of disputes between consumers and builders
- provides for “last resort” home warranty insurance to protect consumers.

## 7.4 Building Professionals Board

### Background

Traditionally local government councils have undertaken the role of reviewing building plans and assessing construction against plans and building codes. As noted above, as part of the major changes in 1997 to the EP&A Act, provision was made for the introduction of private certifiers who could compete with councils to certify buildings' conformity with approved plans and building standards. Initially four professional bodies were approved as accreditation bodies under the Act but after criticisms by the NSW Joint Select Committee inquiry that the scheme was “complex, messy and poorly understood by building practitioners as well as consumers”<sup>6</sup> it was decided to create a government scheme. This resulted in the enactment of the BP Act 2005 which came into effect in 2007.

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<sup>6</sup> NSW Joint Select Committee on the Quality of Buildings, Report Upon the Quality of Buildings, July 2002, p ii

## **Objectives of building regulation and certification**

There are two broad objectives for building regulation and certification.

The first is to achieve a level of building performance and quality consistent with the needs of society in terms of safety, amenity and sustainability which is broadly defined by consistency with the building standards and codes, as well as the ongoing satisfactory performance of the building.

The second is to ensure compliance of buildings with planning requirements as defined by the planning system which can have State, regional and local considerations.

In essence this defines the role and responsibility of a building certifier which, whether a council or private certifier, has a core public interest responsibility and undertakes a regulatory role.

## **The BP Act and regulations**

The role of accredited certifiers was part of the amendments made in 1998 to the EP&A Act which introduced a new system for the certification of building works and sub-divisions. These involved the insertion of Parts 4A, 4B and 4C into the EP&A Act. Initially the Minister approved four professional associations as accreditation bodies for certifiers. In 2005 it was decided to centralise the accreditation of certifiers in one statutory authority and in December 2005 the BP Act was passed by Parliament. During the course of 2007 the various parts of the BP Act, the Regulation 2007 and the Accreditation Scheme all commenced.

In 2008 there were significant amendments to the Act, these covering the following matters:

- increased disciplinary powers which mirrored those of the Administrative Decisions Tribunal
- provision of accreditation of bodies corporates
- bringing of council building certifiers under the Act which took effect from 1 September 2010, subject to certain transition arrangements, including the three year grandfathering provision.

In 2013 there were amendments to the Regulation to specify the requirements for a certifier contract.

Set out in Table 7.3 is an overview of the provisions of the BP Act and Regulation:

**Table 7.3: Overview of BP Act and Regulation**

Part/Division	Brief Explanation
<b>BP Act 2005</b>	
Part 1 Preliminary	Name, commencement and definitions
Part 2 Accreditation of certifiers	Sets out the process for applying for accreditation, the classes of accreditation, duration and conditions as well as the power to suspend accreditation
Part 3 Disciplinary proceedings	Sets out the procedures for making and investigating complaints
Part 4 Investigation of certifying authorities and accreditation holders	Allows for the investigation of councils as certifying authorities and accredited certifiers and building professionals, outside of the laying of complaints
Part 5 Powers relating to investigations	Covers such matters as power to obtain evidence, obtain entry to premises
Part 6 Requirements relating to accredited certifiers	Addresses such matters as record keeping, insurance requirements, conflicts of interest and matters relating to improper conduct
Part 7 Constitution and management of Board	Sets out the governance arrangements applying to the board and the conduct of its business
Part 8 Miscellaneous	Covers a range of matters including disclosure of a misuse of information; improper influence of a PCA; false representation; documentation to be provided to BPB by accreditation bodies; and penalty notices.
Schedule 1	Constitution and procedure of the Board
Schedule 2	Savings, transitional and other provisions
<b>BP Regulation 2007</b>	
Part 1 Preliminary	Commencement, definitions
Part 2 Accreditation of certifiers	Provides additional detail on the accreditation process
Part 3 Record keeping	Sets out in detail the records that must be maintained by certifiers and councils
Part 4 Insurance	Sets out specific requirements in respect to professional indemnity contracts
Part 5 Conflicts of interest	Provides additional guidance on conflicts of interest in regard to involvement in design of development, exemptions applying to certifiers employed by councils
Part 6 Miscellaneous	Sets out a range of matters including the requirements relating to contracts for certification work
Schedule 1	Categories of certificates of accreditation
Schedule 2	Fees
Schedule 3	Penalty notice offences
Schedule 4	Savings and transitional matters

The Act and Regulation are focussed on the process to be undertaken by the Board in the accreditation and disciplining of certifiers. The main matters omitted from the Act and Regulations are the following:

- absence of a statement of objectives for the Act which is a significant omission as it creates uncertainty on how to evaluate the performance of BPB
- absence of a consolidated statement of the functions of certifiers by category which, once again, is a significant omission but in this case is explicable as the functions are set out in various parts of the EP&A Act dealing with certification. As noted elsewhere it would be desirable to have a consolidated set of functions but these are better included in a Building Act
- no coverage of the role of the Board in supporting certifiers through education, training and other means, including peer review panels.

Chapter 11 sets out suggested changes to the BP Act while Chapter 15 undertakes a review of the Board functions of certifier accreditation, accountability and discipline and support

### **Role and functions**

The BPB has the role for accrediting certifiers, both council and private, under the BP Act. In undertaking this role the BPB undertakes a number of functions which are as follows:

- administration of an accreditation scheme under which it accredits certifiers to issue the certificates set out in the EP&A Act and other legislation which evidence that the building project has met specified requirements. The BPB has, as required by the Act, developed the Building Professionals Board Accreditation Scheme which has Ministerial approval
- promotion and maintenance of standards of building and subdivision certification
- facilitation of education and training for accredited certifiers
- undertaking disciplinary proceedings against any certifiers found to have engaged in unsatisfactory professional conduct or professional misconduct
- auditing accredited certifiers and councils in their certification role to assist in improving the system and the certification process
- provision of advice to the Minister on policy development on matters relating to the BP Act.

The Board comprises eight part time members appointed by the Minister on the basis of their knowledge and experience. The board is supported by a secretariat of twenty eight staff who are either employees of the Department or are contract employees. The Board has three Board Committees: Accreditation Committee, the Disciplinary Committee and the Insurance Committee.



The role of these Committees is summarised in Table 7.4:

**Table 7.4: BPB Committees**

Committee	Role
Accreditation Committee	<p>The role of the Accreditation Committee is to review accreditation reports prepared by staff of the Board and determine those applications for accreditation which are referred to the Accreditation Committee in accordance with the requirements of the Building Professionals Accreditation Scheme (Accreditation Scheme), the <i>Building Professionals Act 2005</i> and the <i>Building Professionals Regulation 2007</i>. Note the Manager of the BPB and the Team Leader Accreditation have delegation to approve of all A3, A4 and E1 applications and C1 to C16 applications if the applicant has the relevant registration on the National Professional Engineers Register and all applications made under the Mutual Recognition Act 1992 and applications for a certificate of corporate accreditation.</p> <p>The Committee provides advice to the Board on the accreditation process.</p>
Insurance Committee	<p>This committee is a special purpose committee which has been established to investigate ways in which to address current deficiencies in professional indemnity insurance of certifiers. It is chaired by a board member and includes representatives from the certification industry.</p>
Disciplinary Committee	<p>This committee was established to consider reports on all complaints and other investigations which were assessed as requiring further review and of a significance that could not be delegated to management to address. This committee has been recently replaced with a committee constituted by an external retired judicial officer, who acts as the committee chair, a certifier and a nominated board member.</p>

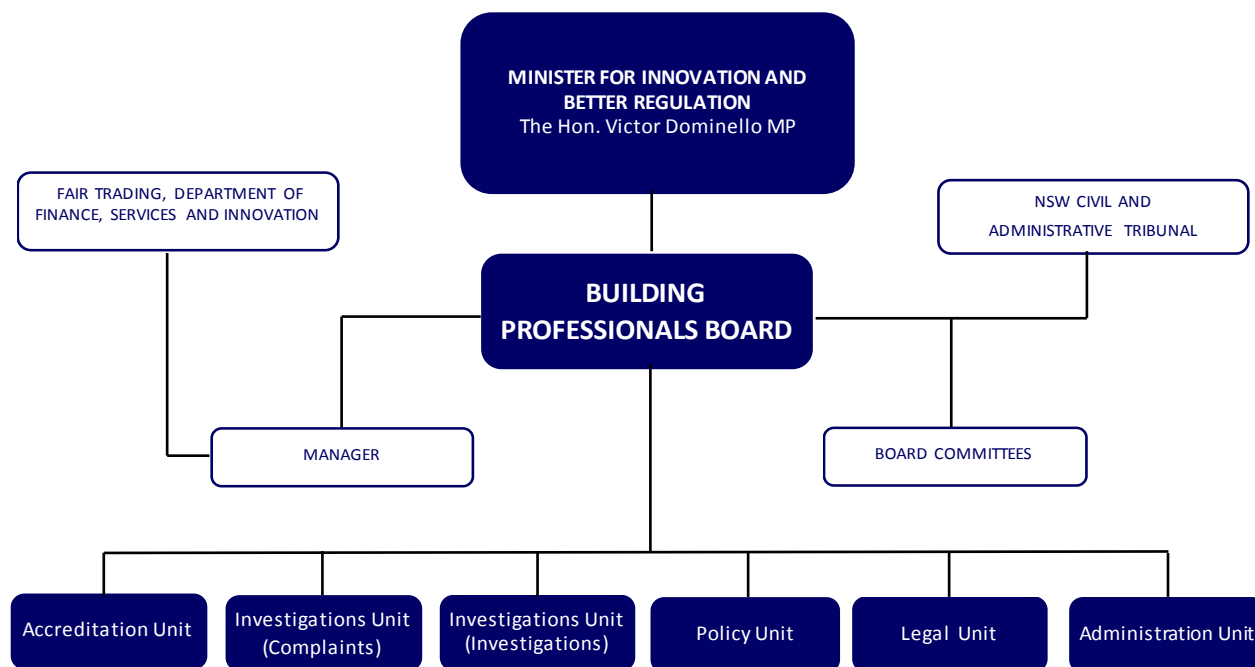
In addition the Board established two special purpose reference groups which include representatives of external organisations to progress matters that were identified in the Maltabarow Report, these being:

- Local Government Reference Group
- Practice Guide Reference Group

The work of these two groups is well advanced and the BPB would like to proceed to external consultation. However, consideration will need to be given as to how this fits into the recommendations contained in this report and the Government's response to these recommendations. Specifically, the proposals in the two documents, while a very useful initiative, are part a broader range of reforms identified in this report. In particular the practice guide includes within it various changes in certification process but by no means are these all the changes proposed in either Chapter 14 of this report or Chapter 8 of the Planning White Paper. Further, the changes proposed involve in certain cases the need for legislative change.

The structure of the Board and the supporting secretariat is set out in Figure 7.5:

Figure 7.5: Building Professionals Board Organisation Structure



Source: *Building Professionals Board 2013/14 annual report*

**Table 7.5: Organisation Structure, Function and Resourcing of BPB Secretariat**

Administrative Unit	Function	Staffing (FTE)
Accreditation	Undertakes an annual accreditation process for all certifiers and manages the accreditation conditions such as Continuing Professional Development. Also liaises with educational bodies to assess available qualifications	8
Investigations	Investigations all complaints lodged with the board and in addition is charged with the responsibility of undertaking proactive investigations and audits to assess the performance of certification undertaken and identify ways it could be improved	10
Policy	Undertakes research and manages policy development in support of building regulation and certification as relevant to the BP Act.	3
Legal	Advises the Board on the application of the Act and any proposed amendments as well as monitoring and advising the board on any relevant judicial decisions	1
Organisational support	Manager, administration and business support	6
<b>Total</b>		<b>28</b>

## Resources

The BPB is funded by a combination of accreditation fees and, prior to the transfer to Fair Trading, a grant from DPE, together with certain miscellaneous revenue. The BP Act contemplated funding from revenue sourced from development fees. The cabinet minute establishing funding arrangements for BPB proposed that a proportion of between 0.13 and 0.15 per \$1000 of development value for development applications over \$50,000 be used to assist funding the BPB. The revenue and expenditure over the last five years is provided in Table 7.6 together with information on employees and contracted staff.

**Table 7.6: Financial Resources and Staff Resources of BPB\***

Items	2014-15	2013-14	2012-13	2011-12	2010-11
Revenue \$000					
• fees	1012	1151	410	847	702
• Dept.	2900	2900	2900	2900	3300
• other	793	358	422	327	264
• total	4705	4409	3732	4074	4266
Expenses \$000	4893	3496	3967	4584	3814
Staffing (FTE)					
• Employees	17	19	19.9	20.2	21.7
• contractors	11	3	2	5	6
• Total	28	22	21.9	25.2	27.7

*Source: Building Professionals Board 2013/14 annual report and Department of Finance and Innovation*

BPB has been heavily dependent for funding on a grant provided by DPE. There has been no budget process applied to BPB (though it was planned to introduce this for 2015-16, prior to the transfer of BPB to Fair Trading) and no system of forward estimates. Hence it has been difficult for BPB to engage in forward planning, given the high level of uncertainty about its funding position on a year to year basis. Over the last year there has been a substantial reliance on contractors who in 2014-15 accounted for nearly 50% of staffing resources. The contractors have been funded by drawing down the BPB's bank account, which is clearly not sustainable. There has been a longer term decline in the number of permanent employees which currently stands at 17.

### **Accreditation scheme**

The Board is required to and has put in place an accreditation scheme. The key elements of the scheme are as follows:

- core performance criteria (core skills and core knowledge) that apply to each category of accreditation
- requirements for each certifier category which covers speciality knowledge(know and understand),speciality skills (ability to), speciality qualifications and level of experience
- code of conduct that applies to all certifiers
- Continuing Professional Development (CPD) requirements that apply to all certifier categories other than E1, swimming pool certifier.

In addition, under the BP Act and Regulations, there is a requirement for private certifiers to be covered by professional indemnity insurance.

Accreditation applies to both private certifiers and council building certifiers, though the terms of accreditation differ as between council and private certifiers. Amendments to the Accreditation Scheme, which commenced on 1 March 2010, established transitional provisions that applied up until 1 March 2013. Council certifiers accredited under these transitional arrangements before that date can retain their current level of accreditation while employed as certifiers in councils. From 1 March 2013 all persons applying for accreditation, including council accredited certifiers who apply for a higher

level of accreditation, are subject to the same criteria and assessment. The only exception applies to council accredited certifiers who were enrolled in a course approved by BPB and who applied to BPB before 1 March 2013.

Accreditation is undertaken annually and is subject to an annual fee. All persons applying for accreditation, except for the E1 category, are required to have successfully completed the certification short course provided by University of Technology Sydney or undertaken the accreditation exam. In general the accreditation assessment is desk top in approach that relies on the applicant to have obtained a qualification recognised by BPB rather than test an applicant's actual knowledge and skills. BPB has provided a grant to the University of Newcastle to undertake research to develop a competency based assessment and diagnostic tool to test the competency of persons seeking to be accredited.

The categories and numbers of certifiers for each of the last five years are set out in Table 7.7.

**Table 7.7: Categories and Numbers of Certifiers 2010-11 to 2014-15**

Category of accreditation	2007/08	2008/09	2009/10	2010/11	2011-12	2012-13	2013-14	2014-15
A1 – Accredited certifier – building surveyor grade 1	119	128	150	629	633	648	660	666
A2 – Accredited certifier – building surveyor grade 2	112	94	100	292	288	296	279	277
A3 – Accredited certifier – building surveyor grade 3	11	17	27	155	174	202	207	222
A4 – Accredited certifier – building inspector			1	119	129	152	146	183
B1 – Accredited certifier – subdivision certification	23	18	13	17	18	21	20	21
C1 – Accredited certifier – private road and drainage design compliance	165	72	71	71	141	156	168	191
C2 – Accredited certifier – private road and drainage construction compliance	132	72	71	71	67	71	70	77
C3 – Accredited certifier – stormwater management facilities design compliance	132	76	76	75	72	75	74	82
C4 – Accredited certifier – stormwater	132	76	77	76	73	77	76	82

Category of accreditation	2007/08	2008/09	2009/10	2010/11	2011-12	2012-13	2013-14	2014-15
management facilities construction compliance								
C5 – Accredited certifier – subdivision and building (location of works as constructed)	132	44	26	22	19	18	19	19
C6 – Accredited certifier – subdivision road and drainage construction compliance	132	70	68	69	65	71	70	76
C7 – Accredited certifier – structural engineering compliance	181	85	81	78	75	79	79	86
C8 – Accredited certifier – electrical services compliance	8	4	3	3	4	4	5	5
C9 – Accredited certifier – mechanical services compliance	10	5	4	4	7	7	10	11
C10 – Accredited certifier – fire safety engineering compliance	27	39	43	51	64	71	85	100
C11 – Accredited certifier – energy management compliance (Classes 3, 5 to 9)	6	3	3	3	3	3	3	3
C12 – Accredited certifier – geotechnical engineering compliance	127	60	54	50	46	48	49	51
C13 – Accredited certifier – acoustics compliance	7	3	2	2	2	2	2	2
C14 – Accredited certifier – building hydraulics compliance	133	43	23	18	16	19	20	21
C15 – Accredited certifier – stormwater compliance	132	76	76	75	72	76	75	82
C16 – Accredited certifier – specialty	133	62	55	51	49	51	53	54

Category of accreditation	2007/08	2008/09	2009/10	2010/11	2011-12	2012-13	2013-14	2014-15
hydraulic services compliance								
D1 – Accredited certifier – strata certification	19	19	20	24	24	23	24	25
E1 – Accredited Certifier – Swimming Pool Certification								9

\*Accredited certifiers are often accredited in more than one category of accreditation

Number of certifiers	2007/08	2008/09	2009/10	2010/11	2011-12	2012-13	2013-14	2014-15
Overall number of certifiers at end of the financial year	384	373	420	1,351	1,380	1,467	1,476	1,602

Source: Building Professionals Board 2013/14 annual report

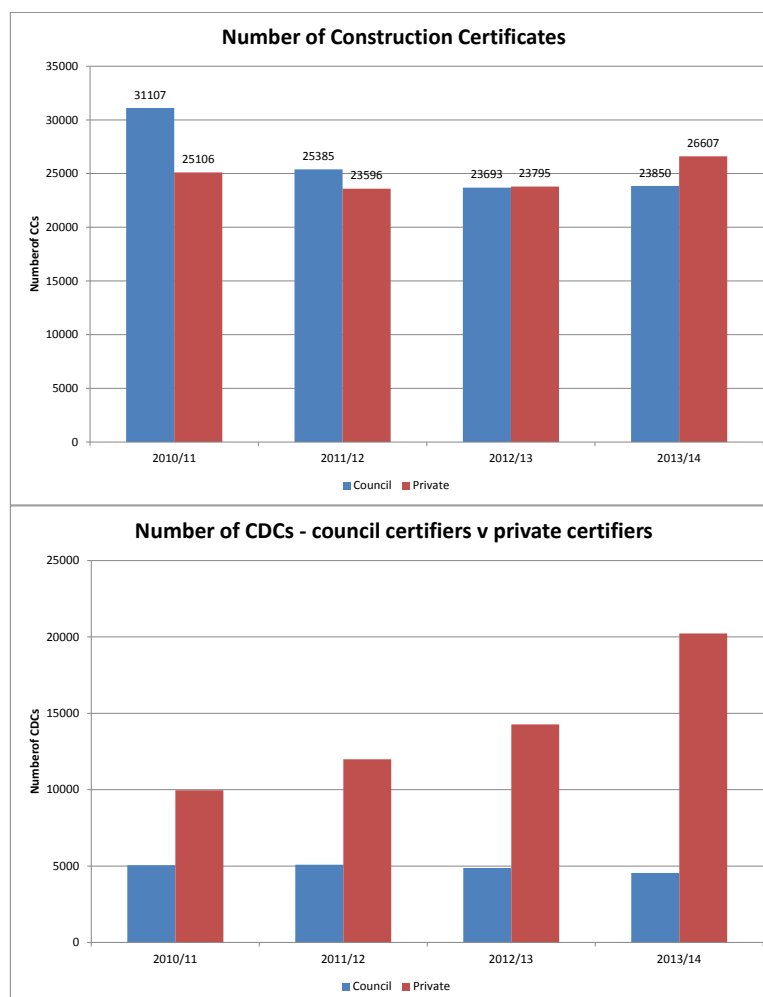
In total there are currently about 1600 individual certifiers, noting that a person can have more than one category of certification. The largest categories are A1 to A3. The number of private certifiers is 756 while there are 845 council certifiers.

The Board is required to maintain a public register which includes the particulars of each accredited certifier.

A person who is refused accreditation or is suspended from accreditation can seek a review of the decision by the NSW Civil and Administrative Tribunal (NCAT).

The trend has been for increasing use of private certifiers compared to council certifiers for the issue of CCs and CDCs. In 2010-11 council certifiers issued 51% of all CCs and CDCs but by 2013-14, this had fallen to 38%. Associated with this fall was the substantial increase in the number of CDCs issued over the period, which are predominately issued by private certifiers. This trend is shown in Figure 7.6:

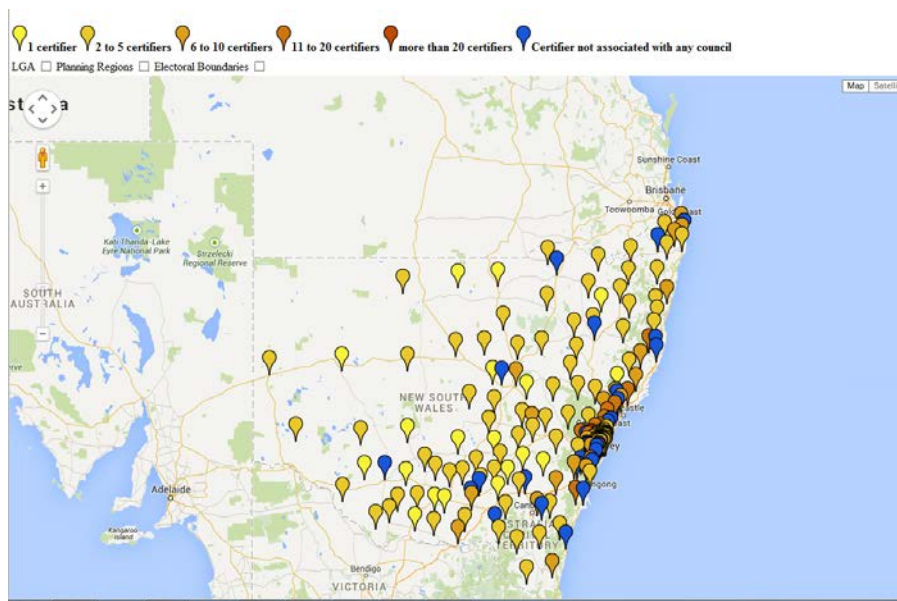
**Figure 7.6: Number of CCs and CDCs Issued by Year, Private and Council Certifiers**



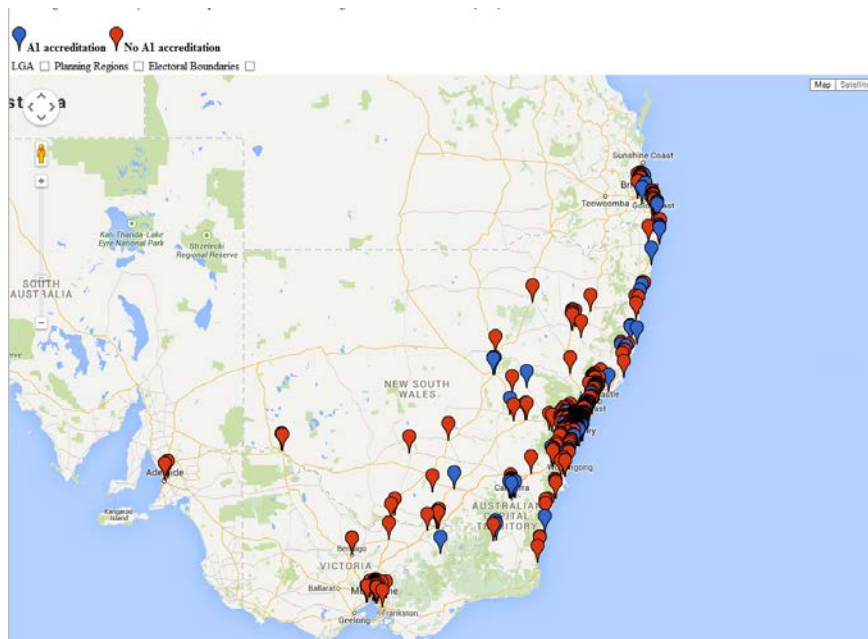
Source: Local Development Performance Monitoring data, Department of Planning and Environment

This trend is allied to the location of private certifiers, who are predominantly located in the Sydney Region and east coast of NSW. However, certification services are needed state-wide as reflected in the location of council certifiers. The market share of private certifiers is largest in metropolitan areas where there is a substantial volume of work and ability to cover multiple council areas. In regional areas the market share of private certifiers is considerably lower owing to the lesser volume of work and in particular the greater distances to travel to service clients. This difference in part explains a very different dynamic in the relation between councils and private certifiers in regional area relative to metropolitan areas which is further commented on in Chapter 9.



**Figure 7.7 Location of NSW council certifiers**

*Source: Building Professionals Board*

**Figure 7.8 Location of NSW private certifiers**

*Source: Building Professionals Board*

## Complaints and Disciplinary Process

The complaints and disciplinary process followed by the Board is set out in Part 3 of the Act. This is largely a reactive process which can be initiated under three situations: by the lodgement of a complaint; as a result of an audit undertaken under Part 4 of the Act; or following the imposition of a suspension under the emergency powers of the Act.

The great bulk of disciplinary action and investigations are taken in response to a complaint, though it should be noted that the Board has the power to act in urgent cases to suspend accreditation or impose conditions. Any complaint must be in writing, contain full particulars of the matter and accompanied by a statutory declaration. At the time of submission the complaint is assessed and a decision is taken whether to dismiss or proceed with an investigation. If the complaint is not dismissed the Board must, within 28 days, inform the relevant certifier of the nature of the complaint and provide the opportunity for a written submission. An investigation is undertaken and a report produced and the certifier has 21 days to respond to the report.

The steps involved in the process can be summarised as follows:

1. receipt of a complaint
2. Board informs certifier of complaint within 28 days of complaint
3. certifier has 7 days to respond
4. an investigation is undertaken (no time limit)
5. the investigator prepares a written report (no time limit)
6. a copy of the report is provided to the certifier (no time limit)
7. the certifier has 21 days to respond
8. matter is heard by Board or Board committee and decision made. Low level matters can be delegated to the manager for action (no time limit for this).

The Board Disciplinary Committee considers the reports and makes decisions on disciplinary action, though as noted above the manager has delegation to handle less serious matters.

The number of complaints, the matter being complained about and how they were determined are set out in Tables 7.7 and 7.8 for the broadly five year period from January 2010 to February 2015. Over that period 579 complaints were lodged, an average of 115 per annum. Of that total of complaints, 21 were withdrawn, 296 were dismissed and 92 were upheld, the latter averaging 18 upheld complaints per year. Dismissed complaints were 78% of total complaints lodged. Upheld complaints were reasonably evenly divided between matters relating to CCs, CDCs, OCs and the role of the PCA.

Councils generate about 38% of all complaints.

**Table 7.8 Building Professionals Board Complaints**

Nature of Complaints		Dismissed				Upheld				Withdrawn / Terminated				Pending
(01.01.2010 to 26.02.2015)	Total Lodged	Simple	Medium	Complex	Total Complaints	Simple	Medium	Complex	Total Complaints	Simple	Medium	Complex	Total Complaints	Total Complaints
Code of Conduct	39	19	1	0	20	3	0	0	3	1	0	1	2	14
Construction Certificate	110	47	7	1	55	22	1	0	23	5	1	0	6	26
CDC Codes SEPP	154	31	21	1	53	22	4	1	27	3	2	0	5	69
CDC AH SEPP	4	0	0	0	0	0	0	0	0	0	0	0	0	4
Occupation Certificate	82	28	5	1	34	14	2	2	18	1	0	0	1	29
PCA	172	103	16	2	121	16	3	1	20	6	0	0	6	25
Other Complaint Nature	18	7	6	0	13	1	0	0	1	0	1	0	1	3
	579				296				92				21	170

**Table 7.8 Building Professionals Board Complaints**

Complaints Reasons Categories (1.01.2010 to 26.02.2015)		Total Lodged	Dismissed				Upheld				Withdrawn / Terminated				Pending
			Simple	Medium	Complex	Total Complaints	Simple	Medium	Complex	Total Complaints	Simple	Medium	Complex	Total Complaints	Total Complaints
1	Complying development certificate does not comply with the Codes SEPP/LEP/DCP	142	30	19	1	50	21	4	1	26	3	2		5	61
2	PCA monitoring - failure to take action when matters were identified	180	114	15	2	131	14	3	1	18	7		1	8	23
3	Occupation certificate issued when development consent conditions were not satisfied	40	19	2		21	7		1	8				0	11
4	Construction certificate issued when conditions of consent were not satisfied	14	8	1		9	4			4	1			1	
5	Failure to respond appropriately to enquiries / correspondence	34	11	5	1	17	2			2		1		1	14
6	Failure to lodge copy of CDC / CC documents with Council.	15	8			8	3			3				0	4
7	Failure to notify residents of pending CDC.	3				0				0				0	3
8	Conditions of consent not complied with.	0				0				0				0	
9	CC/CDC application does not comply with regulation.	42	15	3		18	4	1		5	4	1		5	14
10	PCA monitoring - failure to take appropriate action (missed inspection, unauthorised work, inconsistent with DA/CDC, other)	3				0				0				0	3
11	OC issued when consent conditions were not finished.	9	8	1		9				0				0	
12	OC issued when building not suitable for occupation - BCA related.	3	2			2				0				0	1
13	OC issued when building not suitable for occupation - non-BCA related.	15	5	1	1	7	5	1	1	7	1			1	
14	CC/CDC does not comply with BCA.	19	6			6	8			8				0	5
15	OC issued when building inconsistent with DA.	4	1			1		2		2				0	1
16	Failure to ensure regulatory requirements for issue of certificate.	90	36	9		45	13	1		14	5	1		6	25
		613				324				97				27	165

(note - more than one reason captured for some complaints)

Source: Building Professionals Board Complaints Register (internal)

The average time to complete the review of certifier complaints over the last five years is set out in Table 7.9. Over the period July 2010 to April 2015, the average time taken to complete all reviews was 175 days or nearly six months. This includes complaints that were withdrawn or dismissed early in the process and hence is an understatement of the time taken to finalise complaints. It is notable that even for the category of simple complaints the average time taken was 148 days or five months, which appears excessive. For medium and complex matters the average time taken was about 280 days or over nine months.

**Table 7.9: Average Time to Complete Certifier Complaints**

Average Days to Complete Certifier Complaints July 2010 – April 2015	
Complaint Category	Average Days to Complete
Complex	279 days
Medium	285 days
Simple	148 days
<b>Average duration for all types</b>	175 days

*Source: Building Professionals Board Complaints Register (internal)*

Priority is given to complex complaints (10.4% of complaints) as they are generally of a more serious nature or potentially can affect occupant safety, whereas medium complaints (28.2%) are of a less serious nature, usually contain more allegations/issues and investigation processing times are dependent upon available resources.

Typically there are around 115 complaints lodged per year and normally between 60% and 80% are withdrawn or dismissed. At present there is a significant backlog of complaints that have not been finalised despite 140 complaints having been determined in the 2015 financial year, with an excessive 150 complaints outstanding as at end June 2015. The reason for the backlog was due to insufficient experienced staff to handle the volume. Additional short-term resources have been provided to seek to address this backlog.

An independent review of the process was undertaken by Mr Stephen Walmsley with a report produced in May 2014<sup>7</sup>. It was noted that the complaints process can take considerable time, with the simplest complaint that is not dismissed or withdrawn upfront taking about three months to investigate and that a more complex complaint can take six months or more with the most efficient personnel. The report concluded that “there is little time currently being wasted in the process and the time taken is generally a consequence of the need to comply with the obligations of fairness

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<sup>7</sup> Review of the Complaints, Investigation and Disciplinary Functions of the Building Professionals Board, May 2014

accorded by the Act to both complainants and certifiers". The report made a number of recommendations, the more significant ones being:

- utilise a gatekeeper at receipt of complaints to undertake a triage of all incoming complaints, assessing each, imposing PINs fines where appropriate and ensure that only significant matters go to the Board
- establish a revised Disciplinary Committee chaired by an external lawyer, a certifier and give consideration to the appointment of a community member
- develop and publish a penalty guideline to provide greater assurance of consistency in decision making
- maintain and use more actively the PINs system
- do not introduce a penalty demerits system.

Action has been taken with respect to the Disciplinary Committee which is chaired by a former judicial officer (Mr Walmsley), with a board member and a certifier as the other members.

A demerit points system, akin to the system that operates for drivers in NSW, is in place for building professionals in Queensland and the ACT. The independent review argued against the scheme on the basis that there was no firm evidence of its effectiveness; that the scheme would have a significant administrative burden which would be difficult to justify with 1500 certifiers; and the use of PINs would be a more effective alternative.

The Building Professionals Board is triaging all incoming complaints, both formal and informal, and introduced further efficiencies as Mr Walmsley recommended. The Board recently established a disciplinary committee and has not introduced a penalty demerits system.

The Building Professionals Board has not yet introduced Mr Walmsley's recommendations to:

- amend its letter templates for complaints, investigations and audits
- amend and publish the penalty guideline (the 2012 version is being used)
- maintain and use the PINs system
- amend the complying development certificate.

### **Investigation and audits**

The Board has the power under Part 4 to undertake investigations and audits that are not based on complaints. It is able to investigate private certifiers, council certifiers and councils. These investigations could be initiated because of a concern about particular certifiers or else they could be undertaken to investigate specific topics, seeking to identify current practice and to highlight any deviations from best practice. The purpose of such audits is not to undertake disciplinary actions, though that could be a side effect, but rather to seek to improve the performance of certification. Improved performance can occur through an active audit process through two channels:

1. sending a signal to certifiers that there is an active audit program which is capable of identifying and addressing sub-standard certification
2. providing a means to communicate to all certifiers on what is best practice in particular areas of certification and what are common problem areas that need to be addressed.

At the time of the establishment of the BPB it was contemplated that the BPB would have a substantial audit program, with initial audit staff of eight rising to fourteen undertaking 256 audits of high risk critical stages; 80 council audits; and 300 audits of accredited certifiers per annum. This represented auditing of 1 in 66 developments in NSW.

Owing to the limited resources available to the board there is currently no audit program being undertaken and, past audits were largely a desk top review.

### **Education, training and support**

The Accreditation Scheme sets the requirements for continuing professional development for certifiers. The Accreditation Scheme requires all certifiers, other than category E1 certifiers, to participate and satisfy the requirements of the Board's Continuing Professional Development program as specified in Schedule 5.

The CPD program requires all certifiers to successfully complete the approved CPD activities as set by the Board and also sets different requirement for private and council certifiers.

BPB is able to set approved CPD activities for up to five days per calendar year and may determine different course content for different certifier categories. The BPB has not set any approved CPD activities since 2009.

BPB is currently working with two external Registered Training Organisations to develop an approved CPD activity on complying development which it is intended to require all A1, A2 and A3 certifiers, private and council, to successfully complete.

Since 1998, when private certification was introduced, private certifiers have been required to undertake CPD in accordance with the requirements of a professional association's CPD program. The Board does not deliver CPD but the Accreditation Scheme requires it to be obtained through other organisations and institutions. The Accreditation Scheme requires private certifiers to:

- participate in, and satisfy, the requirements of a CPD program offered by a professional association, institute or organisation recognised by the Board
- undertake the equivalent CPD to a CPD program offered by a professional association, institute or organisation recognised by the Board
- successfully undertake 25 hours of training or education in a course or program approved by the Board.

Nearly all private certifiers participate in, and satisfy, the requirements of a CPD program offered by a professional association, institute or organisation recognised by the Board.

**Table 7.10: Recognised professional associations, institutes and other organisations**

Association of Accredited Certifiers
Association of Consulting Surveyors NSW Inc.
Association of Hydraulic Services Consultants Australia
Australian Institute of Building
Australian Institute of Building Surveyors
Board of Surveying and Spatial Information (New South Wales)
Engineers Australia
Institution of Surveyors NSW Inc.
Planning Institute of Australia

*Source: Building Professionals Board accreditation scheme*

The professional associations require varying amounts of CPD to be undertaken by their members. The Association of Accredited Certifiers requires 30 hours of CPD per year. The Australian Institute of Building Surveyors requires 90 hours of CPD over three years and Engineers Australia requires 150 hours of CPD over three years.

Council accreditation commenced on 1 March 2010 and the current CPD requirements for council accredited certifiers are:

- four hours for the first year of accreditation
- six hours for the second year of accreditation
- eight hours in the third and any subsequent year of accreditation.

Private certifiers are required to undertake and satisfy the CPD program of a relevant professional association recognised by the Board in Schedule 5 of the Accreditation Scheme. For example building surveyors can choose between the Association of Accredited Certifiers and the Australian Institute of Building Surveyors CPD programs and engineers (c categories) satisfy the CPD program of Engineers Australia.

Council certifiers are in general required to undertake eight hours per year of CPD in areas of technical specialty relevant to their category of accreditation. The Accreditation Scheme provides some general guidance on what is acceptable training for council certifiers however it is left up to the individual council certifier to determine what constitutes training in an area of technical specialty relevant to their category of accreditation.

The Board does not have a list of available CPD courses but relies on certifiers to undertake CPD courses offered by the recognised professional associations. The BPB currently plays no role in ensuring certifiers engage in suitable and useful courses other than relying on the programs of recognised professional associations.

In 2007 the Board developed and delivered a mandatory CPD course on the recent changes to legislation such as the commencement of the Building Professionals Act 2005, the Building Professionals Regulation 2007 and the Accreditation Scheme. Between 2008 and 2009 the Board worked with external providers being the



Australian Institute of Building Surveyors, TAFENSW, OTEN and Kite Events and Conference to set mandatory CPD in relation to legislative requirements and professional practice. The external organisations developed relevant CPD training and the Board approved of these as approved CPD activities that all certifiers were required to undertake. The training related to insurance, risk management and ethics.

More recently, the Board has engaged registered training organisations to develop a CPD course on complying development, which is due to commence in the latter half of 2015.

The Board provides education material on its website and in articles in its enews.

## **7.5 Certification process**

As shown in Section 7.4, there are a large number of categories of certifiers and in general terms their role is to issue development certificates relating to a range of building matters that confirm that the specific aspect of the development meets required standards. These could relate to fire safety systems, hydraulic systems, swimming pools and swimming pool fences, stormwater management and a host of other types of development.

The key type of certifier is a building certifier who has overall responsibility for certification of a complete building project. The EP&A Act sets out the responsibilities for both “certifying authorities” and “principal certifying authorities” (PCA) which are the responsibilities undertaken by a building certifier. Certifying authorities are involved in the planning stage leading to the issue of a CDC or CC and can also be involved in the issue of compliance certificates. A PCA is appointed after the issue of a construction or complying development certificate and acts as the certifier during the construction stage. The PCA can issue occupation certificates and subdivision certificates.

The types of certificates that can be issued are explained in Table 7.11:

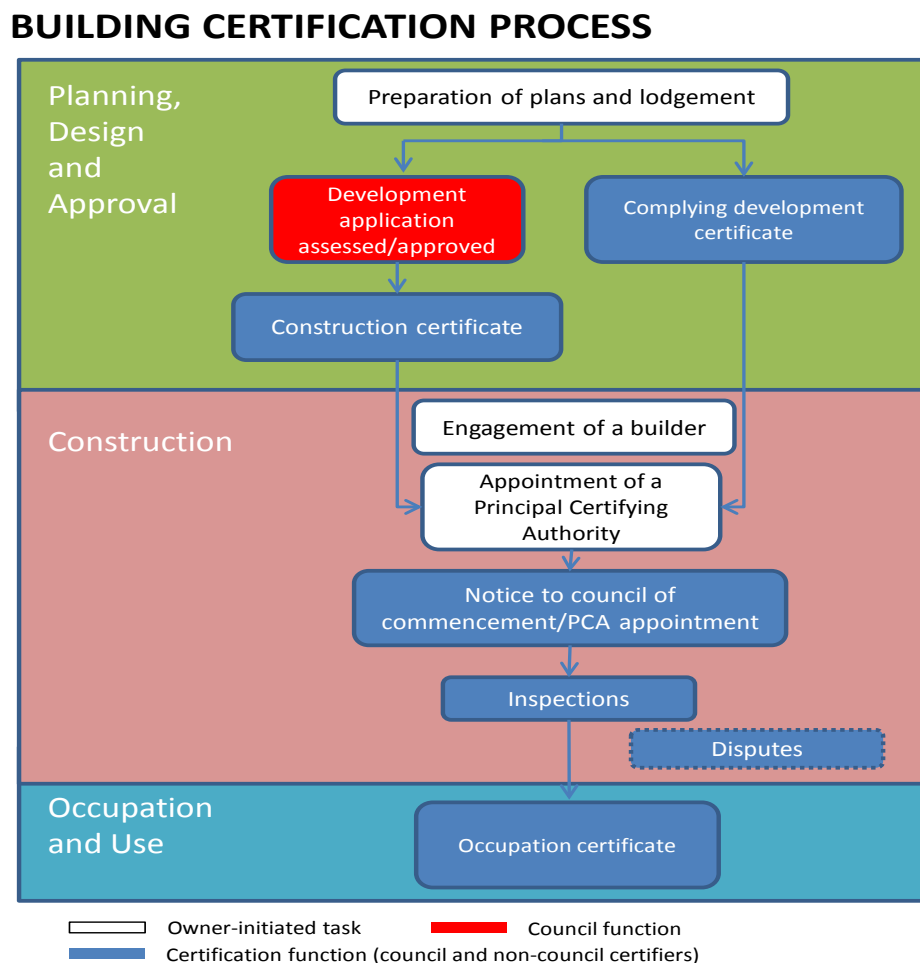
**Table 7.11 Building Certificates Issued Under the NSW Building Regulation System**

Certificates	Role of certificate	Legislation issued under
Complying development certificate	Development consent for a complying development, issued prior to commencement of construction and specifies any conditions of consent	Environmental Planning and Assessment Act
Construction certificate	Certifies that a building or subdivision work that has been specified but for which work has yet to commence will comply with all relevant regulatory requirements and standards	Environmental Planning and Assessment Act
Compliance certificate	Certifies that a specific aspect of a development complies with the relevant regulatory requirements either before work has commenced, in which case the design is certified, or after work is complete, in which case it is certification of the design and installation.	Environmental Planning and Assessment Act
Occupation certificate	An occupation certificate permits occupation of a new building or change in building use and may be issued for the whole or part of a building. It is able to be issued as an interim or final certificate Prior to the issue of the certificate the certifier must be satisfied that: <ul style="list-style-type: none"> <li>• The critical stage inspections have been conducted</li> <li>• Any conditions of the development approval or the complying development certificate have been met</li> <li>• The building conforms with the BCA</li> </ul>	Environmental Planning and Assessment Act
Subdivision certificate	Authorises the registration of a plan of a subdivision. Prior to the issue of the certificate the certifier must be satisfied that: <ul style="list-style-type: none"> <li>• The critical stage inspections have been conducted</li> <li>• Any conditions of the development approval or the complying development certificate have been met</li> </ul>	Conveyancing Act 1919
Strata certificate	Authorises a strata plan, a strata plan of subdivision or a notice of conversion to be lodged for registration with Land and Property Information (a division of the NSW Office of Finance and Services). Strata plans are prepared by a registered land surveyor and must include a location plan, floor plan and schedule of unit entitlement. Strata subdivision may be approved via the development consent pathway or, under certain conditions, via a complying development certificate.	Strata Schemes (Freehold Development) Act 1973 and the Strata Schemes (Leasehold Development) Act 1986

A certifying authority is able to issue the certificates authorising the construction to commence while the PCA issues the certificates from the start to completion of construction and must issue the OC. It is required that a PCA is appointed prior to the commencement of building work. In practice it is the norm for the certifying authority and the PCA to be one and the same person with the legislation in effect providing the option for the project owner to make a change.

The building certification process is presented diagrammatically in Figure 7.9:

Figure 7.9: Building Certification Process



Source: Building Professionals Board

Building certification can either be undertaken by private certifiers or by council certifiers but in all cases the certifiers must be accredited by the BPB. The certifier is required to be appointed by the beneficiary of the development which in most cases will be the owner and under the BP Act there is a requirement that the beneficiary of the development enter into a written contract with the certifier. In undertaking their role certifiers have a number of statutory obligations, these being:

- act within the terms and conditions of their accreditation
- comply with the code of conduct
- undertake a program of continuing professional development, including any additional training required by the Board
- hold, if they are a private certifier, professional indemnity insurance (council certifiers are covered by the council's general insurance)
- maintain complete, confidential and secure records
- avoid any conflicts of interest.

The functions required of a building certifier are as follows:

- determining an application for CDC within a set period defined by the policy
- confirming the builder for the development has the required licence, permits, approval and insurance or an owner builder has an owner builder permit
- being satisfied that any preconditions required to be met before building starts or a certificate is issued have been met
- conducting critical stage inspections and issuing certificates in respect of each
- ensuring that critical elements and systems for the building have been certified by a properly qualified and experienced person
- taking steps to identify and address any non-compliance, including reporting non-compliance to the consent authority
- ensuring the development conforms with the standards of the NCC.

It is important that the distinction between the role and responsibility of the certifier and the builder are well understood, noting that there appears to be some confusion of these roles in the community. The certifier has two broad roles:

- ensure the building is compliant with the building consent relating to planning requirements
- ensure the building is compliant with building standards in the NCC and with any additional relevant State requirements.

It is in effect a regulatory role and does not involve a clerk of works or quality control function for the project. Building construction and the quality of the work is the responsibility of the builder and it is best managed by the builder.

## 7.6 Conclusions

The development of the national building code and its evolution to a performance based approach has created a sound and economically efficient base for building regulation at the state and territory level. However, the administrative structure of building regulation in NSW is complex and fragmented. There is a need for greater clarity in the relation between Fair Trading, DPE and councils and local government in respect to roles and responsibilities.

It is also clear that inadequate resources have been provided to the building regulation function in general, including BPB. In the case of BPB this has been compounded by a lack of certainty about the level of funding from year to year and an inadequacy in the level of funding relative to both its mission and the expectations for its functions set out in the initial government approval. Due to inadequate and uncertain funding, BPB has not been able to undertake its full role, with inadequate resources applied to handling complaints, education and training, a lack of an audit function and inadequate support for certifiers in undertaking their role. The time taken to address complaints is excessively long as is the number of outstanding complaints.

The following chapter compares the structure and approach applied in NSW with other jurisdictions.

## **8 Approach to building regulation and certification in other jurisdictions**

### **8.1 Introduction**

The purpose of this chapter is to document the approach followed in building regulation and certification in other jurisdictions. In order to consider whether a different culture and history has an impact on the approach to building regulation an examination was undertaken of select European countries' approach to building regulation. This is followed by a more detailed examination in Sections 8.3 and 8.4 of the approach followed in each Australian state and territory as well as New Zealand. The purpose of the survey is to identify points of similarity as well as differences as an input to assessing what is the most appropriate approach to structuring building regulation and certification.

### **8.2 Summary survey of select European approaches to building regulation**

A selection of European countries, have been surveyed in respect to their approach to building regulation. The purpose of doing so is to assess whether significantly different approaches are taken in regard to building regulation by other countries. The EU does establish regulatory protocols in certain leading or priority sectors of the economy. One of the lead markets is the regulation of sustainability in building construction. The EU has developed policies in this area but the individual European countries take responsibility for their approach to building regulation and seek to incorporate into their approach the proposed approach to building sustainability.

The European countries selected are France, Germany, UK, Sweden and Poland, being a spread of major western European countries, a Scandinavian country and a major eastern European country.

France has a distinctively different approach to building regulation with an approach that has been described as hybrid, with authorisation by public sector parties and control by an insurance based system (termed decennial insurance). The Housing and Building Code defines the requirements in the fields of safety, accessibility, acoustics, energy consumption etc. Building regulation is set out in state laws with a Model Building Code. There is a trend towards the code becoming performance based. The municipal councils undertake a compliance function during construction.

Insurance is obligatory for all building projects and the form of insurance is regulated by the state. The insurance scheme was introduced in 1978 and provides three levels of guarantee: zero defects for one year; satisfactory functioning for two years and ongoing responsibility for 10 years in respect to any major defects. Insurance requires a technical verification up front of the conformity of the work with the technical standards.

Building regulation in Germany is determined by the federal structure and relies on a strict system of product approvals. Building regulation is set at the state level but based on a Federal Model Building Code. The trend is towards making the regulation performance based. The municipal councils undertake the compliance function.

In the UK (excluding Scotland), the UK Department for Communities and Local Government is responsible for building regulation. Planning and building control are the responsibility of local authorities. In addition to the legislation there are various voluntary codes and standards.

In Sweden building regulation is performance based and mostly national but there are local rules that can apply. All building work requires a building permit. The owner is responsible for ensuring adherence to the technical regulations. The local authorities have an inspection role and use building committees to oversight developments.

Poland has a national building code which is largely prescriptive. Municipal councils have the role of reviewing building plans and issuing building permits and then undertake a role of checking as construction proceeds.

Overall, across Europe the following broadly characterises the approach to building regulation:

- a strong emphasis on sustainable development, driven by the EU
- mainly performance based building code, though with a few countries using prescriptive regulation
- national building codes and reliance on municipal councils for the approval and compliance function, with some take up of the French approach of using mandatory insurance.

In reality it is not that distinct from the approach followed in Australia and New Zealand which are reviewed in the following sections.

## **8.3 Survey of individual jurisdictions in Australia and New Zealand**

### **8.3.1 Victoria**

#### **Background**

Victoria has had a competitive building permit system in place since 1994, whereby building certification can be provided both by councils and private certifiers. It was introduced to seek to speed up the building approval system.

Victoria has a statutory authority charged with the responsibility for the regulation of the building sector. The Victorian Building Authority (VBA) was established on 1 July 2013 by means of an amendment to the Building Act 1993 and replaced two bodies, the Building Commission and the Plumbing Industry Commission. The VBA operates under the Building Act 1993 which regulates the full building industry and includes compulsory registration and insurance for builders and other building practitioners. The VBA is accountable to the Minister for Planning and is responsible for carrying out the functions set out in the Building Act 1993 and the Building and Construction Industry Security of Payments Act 2002.

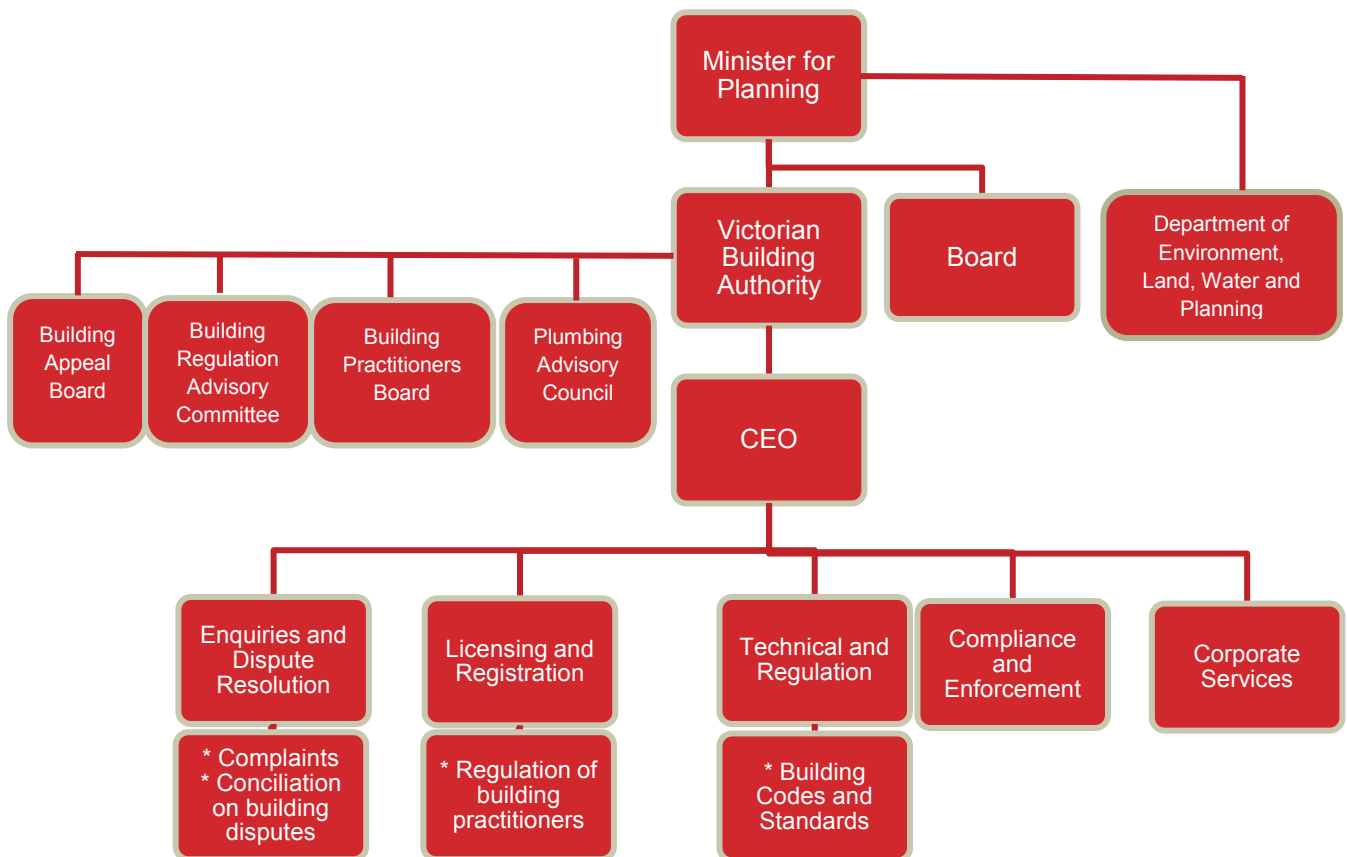
The VBA replaced the Building Commission after the Victorian Auditor General and the Victorian Ombudsman investigated and reported to the Government in 2011 and 2012, setting out criticism of the approach to building regulation. The Victorian Auditor General (VAG) report, Compliance with Building Permits, December 2011, found that the then Building Commission could not demonstrate that the building permit system, including the requirement to uphold and enforce minimum building and safety standards, was operating effectively.

Concerns were also expressed by the Victorian Ombudsman about the vulnerability, integrity, independence and administration of the registration system for building practitioners.

### Organisational structure

Prior to the formation of the VBA there were three statutory bodies with regulatory responsibilities in the building sector, namely the Building Commission, the Plumbing Industry Commission and the Architects Registration Board of Victoria; two advisory bodies to the Minister, the Building Advisory Council and the Plumbing Industry Advisory Council; and three regulatory bodies for the building industry: the Building Practitioners Board, the Building Appeals Board and the Building Regulations Advisory Committee. The formation of the VBA in effect combined the Building Commission and the Plumbing Industry Commission, while continuing with the advisory bodies with the structure as set out in Figure 8.1.

Figure 8.1 Victorian Building Regulation Organisational Structure



Source: author extracted from published material



The functions of the VBA are as follows:

- administer licensing and registration of plumbers
- support the Building Practitioners Board in administering the registration of building practitioners, namely building inspectors and surveyors, commercial builders, demolishers, domestic builders, draftspersons, engineers, quantity surveyors and erector of temporary structures
- undertaking of inspections, investigations and audits to enforce compliance with relevant legislation
- administer the collection of building levies
- oversees the work of building surveyors and Victoria's building permit system
- participates in the development of national building and plumbing standards
- provides information to consumers
- promotes the resolution of building and plumbing complaints
- conducts research relating to regulation.

The building policy function is exercised by a building policy unit within the Department of Environment, Land, Water and Planning. VBA works closely with four statutory bodies: the Building Advisory Council, Building Appeals Board, Building Practitioners Board and the Building Regulations Advisory Committee. Each of these bodies is an independent statutory authority supported by the VBA, whose members are appointed by the Minister for Planning. The role of each of these organisations is set out below:

- Building Advisory Council advises the Minister on all issues relating to the Building Act and the building industry
- Building Practitioners Board registers and oversees all building practitioners
- Building Appeals Board hears all appeals in relation to decisions by the BPB
- Building Regulation Advisory Council advises the Minister for Planning on draft building regulations, accreditation of new building products, construction methods, building components and systems
- Plumbing Advisory Council advises the Minister for Planning and VBA on plumbing industry issues.

## **Funding**

The VBA is funded by a levy on building permits and fees from registration applications.

## **Recent developments**

In May 2015, the Victorian Auditor General released a report, Victoria's Consumer Protection Framework for Building Consumers. The report notes that VBA is proceeding with efforts to implement the recommendations of the Auditor General's 2011 report but concludes that at this point in time the Victorian building consumer protection system does not possess the essential, required features for such a system.

### 8.3.2 Queensland

#### Background

In Queensland responsibility for planning and building regulation are split between two entities: The Department of State Development, Infrastructure and Planning is responsible for planning matters whereas the Department of Public Works and Housing incorporates the building regulatory and policy functions, in the form of Building Codes Queensland, covering legislation and policy in the building area (covering the responsibilities of the Building Policy Unit in NSW DPE) and the Queensland Building and Construction Commission. It should be noted that building certifiers in Queensland do not assess conformity with planning approvals but solely assess conformity with building standards.

Like Victoria, there was a recent inquiry in Queensland which resulted in the restructure of the then Queensland Building Services Authority (QBSA). The Inquiry was a Parliamentary Inquiry, “Inquiry into the Operation and Performance of the Queensland Building Services Authority”, dated November 2012. The QBSA was established in 1992 as a one stop shop to carry out the functions of licensing, dispute resolution and administer the Queensland home warranty insurance scheme and provide education, support and advice to the building industry and consumers. The inquiry concluded that there was a fundamental weakness in the one stop shop model as structured in QBSA. QBSA was operated by a general manager with an advisory board such that all management decisions were taken by the one person and it was concluded that there was an inherent conflict between its role with consumers and with building practitioners. The report also identified weaknesses in the dispute resolution process involving directions to rectify building problems, both legislatively and organisationally, problems with the certification process and ineffective or conflicted building inspections.

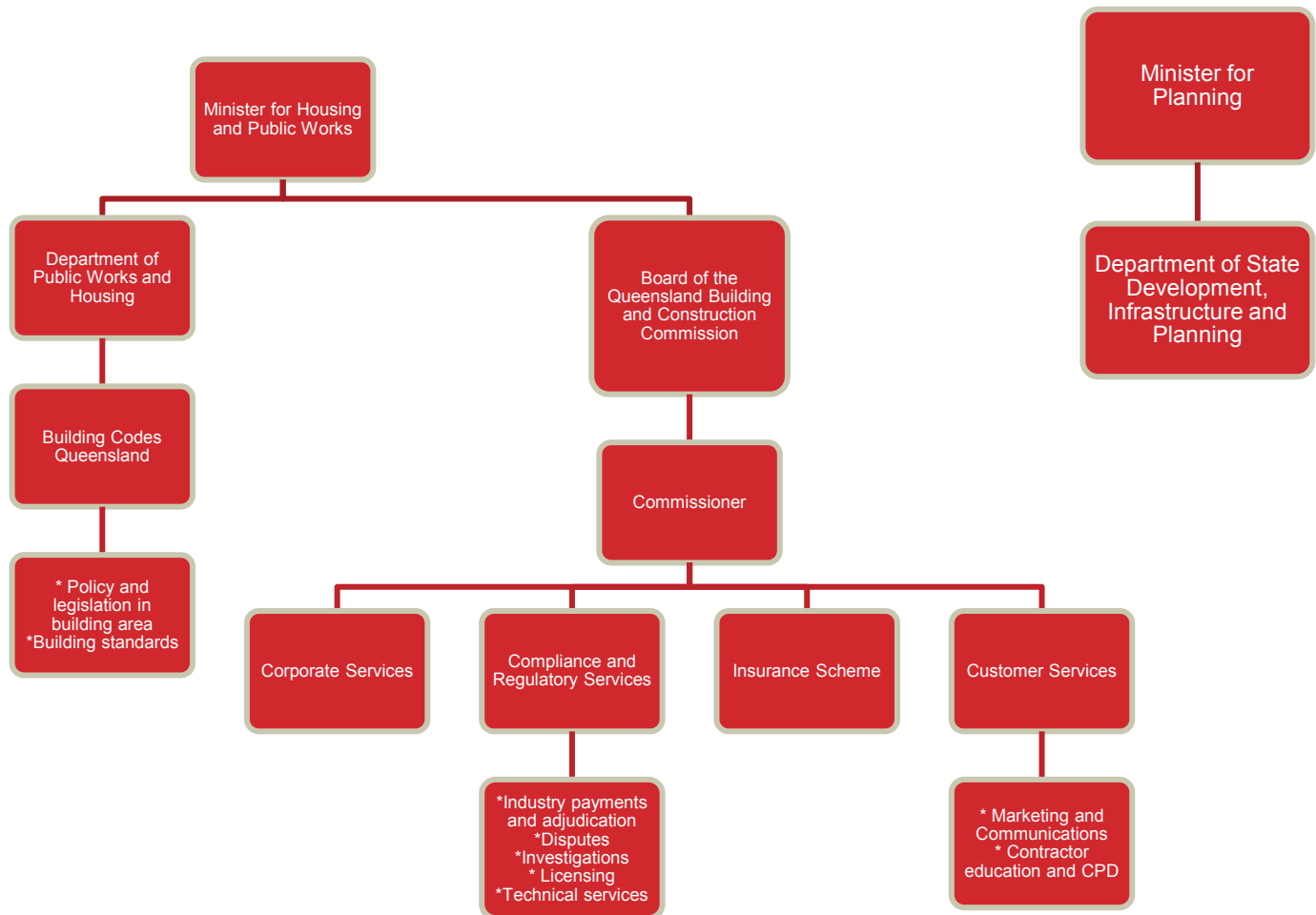
The Government issued a response in May 2013 which involved the following key elements:

- restructure QBSA as the QBCC with separate executives responsible for each of the key functions and with a board of governance
- transfer the licensing of plumbers and drainers from the Department of Housing and Public Works to QBCC, though retaining Building Code Queensland in the Department
- review of the role of private certifiers
- introduction of a rapid domestic building dispute resolution process;
- review of the licensing system
- creation of a framework for the audit and investigation to check compliance with building standards
- introduction of a penalty system for illegal and defective work
- improved education and training support for home owners and consumers.

## Organisational structure

The organisation structure for Queensland building regulation and certification is set out in Figure 8.2

**Figure 8.2: Queensland Building Regulation and Certification Organisational Structure**



Source: author extracted from published material

QBCC's role includes the following:

- education: runs seminars for licensees and consumers, including educating licensees on technical issues and good business practice and offering consumers advice on how to resolve disputes
- home warranty insurance scheme: any project with a licensed contractor performing residential work over a certain value is given insurance cover for up to 6.5 years after the date of the insurance premium or the date of the contract to build, whichever is the earlier
- dispute resolution service
- licensing licenses building practitioners.

## Funding

QBCC is funded by a combination of license fees and budget funding.

## Recent developments

In August 2011 a discussion paper was issued entitled, “Improving building certification in Queensland”. This was followed by a review of the Building Act and building certification with the report released in October 2014 and is currently subject to consultation and government deliberations<sup>8</sup>. The report contained 122 recommendations but the key recommendations are as follows:

- need for increased accountability for building certifiers and all other building professionals
- consumers need to be educated on the role of building certifiers
- disengagement of certifiers should only occur with the consent of the QBCC
- need for an increase in the supply of certifiers
- building legislation and code of conduct for certifiers needs to place greater emphasis on the public interest being the over-riding duty of certifiers
- improved disciplinary process through appropriate flexible and equitable penalties
- mandatory CPD
- licensing of private certifier employers
- greater control on the use of ‘competent persons’
- private certifiers to be able to refer building and construction compliance issues to the QBCC after serving a show cause notice
- no minimum mandatory fee for certifiers
- certifiers, inspectors and pool safety inspectors should have a minimum \$2 million professional indemnity
- establish the Building Industry Policy Unit in QBCC and disband BCQ
- not to be mandatory for an owner to engage a building certifier.

To date no decisions have been announced in respect to this review.

In June 2015 QBCC announced increased demerit point penalties.

### 8.3.3 Western Australia

#### Background

In Western Australia the Building Commission, while a statutory authority, is a division of the Department of Commerce and regulates building, plumbing and painting services. The Commission was established by the Building Services (Complaints Resolution and Administration) Act 2012. There are three Building Services Acts:

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<sup>8</sup> Andrew Wallace, Review of the Building Act 1975, and building certification in Queensland, Final report of discussion paper, October 2014

- Building Services (Complaint Resolution and Administration) Act 2011, which establishes the Building Commissioner as a statutory authority
- Building Services (Registration) Act, which establishes the Building Services Board which operates under the Building Commission with a registration and compliance/disciplinary role
- Building Services (Levy) Act which facilitates and regulates the funding of the Commission.

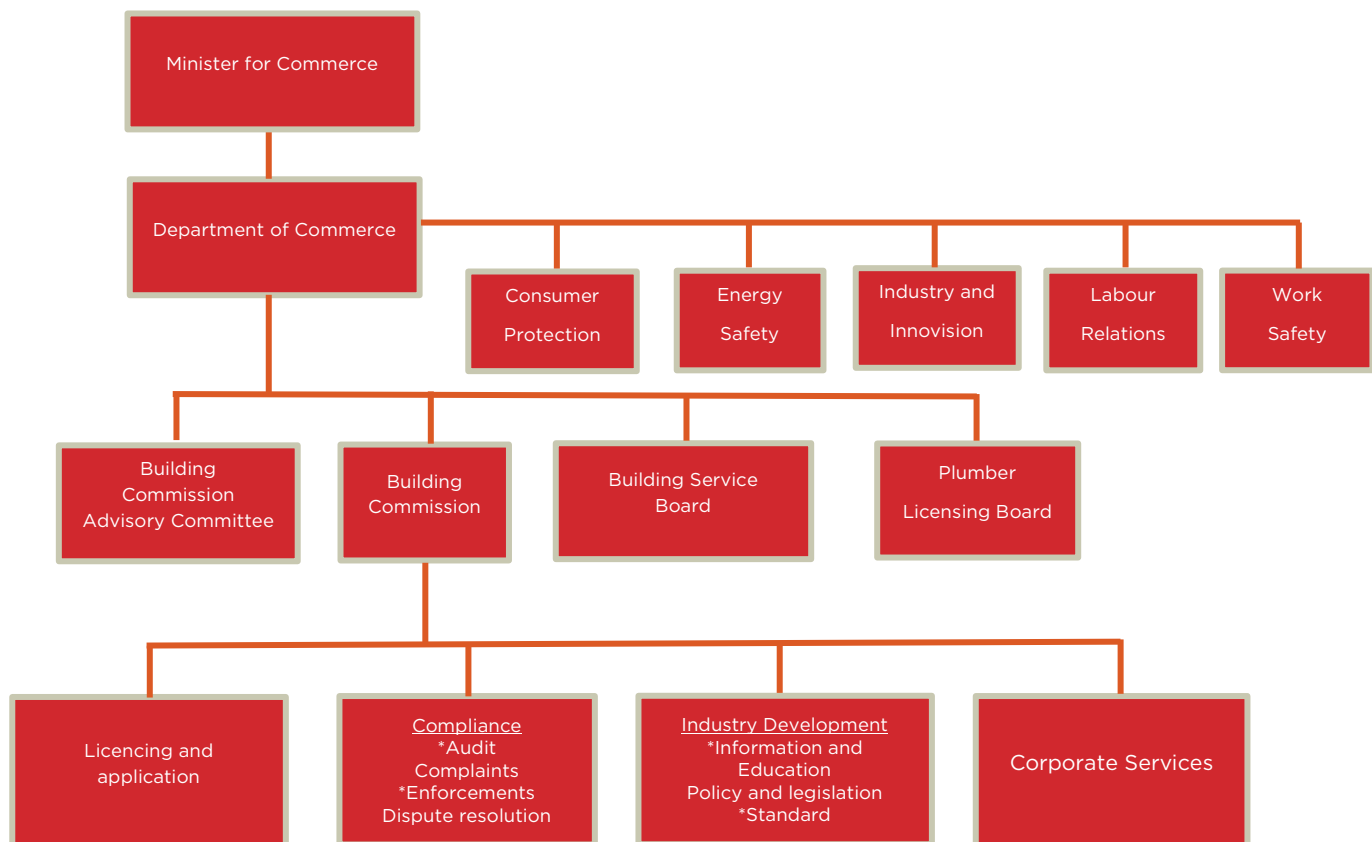
The Building Act 2011 established Western Australian building standards (NCC adopted), established local government permit authorities and governs the process for certification of compliance against building standards and the issuing of building, demolition and occupancy permits for construction in Western Australia.

The Department of Commerce, separate from the Building Commission, includes responsibilities for consumer protection, energy safety, industry policy and innovation, labour relations and work safety.

### Organisational structure

The structure of building regulation administration in Western Australia is set out below.

**Figure 8.3: Western Australia's Building Regulation and Certification Organisational Structure**



*Source: author extracted from published material*

The Building Commission has the functions of regulation of building, painting, building surveying and plumbing services. Supported by the Building Commission are two organisations: the Building Services Board, established under Part 7 of the Building Services (Registration) Act, which sets the accreditation standards and licenses building practitioners, namely builders, painters and building surveyors; and the Plumbers Licensing Board, which sets accreditation standards and licenses plumbers.

Separate from the Building Commission, the Electrical Licensing Board sets accreditation standards and licenses electricians. It is supported by the Energy Safety Division of the Department of Commerce. The Commission also provides advice to the Minister regarding the administration of the Architects Act.

There is also a Building Commission Advisory Committee that comprises representatives of all occupational and technical groups regulated by the Commission, together with industry stakeholders.

The Building Commission undertakes the following functions:

- registration and licensing: this covers builder, painters, plumbers, building surveyors, owner builders; adjudicators; and adjudication of construction contracts
- customer services: provision of information, advice and dispute resolution for industry and consumers
- technical services: represents Western Australia in regard to the NCC and development of state standards
- government services: advises government on building industry matters and regulatory reform.

The Building Commission can take enforcement action in relation to building standards. Enforcement of compliance with the building permit is a function of the permit authority, local government, as is the enforcement of compliance with the Building Act and Regulations.

The Building Commission has recently developed an audit program for various building professionals and certifiers. The audit of certifiers is supported by a comprehensive audit checklist. It is intended to use the check list to enable contractors to develop their own internal quality assurance activities. The Building Commission also carries out general inspections of building work to assess how well building standards are being applied.

### **Funding**

The Building Commission collected \$21.7 million in user charges in 2013-14, raised through a levy on applications for building and demolition permits.

### **8.3.4 South Australia**

The function of building regulation is undertaken within the Department of Planning, Transport and Infrastructure, within the Planning area. The Planning area of the Department covers planning systems and policies, building regulation and major buildings and developments. Building regulation covers building standards and the regulation of building certifiers. The Department also regulates private building certifiers.

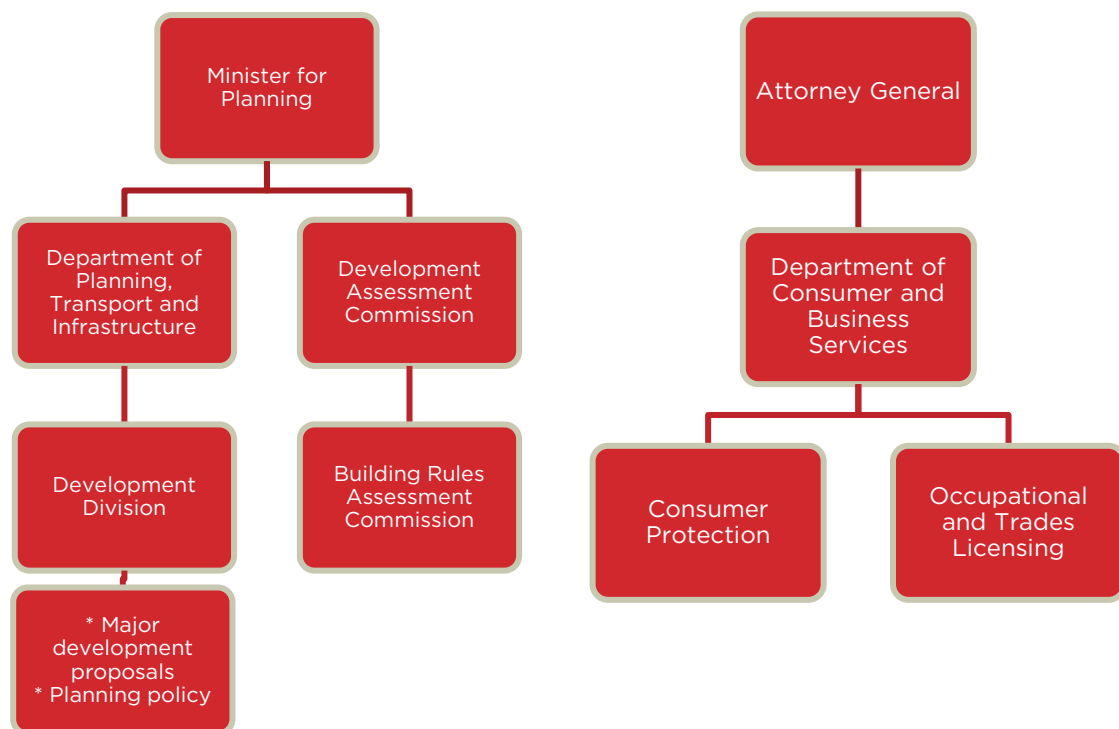
The Department of Consumer and Business Services, within the Attorney General's portfolio, regulates consumer markets to ensure quality of products and services and fair competition. As part of that responsibility it handles business and occupational licensing, including licensing of builders, plumbing, gas fitters and electricians.

In South Australia there is a mixed building certifier system with both private certifiers (about 70) and councils issuing building consents but there is no accreditation for persons in councils undertaking this role. Private certifiers are required to be accredited. The role of building certifiers is narrower than in NSW in that they certify conformity with the building standards but in the main do not certify against planning approvals, which is the responsibility of councils.

The Development Assessment Commission (DAC), established under Part 2 of the Development Act, is an independent statutory body that assesses and determines certain specified kinds of development applications including developments in Adelaide in excess of \$10 million, significant regional developments and developments in key areas. It also has a role, together with the relevant council, in dealing with non-complying developments that is developments that are contrary to Development Plans. Within the DAC is the Building Rules Assessment Commission which can provide approval to vary the performance requirements of the BCA and also has a role to assist councils and private certifiers.

The structure of building regulation administration in South Australia is set out in Figure 8.4:

**Figure 8.4 South Australia's Building Regulation and Certification Organisational Structure**



Source: author extracted from published material

## Funding

The funding for the State's functions in building regulation is a combination of State budget funding and a levy on development applications.

### 8.3.5 Tasmania

The administration of building regulation, occupational licensing and building practitioner accreditation is undertaken by the Building Standards and Occupational Licensing division within the Department of Justice. The Building Act (2000) introduced the following:

- accreditation of all responsible building practitioners (designers, builders and building surveyors) with mandatory insurance and a requirement for CPD
- private certifiers of building compliance, with permits issued by council Permit Authorities
- establishment of a Director of Building Control, a Building Regulation Advisory Committee and continuation of the Building Appeals Board
- establishment of nationally consistent building standards.

The role of consumer protection, including that relating to building services, is undertaken by consumer affairs and fair trading in the Department of Justice.

Certification can now be undertaken by both council and private certifiers who must be engaged by the owner of the building development and owe a duty to the community. The Building Act allows for certificates of specialists to be issued and protects the certifier in undertaking honest acts. The role of the issue of building permits is retained by councils. Compliance and enforcement of building standards are delegated to building surveyors, Permit Authorities and councils. The Director of Building Control has a statutory function to audit the performance of owners, owner-builders, building practitioners and plumbers and councils. The Director is funded from the building levy collected by councils as well as from accreditation fees.

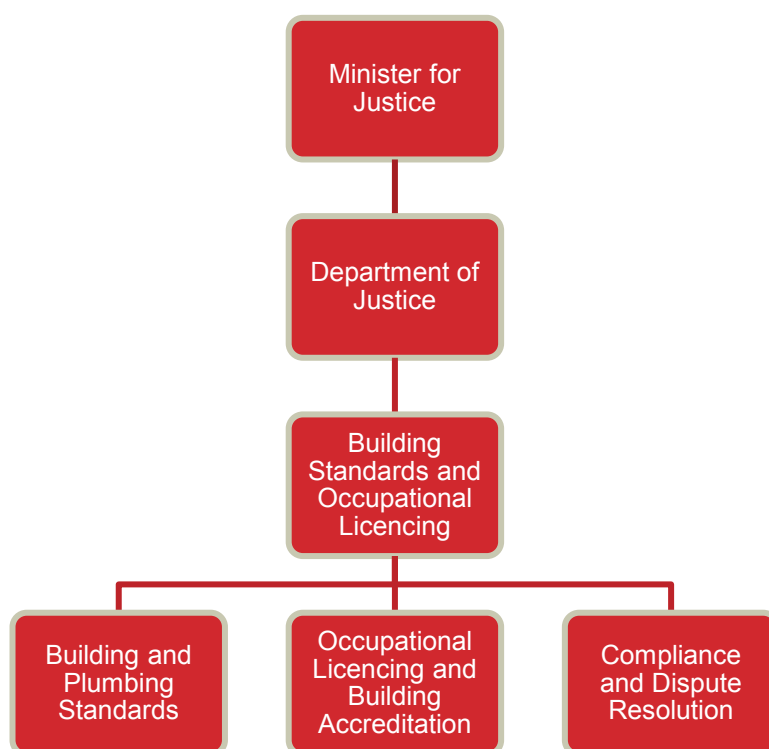
Private certifiers only assess buildings against building standards and not against planning requirements.

The trades of electricians, plumbing and gas-fitting are licensed under the Occupational Licensing Act while building practitioners are accredited under the Building Act and covers builders, some engineers, civil designers, architects, building designers and building certifiers. There were 2979 building practitioners accredited at June 2014, including 32 building certifiers. The compliance and Disputes Resolution Section undertakes performance reviews of practitioners, permit authorities and councils and of licensees and undertakes investigations and audits.



The structure of the building regulatory administration function in Tasmania is shown in Figure 8.5:

**Figure 8.5 Tasmania's Building Regulation and Certification Organisational Structure**



*Source: author extracted from published material*

## Funding

Funding for State building regulation function is a combination of a building levy and accreditation fees.

### 8.3.6 ACT

The Environment and Planning Directorate covers the responsibilities of planning, building regulation, leasing, land information and research. The Directorate, besides having responsibility for planning in the ACT, is also responsible for building policy and legislation. Building regulation is now undertaken by Access Canberra, including work associated with administering the Construction Occupations (Licensing) Act 2004 which covers the following:

- maintaining the construction occupation register
- auditing the work of construction occupations
- investigates complaints
- oversee inspection of building, electrical, plumbing, drainage and gas-fitting work.

All building certification work in the ACT is undertaken by private certifiers, given there is no local government. All development approvals are issued by the Environment and

Planning Directorate. Building certifiers assess whether a development needs a development approval or whether it meets the test of being an exempt development.

The following construction occupations are licensed: builder, building assessor, building surveyor, drainer, electrician, gas fitter, plumber, plan certifier and works assessor.

Building certifiers undertake building certification under the Building Act 2004.

Access Canberra undertakes the role of licensing of all building professionals but where there is accreditation path to licence eligibility the accreditation process is undertaken by the relevant professional association.

## **Funding**

The building regulation function is funded from the budget.

### **8.3.7 Northern Territory**

The Building Act and associated regulations set out the building controls that apply in the Northern Territory and is administered by the Building Advisory Services Branch within the Department of Land Planning and the Environment which undertakes the following functions:

- develops legislation, regulations and policies to ensure the building regulatory framework meets contemporary requirements
- participates in the ABCB regarding national building industry reform and building standards
- monitors, audits and enforces compliance with legislative requirements;
- maintains a central building records system
- provides a technical advisory service to industry, government and the public to ensure consistent and competent application of standards
- provides administration and technical support to statutory bodies.

The Building Practitioners Board is established under the Building Act and is responsible for registering building practitioners; maintaining a system of performance reporting; maintaining compliance with registration requirements, competence requirements and professional conduct; conducting inquiries into work and conduct of building practitioners; and developing and publishing codes of practice.

Building practitioners cover building contractors, certifiers, certifying engineers (hydraulic, mechanical, structural), certifying plumbers and drainers and certifying architects.

The Building Appeals Board is also established under the Building Act and administers appeals by and against the Director and against decisions of building certifiers.

All building certifiers in the NT are registered private sector certifiers. The certifiers assess whether building proposals require development consent or are complying developments. The Development Consent Authority provides planning approval.

## Funding

The funding for the building regulation function is from the budget.

### 8.3.8 New Zealand

In 2004 what is termed “the leaky building crisis (LBC)” occurred when it was found that a large number of homes were without adequate weather proofing due to defective work. As a consequence actions were taken to strengthen the building regulatory framework by amending the Building Act with the effect of, amongst other things:

- mandating that all building consents must be approved by accredited Building Consent Authorities (BCAs), rather than the previous system that used private certifiers. Restrictions as to who can meet the “adequate means” test has meant that BCAs are all owned by local authorities
- establishing the Licensed Building Practitioners Scheme.

A subsequent review of the scheme found that, while it was light handed, the distribution of risk was poorly aligned with the ability to manage, with councils absorbing much of the risk of the scheme. In 2010 amendments to the Building Act implemented the following:

- clarified that providers of designs and specifications, as well as construction services, are accountable to the owners of building works for meeting the requirements of the building code and building to plans and specifications
- made owners accountable to the building regulators for gaining necessary approvals
- made building regulatory authorities, that is councils, accountable for issuing building consents, checking plans for code compliance, checking that the work complies with the approved plans
- mandated a written contract for residential building work, which included additional options for dispute resolution
- provided exemption for a broad range of low risk building work from consent requirements and provide for a risk based approach to issuing consents and inspecting work.

The Department of Building and Housing was set up in 2004 and then, following a review, it was decided to bring together in the one agency building policy, building regulation and disputes resolution which had been previously spread over five agencies.

In July 2012 the Department was brought into the Ministry of Business, Innovation and Employment. It has the following broad roles:

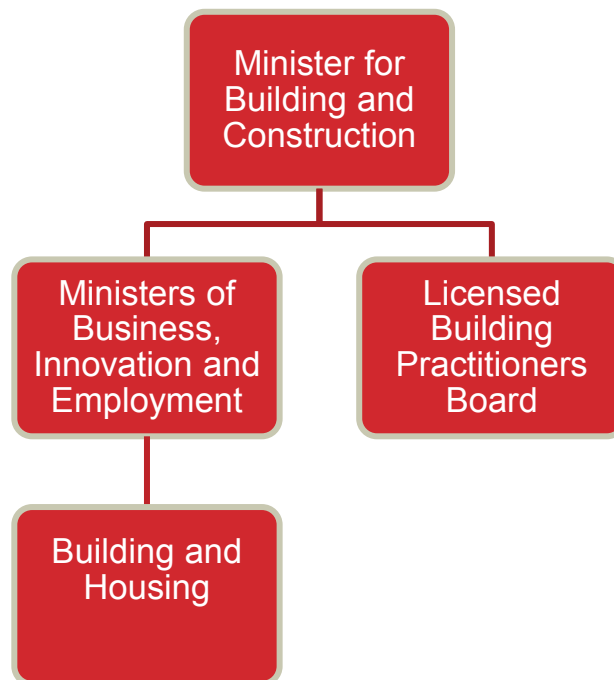
- making housing more affordable and growing the housing supply
- improved access to social housing
- improving the quality of housing and other building
- responding to the Canterbury earthquakes.

Independent of the Ministry but supported by it is the Licensed Building Practitioners Scheme which is oversighted by the LBPS board. The board's functions are as follows:

- manages the licensing scheme
- hears appeals against licensing decisions
- investigates complaints
- approves rules for the scheme
- reports annually to the Minister for Building and Construction.

Under the Act only a licensed building practitioner can carry out or supervise work critical to the integrity of a building. The scheme encompasses seven license classes: design, site, carpentry, roofing, external plastering, brick and block laying and foundations. The scheme is silent on insurance and does not regulate building surveyors. The structure of building regulation administration in New Zealand is summarised in Figure 8.6:

**Figure 8.6: New Zealand Building Regulation and Certification Organisational Structure**



*Source: author extracted from published material*

## Funding

Government costs for building regulation function are funded from a building levy.

## 8.4 Detailed comparison across jurisdictions

Set out in Table 8.1 is a detailed comparison between the building regulation and certification structure and process in each jurisdiction:

**Table 8.1: Comparison of Building Regulation and Certification by Jurisdiction**

Feature	New South Wales	Victoria	Queensland	Western Australia
Administrative structure	Department of Planning and Environment responsible for building regulation. Builders Professional Board accredits council and private certifiers. Licensing of residential builders and trades as well as residential building regulation undertaken by Home Building Services division of Fair Trading.	VBA undertakes building regulation and supports statutory boards with related specialist roles, including BPB which licenses building practitioners.  DELWP deals with policy matters and consults with VBA on legislation	QBCC undertakes the building regulation function including licensing of building professionals (but not certifiers or professions such as architects and engineers) while the Department of Housing and Public Works has the policy responsibility.	Building Commission, a statutory authority, is a division within the Department of Commerce and undertakes the building regulation function. Building Services Board undertakes the accreditation/licensing function.
Building legislation	The Environmental Planning and Assessment Act regulates the development assessment and approval process. The Home Building Act regulates the licencing of the residential building sector.	<i>Building Act 1993 and Building Regulation 2006</i>	<i>Building Act 1997 and Building Regulation 2006</i>	<i>Building Act 2011 and Building Regulation 2012</i>
Entity regulating building certifiers and other building professionals	BPB, with other building professionals licensing undertaken by Fair Trading	BPB licenses certifiers and other building professionals	Certifiers are accredited by the professional bodies, AIBS and RICS. QBCC licenses other building professionals.	Building Commission regulates certifiers and licences all building professionals
Entity that handles consumer protection in the building sector	Fair Trading in the Finance, Services and Innovation portfolio	Complaints about domestic building work made to Building Advice and Conciliation Victoria (BACV)	Fair Trading within the Department of Justice and the Attorney General	The Building Commission handles complaints about regulated building services (and home building contract

Feature	New South Wales	Victoria	Queensland	Western Australia
		through Consumer Affairs Victoria. VBA deals with any technical matters.		complaints. The Consumer Protection Division of Department of Commerce essentially deals with complaints about goods and services covered by Australian Consumer Law. Electricians and gas fitters are licensed and regulated by Department of Commerce, Energy Safety Division.
Scope of building profession licensing	Limited to residential buildings, under the Home Building Act with builders who specialise in commercial building not subject to licensing	In Victoria it covers all Classes of buildings. Registration is required for builders, building surveyors, building inspectors, engineers, draftsman, but not all trades such as painters or tilers. Separate registration is required for plumbers, electricians and architects.	QBCC licences for all classes of building work	WA registers builders, painters, building surveyors and adjudicators (Construction Contracts Act). It approves owner builders and licenses plumbers. It covers the full commercial and residential construction sector.
Entity undertaking building policy role	Building Policy Unit within the Department of Planning and Environment as well as Home Building Services in Fair Trading, the latter covering residential building licensing policy	The Department of Environment, Land, Water and Planning (DELWP) deal with policy matters whilst the VBA is the regulator and has input through DELWP on legislation proposals.	Building Code Queensland Division of the Department of Housing and Public Works	Building Commission
Scope of certifier building responsibility	Certifiers issue certificates under Part 4A of the EP&A Act which are not building permits but 'certify' that the building is in accord with the planning and building conditions. As a certificate it is not able to be	The building surveyor issues a building permit that can be conditioned as well as an occupancy permit which can be conditioned.	Certifiers issue building development approvals which are similar in concept to the Victorian building permit and issue final completion certificates.	Both building and occupancy permits are issued by permit authorities, not by certifiers

Feature	New South Wales	Victoria	Queensland	Western Australia
	<p>conditioned</p> <p>Certifiers issue both complying development certificates which are a type of development consent and also certificates under Part 4A of the EP&amp;A Act, the purpose of which are to “certify” that the building is in accord with legislative requirements. Private certifiers cannot impose conditions on such certificates although conditions may be imposed by way of regulation or other subordinate instrument.</p>			
Role of certifiers with planning versus building approvals	<p>Building certifiers certify both adherence to planning and building requirements</p> <p>Certifiers issue both certificates which are a type of development consent and also certificates which certify compliance with requirements under legislation and subordinate legislation, including that the certificate be not inconsistent with the development consent (where relevant).</p>	<p>Council planning officers issue planning permits and building certifiers issue building permits. Before issuing the building permit the building certifier has to ensure that the building will be consistent with the planning permit</p>	<p>Council planners provide planning permits while building certifiers provide building permits. Certifiers have to check to ensure development is consistent with planning approval</p>	<p>Councils issue planning approvals whereas building certifiers assess against the BCA.</p>

Feature	New South Wales	Victoria	Queensland	Western Australia
Number of building certifiers and market split between private and council certifiers	1600 certifiers, being 756 private certifiers and 845 council certifiers	500 registered building certifiers (private and council). Private certifiers have up to 95% of the market	421 licensed certifiers (council and private). 50% of building permits issued by private certifiers and up to 90% for commercial buildings	There are 104 currently registered Building Surveyor Contractors and 362 people registered as Building Surveyor Practitioners in WA. Market share between private and council certifiers is broadly 50:50
Approach to competitive neutrality between private and council certifiers	Councils are required to publish their fees which are required to cover costs.	<i>The Building Act 1993</i> requires councils to charge at least cost recovery fees	Subject to the Queensland Competition Authority Act	Private certifiers undertake a relatively narrow function dealing with building certification. Councils can compete and there are no explicit provisions for competitive neutrality of fee regulation.
Form of engagement of certifiers	Engaged by the beneficiary/owner of the development  Engaged by landowner, or a person on behalf of, or with the consent of, the landowner	The owner engages the certifier. There are standard contracts but these are not regulated.	Any party can engage a certifier and there is no standard contract	The owner or the builder engages the certifier. There is no standard contract.
Availability of guidance for certifiers	Practice notes have been issued. A practice guide is in preparation.	The VBA has a range of practice notes which provide guidance to certifiers	<i>The Building Act 1975</i> sets out the role, responsibilities and activities of certifiers. In addition guidance material is issued under the provisions of the Act.	No available guidance material noting that the role is relatively limited.
Accountability mechanisms	Certifiers subject to a complaints mechanism  Certifiers subject to a complaints mechanism under the BP Act. There are also requirements to notify councils imposed at various stages under the EP&A	Under the Act certifiers are required to undertake certain functions and are not able to act if there is a conflict of interest. Also subject to a complaints mechanism administered by VBA	Subject to a code of conduct as well as the complaints and audit function undertaken by QBCC.	The builder is prohibited from also being the certifier for a building proposal. Complex conflict of interest controls do not exist in WA because the local government retains control over what gets approved and enforcement of building control.



Feature	New South Wales	Victoria	Queensland	Western Australia
	Act, conflict of interest provisions in the BP Act and requirements to keep records under both the BP Act and the EP&A Act.			
Enforcement role of certifier	Able to issue a notice directing a person to carry out work as if it were an order issued by a council, but any enforcement rests with a body that has investigation and enforcement powers under the EP&A Act. This would normally be the council in relation to local matters.	Have enforcement responsibility and powers	Do have enforcement powers and responsibilities but only used as a last resort given that it conflicts with the commercial interests of the certifier.	Private certifiers have no enforcement role. However, they may refuse to sign a certificate if they are not satisfied that compliance has been achieved. The Building Commission can take enforcement action in relation to building standards where it considers it is necessary to prevent or remedy a dangerous situation.
Requirements to inform councils of actions	Required when issuing complying development certificates, Part 4A certificates and also notices directing a person do something under the EP&A Act.	Required to provide a copy of notices and orders issued within 7 days to the local council	Legislation sets out the requirements and timing. Required to inform councils of when approvals provided, inspections undertaken and when orders issued.	There are no requirements for private certifiers to provide information. Local government receives all compliance certificates issued by private certifiers with submitted permit applications. LG has no formal role to assess the correctness or otherwise of compliance certificates, but retains the right to refuse to issue permits based on non-compliance with building standards or other Building Act requirements.
Requirement for professional indemnity insurance for certifiers?	Yes	Yes	Yes	Yes
Level of public understanding	Limited with confusion regarding	Assessed as a problem area	Seen as a problem area.	This has not been seen as a problem area in

Feature	New South Wales	Victoria	Queensland	Western Australia
of role of certifiers	roles and responsibilities of certifiers relative to builders	despite the issue of many advice notes to consumers over the years	Consideration is being given to undertaking some form of public education.	WA, given that private certifiers have a very limited role. However, builders are able to engage their own certifier and this could be perceived as problematic in the domestic sector, with volume builders in particular. However, again the local government still retains the right to check and refuse the issue of a permit for non-compliance with building standards or Act requirements.
Are there pro-active audits of certifiers	BPB has the power to undertake audits but at present is not resourced to do so.	VBA undertakes audits	QBCC undertakes onsite audits of constructions as well as in office inspection of documentation.	The Building Commission has recently developed an audit program for various building professionals and certifiers. The audit of 'certifiers' is supported by the development of a comprehensive audit checklist.
Form of support for certifiers	Limited advisory service	Phone and email advice service to certifiers; practice notes; run seminars from time to time.	Provide training videos to certifiers, replacing previous training roadshows. The main source of training is from the professional associations.	Training and assistance to carry out building surveying activities is not a primary role for the Building Commission which relies on the professional bodies. The Building Commission provides information and education to building surveyors (and other building industry practitioners) in respect of BCA compliance and requirements. Seminars, information sessions and technical workshops are regularly hosted. Also publishes advisory notes, technical notes, and industry bulletins
Funding for building	Funded from NSW budget with fees	The VBA is funded by a levy on each	License fees and budget funding	The Building Commission applies a

Feature	New South Wales	Victoria	Queensland	Western Australia
regulation	charged for accreditation of certifiers	building permit. Fees are also provided for registration of practitioner applications. Council is partly funded by building permit fees and some regulated fees with the remainder via council rates.		building services levy to applications for building and demolition permits to fund building regulation in WA.
Level of resourcing for building regulation and policy roles	DPE has approximately seven persons involved in building regulation (Building Policy unit only) whereas BPB has staffing of 28 FTE.	The VBA has 243 EFT with a total Budget \$46.5m (includes the resourcing for BPB). DEWLP has 20-25 staff dealing with building policy and regulation	QBCC employs 358 staff (FTE) and has operating expenses of \$30m pa.	Building Commission has staff of 115 (FTE) and budget of \$26.8m

Feature	South Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
Administrative structure	Building regulation and planning is undertaken in the Department of Planning, Transport and Infrastructure  Consumer and Business Services in Attorney Generals undertakes consumer protection and business and occupational licensing	Building regulation and occupational licensing undertaken by Building Standards and Occupational Licensing within Department of Justice	Environment and Planning Directorate is responsible for planning and building policy/legislation while Access Canberra handles building regulation, including occupational licensing	Building regulation is undertaken by the Building Advisory Services Branch within the Department of Land Planning and the Environment. BPB regulates building practitioners	MBIE is the regulator that oversees the Building Act and monitors the building control functions of the Building Consent Authorities (BCAs)  IANZ, a government agency, undertakes accreditation of BCAs.
Building Legislation	Development Act 1993	Building Act 2000	Building Act 2004	NT Building Act	Building Act 2004
Entity regulating building certifiers	Department of Planning. Certifiers	Department of Justice	Access Canberra undertakes the	Building Professionals Board	Building Consent Authorities

Feature	South Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
	must be accredited with AIBS		licensing of all building professionals but where accreditation is required the accreditation is by the relevant approved private sector association.		(BCAs) need to be accredited by IANZ which is a crown entity that specialises in accreditation of a wide range of professional organisations and occupations.
Entity that handles consumer protection	Department of Consumer and Business Services	Fair Trading in the Department of Justice	Access Canberra handles all consumer protection matters	Consumer Affairs within the Department of the Attorney General	Department of Consumer Affairs
Scope of building profession licensing	Covers all building professionals across the full industry	Covers all building professionals across the full industry	All building work, other than minor exempt work, is required to be built by a licensed builder. This covers all BCA categories. In addition to builders and certifiers, plumbers, drainers, gasfitters and electricians are also licenced.	Covers all building professionals and associated trades. BPB handles all other than electricians, plumbers, drainers and architects.	Licensed Building Practitioners covers a number of licensing categories and covers all building works. LBPs are licensed by MBIE while the BCAs are accredited by IANZ which is contracted to undertake that role on behalf of MBIE.
Entity undertaking building policy role	The Development Division within the Department of Planning, Transport and Infrastructure undertakes the planning policy role and has within it a Building Policy Unit	Building policy area within the Department of Justice	Environment and Planning Directorate provides policy advice. This may be supplemented by operational policy advice from Access Canberra which has taken over the regulatory functions.	Building Advisory Committee and the Department	MBIE
Scope of certifier building	Certifier issues	Certifier issues building	Certifier issues building	Certifier issues building	BCA assesses and provides

Feature	South Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
responsibility	building permit and completion certificates	permits and completion certificates	approval and a completion certificate	approval and a completion certificate	building approval
Role of certifiers with planning versus building approvals	Private certifiers can do both planning and building consents for basic forms of development that fit within criteria outlined in schedule 1A of the <i>Development Regulations 2008</i> . For other development the council is the authority for planning consent	Private certifiers can only do building consents. Planning consents are the responsibility of councils.	The only entity authorised to issue a DA in the ACT is the Environment and Planning Directorate. The private sector licensed building surveyors are required to determine if a building application that has no DA, either meets DA exemption requirements, or needs a DA.	Certifiers assess conformity with planning approvals as well as with building standards. Certifiers can also assess complying developments against the planning standards.	BCAs are responsible for checking building consent applications meet the requirements of the Building Act and the Building Code as well as compliance with consents.
Number of building certifiers and market split between private and council certifiers	There are 65 registered private certifiers. There is no registration requirement for council certifiers. No data available on market share between private and council certifiers.	32 certifiers	95 private certifiers. Two of the private certifiers are also designated government certifiers to be appointed in the event of a market failure. There has been no market failure to date.	74 registered certifiers, individuals and companies. 100% private certifiers	All building certification is done by BCAs which are accredited regulatory entities. All BCAs are owned by local councils there is no in principle preclusion of private BCAs.
Approach to competitive neutrality	Code of conduct sets the prime responsibility as acting in the public interest and requires certifiers to be free of any conflict but does not	No formal rules and it can be an issue as some councils do subsidise the building certification function.	Not relevant	Not relevant	Not relevant

Feature	South Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
	explicitly address competitive neutrality				
Form of engagement of certifiers	The applicant engages the certifier. The development application form is a standard contract.	The owner or owner's agent engages the certifier. There are no standard contracts	The land lessee (or in certain cases the land sub lessee or tenant) appoints the certifier. There is no standard contract	The owner engages the certifier. There are no standard contracts	BCAs operate on behalf of the state and their role is set out in legislation
Availability of guidance for certifiers	There is a code of conduct, the Development Act and associated regulations.	Not at present but is being developed.	Mainly the legislation though there are some practice notes.	There is a Building Certifiers Guide which was prepared in 1993 and is in the process of being substantially updated.	There is various documentation including The Building Code handbook, the regulations and various guidance notes for BCAs.
Accountability mechanisms	Code of practice, and mechanism for complaints and complaint investigation – regulation 103 of the Development Regulations 2008	A very minimal amount of auditing has been undertaken	Conflict of interest prohibitions that make a building certifier ineligible to be certifier for building work if they have an interest in the work or completion of the work. Certifiers are required to provide to Government all documents they rely on in their statutory role. Government audits and investigations can target suspicions of unlawful interaction between builders/ developers and	The Building Act provides for a complainants process which allows the Director Building Control to investigate such matters when they are brought to the DBC's attention. The Building Certifiers are also subject to audits conducted by Building Advisory Services which check their compliance with the Building Act. Certifiers are generally audited at least one every three years.	Directly accountable as instruments of government building regulation.

Feature	South Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
			certifiers.		
Enforcement role	No enforcement role for private certifiers- enforcement is by the council	Under the Building Act the certifier can give notice and orders, however if these are not acted on it is the General Manager of the council's responsibility to undertake enforcement.	Certifier can give a written direction to the builder and can issue stop work notices.	Certifiers can issue notices to builders but rarely do so.	Have full enforcement role and powers
Requirements to inform council/consent authority of non-compliances	Private certifiers are required to send the certified documents to the council.	Required to provide copies of directions, notices and orders to councils	Fundamentally non-compliant building work" detected by a certifier must be reported to the ACT Government.	No legislative requirement to report noncompliance to the Building Advisory Service	No relevant
Requirement for Professional indemnity insurance for certifiers?	Yes	Yes	Yes	Yes	No. The accreditation requirements are set out in the regulations, Building (Accreditation of Building Consent Authorities) Regulations 2006 which sets out competency, training and qualification requirements for the individuals operating within the BCA. BCAs are required to meet an "adequate means test".
Level of public understanding of role of certifiers	No known problem	Poorly understood	Not well understood in the small scale residential market. Notices have been	Assessed to be good understanding of the difference between the	Well understood by practitioners but less so by the general public.

Feature	South Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
			placed in relevant forms to inform of role of certifier.	two roles	
Audit of certifiers	Provision in the Act for auditing and has occurred in the past but no current auditing	Have had a round of certifier audits	Most audits are desk-top of certifier's documentation. Additionally, all Building Approvals must be given to the ACT Government. An electronic system facilitates that by electronically upload, which provides basic "auditing".	A number of proactive audits of building practitioners (builders, plumber and building certifiers) are undertaken annually. Building certifiers are generally audited at least once every three years The audits are limited to paper-based statutory requirements.	NA
Form of support for certifiers	The Department provides a free subscription email information service on the building rules. Private certifiers must be accredited, the Australian Institute of Building Surveyors (AIBS) is the only recognised accreditation body, and Continuing Professional Development is a requirement for accreditation. Private	Conduct three certifier forums a year which are compulsory to attend. Certifiers are required to achieve 30 points of CPD per year	Training sessions are held on legislative change. There are no advisory panels. A limited number of practice notes have been issued.	The Branch provides an advisory service to assist certifiers on a case by case basis and issues affecting the industry are discussed at certifiers meetings. Building Notes are also issued to give certifiers direction when legislative requirements are unclear.	NA



Feature	South Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
	certifiers participate in training in order to achieve the required CPD points				
Funding for building regulation	For the state it is a combination of the budget and a levy on DAs. For councils it is a combination of general revenue and a fee for DAs	Building levy and accreditation fees for the State government and a building permit fee for councils	Funded from the budget. Revenue from building levies goes into consolidated fund.	Budget funding	BCA costs are recoverable from consent application fees. Government costs relating to building regulation are recovered from a building levy that is separately imposed on building consent applications. The levy is set at \$1.97 per \$1000 of building work and is only collected on building works valued at \$20,000 or more.
Level of resourcing for building regulation role	3.6 FTE for building regulation	NA	Building policy:2 FTE Certifier accreditation:3 FTE Building licensing: 12 FTE Other building sector licensing and inspection:31 FTE	13 FTE	NA

Source: author, from a survey conducted with all jurisdictions

## 8.5 Conclusions

In Australia and New Zealand there is a broadly similar approach to building regulation which involves three key elements: the establishment and mandating of building standards which provide flexibility for innovation; independent third party checking of

compliance with those standards; and the licensing and oversight of building professionals.

The approach to building regulation and certification in NSW has a number of characteristics which distinguish the approach in part or whole from what applies in other jurisdictions.

First, the approach, both legislatively and administratively, is more complex and fragmented than applies in most other Australian jurisdictions where there is a tendency to consolidate both the legislation and to have the administration of building regulation and certification addressed in one entity, often in the form of a Building Commission. Three states, Victoria, Queensland and Western Australia, utilise a statutory entity for the undertaking of the building regulation and certification function. However, the policy function is undertaken in a separate department. All jurisdictions tend to use a statutory board approach for the licensing/accreditation function.

Most jurisdictions combine in the one entity the responsibility for accreditation of building professionals including building certifiers. In NSW they are separated between BPB and the Home Building Services division of Fair Trading where the former accredits and oversees certifiers and the latter licences other building professionals. South Australia follows a model similar to NSW in that certifier registration is in the Planning area whereas building professionals licensing is in a separate occupational and trades licensing area in the Department of Commerce and Business Services. In New Zealand all building certification is undertaken by councils and there is no accreditation process for individual certifiers but rather there is accreditation of organisations that undertake certification and this is handled separately from the licensing of building professionals.

Second, in NSW the registration or licensing of builders is limited to the residential building sector (though licensing for plumbers, electrician and other trades applies to the full building sector) whereas in all other Australian jurisdictions and New Zealand, the licensing covers the full building sector. This appears to reflect a philosophic position in NSW that licensing is a matter of consumer protection and that as the other parts of the building sector, namely commercial, industrial, retail and infrastructure, involve informed owners/developers interacting with builders and practitioners, there is no need for consumer protection and hence no need for licensing. This assumes that licensing is not justified for broader regulatory reasons than consumer protection.

Third, the coverage of certification appears narrower in NSW than is the case in most other jurisdictions which accredit a broader range of professionals.

Fourth, the level of resourcing in NSW for the building regulation function is significantly less than in comparable jurisdictions such as Victoria or Queensland and there is a greater use of budget funding of the building regulatory function than occurs in most other jurisdictions where there is greater recourse to fee for service and levies on building approvals.

Fifth, NSW is almost unique in the scope of the role of the building certifier. In NSW the certifier does not issue a building approval but instead issues a certificate that certifies that the building meets building standards and the development approvals. In general certificates cannot be conditioned (except under Clauses 187 and 188 of the EP&A Regulation which requires the DPE secretary's concurrence). In most jurisdictions the

certifier, when assessing the building, is required to assess conformity with planning conditions.

Of those five key areas of difference, this report proposes that action is taken to move towards the broad practice in other jurisdictions in four of these areas:

- less complex and fragmented legislative and administrative structure
- broader coverage of accredited certifiers
- enhanced resourcing of the building regulation function and with greater use of funding by a levy on development
- providing the ability for certifiers to place prescribed conditions on CCs and CDCs.

The one area of difference which it is not proposed to vary current practice is in respect to only licensing builders for residential building.

There are also some similarities between the NSW approach and the approach in other jurisdictions. In all Australian jurisdictions there are private certifiers though in New Zealand there are only council certifiers. The other common feature is the commitment to a National Construction Code, though there are variations between jurisdictions in the degree to which the jurisdiction's building controls deviate from the National Code.

## Part C. Key issues and reforms

The following eight chapters identify and explain the key issues impinging on the effectiveness of the building regulation and certification system and then set out the proposed reforms.

Chapter 9 provides an overview of the feedback received from stakeholder meetings and public hearings, with the hearings structured around the discussion paper that was released in May 2015.

Chapter 10 is an overview assessment of building regulation and certification in NSW based on good practice regulatory principles, the survey undertaken of regulation in other jurisdictions and the feedback received from the discussion paper and public hearings.

Chapter 11 seeks to identify what is the most effective legislative, regulative and administrative structure for building regulation in NSW.

Chapter 12 addresses the issue of achieving a first class digital information system supporting the regulatory system.

Chapter 13 identifies and assesses the roles and responsibilities of councils and private certifiers and proposes a tripartite partnership structure between councils, certifiers and the State.

Chapter 14 undertakes a process review of the building regulation and certification system to ensure it operates in an effective and efficient manner that achieves the goal of achieving a safe, sustainable and fit for purpose built environment.

Chapter 15 addresses the issue of creating an accountable, professional, well supported and effectively oversighted certification industry, considering the specific areas of accountability; accreditation; education, support and training; career path; and complaints and disciplining.

Chapter 16 examines the issue of achieving a properly resourced, efficient and appropriately funded regulatory system. This requires consideration of which party or parties should bear what costs, that is the structure/sourcing of funding as well as the level of resourcing to achieve an effective and efficient function.

## **9 Overview of feedback from public hearings and submissions**

### **9.1 Submissions**

A total of 78 submissions were received which are listed in Appendix 6. The submissions were responding to the issues set out in the discussion paper.

In general the submissions agreed that the issues identified in the discussion paper were the key issues and indicated support for the reforms that were identified. Set out below are additional issues that were raised beyond those set out in the discussion paper and areas of disagreement with the approach set out in the discussion paper.

#### **A. Additional Issues**

##### **1. Standards Australia**

A number of submissions noted that while the NCC is now available free online, the underlying standards issued by Standards Australia are charged for which creates a barrier to their access.

##### **2. Mutual recognition**

The issue was raised of the degree to which the mutual recognition system can lead to the accreditation of certifiers and other building professionals who otherwise would not get accreditation in NSW and hence potentially may impact negatively on the effectiveness of regulation.

##### **3. Accreditation of town planners**

The accreditation of town planners was proposed by a number of organisations as a way of ensuring appropriate expertise was available to be applied to the assessment of whether the CC met the development consents.

##### **4. Section 96 process**

A number of submissions stated that the current Section 96 of the EP&A Act process, involving approval of variations to building approvals, is too long and involved a process, with a need to be able to fast track minor changes.

##### **5. Non building certifiers, including subdivision and strata certifiers**

Concern was raised that the discussion paper did not address issues concerning other categories of certifiers beyond building certifiers and in particular the issue was raised of subdivision and strata subdivision certification in which there are significant barriers to involvement by private certifiers which, it was argued, was having a negative impact on the ability to undertake subdivision work.

##### **6. Minor variations in complying developments**

The Building Regulations Advisory Committee (BRAC) proposed that there be provision for allowing minor variations in CDs which would require guidelines on what constitutes minor variations.

## **7. Builder / Contractor certification**

The BRAC proposed that principal builders and contractors play a greater role in certifying various elements and aspects of building work.

## **8. Using the SEPP on exempt and complying development and affordable housing to get around planning policies**

Certain councils submitted that developers are using the two SEPPs to get around planning policies and excessively develop sites.

## **9. Burwood Council versus Ralan Burwood Pty Ltd**

This case has been referred to by a number of councils. The core concern seems to be that while the Court of Appeal found that even if the CC was not found to be 'not inconsistent' with the DA and therefore in breach of s 109F(1) of the EP&A Act and Clause 145 of the Regulation, the CC is not rendered void as there is nothing in the EP&A Act to support such a conclusion. Therefore, as the CC is to be taken as part of the DA, the development can be validly undertaken in accordance with the CC. If this is a correct interpretation then it appears that there is no basis for enforcing a consistency requirement with the development consent.

## **10. Phoenix company issue**

The ability of builders to create special purpose companies for specific building projects and then unwind the company immediately upon completion of the project was raised by a number of submissions as an avenue by which builders avoid accountability and hence potentially pass liability onto certifiers.

## **11. "Gap" in certification**

A regional council argued that the approval and inspection of civil infrastructure that are not part of a subdivision but may be associated with retirement villages or industrial/commercial development is an area where it is not clear what classification of certifier is responsible for certification. The submission argued that the only classification with the required skills is B1 but a B1 is limited to subdivision work.

## **12. Lack of training**

A number of councils raised concerns about the lack of incentives for councils to employ trainees. One council noted the reduction in the number of approved courses since 2010; the high costs of employing trainees with the training costs alone calculated over a six year period for one trainee as \$310,000; and the restricted range of opportunities to gain experience in the regions. The view was expressed that there was a window of opportunity to expand traineeships by councils and use the senior persons as mentors before they retire.

## **13. Imported building material**

One submission raised concerns about the inability of accredited certifiers to evaluate compliance with standards of imported material.

## **B. Different perspective on identified issues**

### **1. Combining CA and PCA**

A number of submissions, including from various councils, AAC, AIB, PCA and Urban Taskforce did not support combining the roles of CA and PCA on the basis of the following considerations:

- the skills involved with the two roles can be quite different
- while there is a need for the PCA to be on location on a regular basis, the same is not true for the CA role
- in most cases the CA and the PCA are the same and it is only when there are sound reasons to the contrary that the two can be different. Hence the current system provides the flexibility to vary when appropriate
- combining the two could lock in and extend the monopoly councils have with the subdivision PCA role.

Sydney City Council took a quite different perspective on the distinction between the CA and PCA role, proposing that they be kept separate and that the PCA role be reserved for councils. The rationale for this position was that the PCA role required significant resources and a substantial on-site presence which private certifiers were said to not be in a position to provide. Further, it was argued that the community looks to the council to deal with any onsite matters of concern.

### **2. Replacing the “not inconsistent” test with a requirement for consistency**

Concern was raised about the proposal to replace the “not inconsistent” test with a “consistent” test on the basis that there is well established case law around the concepts, with “not inconsistent” meaning generally “the same” while “consistent” means “the same”. Explicitly adopting the consistent test could signal to the courts that there is now no latitude and create a lack of flexibility for minor building changes.

### **3. Introducing a development completion certificate**

One submission queried whether the proposed change was necessary, noting that in March 2013 there was a requirement introduced that the OC must not be inconsistent with the development consent. It was argued that this meant that the test for an OC is the same as for the proposed DCC and hence nothing was gained by a change.

BRAC does not support having both an OC and a DCC but rather proposes a single certificate which includes and authorises occupation, where applicable.

AIBS also said the distinction between OC and DCC was contrived as occupation also needs to address planning issues such as parking, privacy and acoustics etc.

### **4. Rejection of partnership model**

The LGNSW and a number of councils rejected the partnership model between councils and the State Government on the basis that the building regulation area is not analogous to the food regulation model that was drawn on by IPART in making an argument for a partnership model in the building and planning area. It was argued that state and local government do not share responsibilities. Rather LGSA argued that local government shares responsibilities with private certifiers.

## **5. Risk based approach to critical inspections**

A number of councils expressed concern that the risk based approach would result in insufficient inspections and gave too much discretion to PCAs.

## **6. Accreditation**

A frequent issue raised by councils and certifiers was concern about accreditation and training requirements. A number of private certifiers expressed the view that the CPD requirement was excessive and poorly targeted and was disproportionate to the requirement for accredited council certifiers.

Councils were concerned about the lack of transition of council accreditation into the private market, particularly in the context of possible council mergers which may require council certifiers to seek jobs in the private sector. It was pointed out that an A1 council certifier would typically only be accredited at A4 as a private certifier.

## **7. Concept planning approval**

Most councils raised concerns at the proposal that the planning approval be limited to the development concept and argued that councils would find it difficult to undertake their duties to the community without a reasonable amount of detail about the development.

## **8. Standard DA conditions**

Councils were not hostile to the idea of creating standard DA conditions and a number welcomed the concept. However a number warned that “one size cannot fit all” and in particular consideration may need to be given to the needs of regional versus metropolitan councils.

## **9. Notice of intention to issue an order**

The Property Owners Association and a number of councils queried the logic of replacing the notice of intention to issue an order with a direction and what the change would achieve. The Property Owners Association cited cases where the notice allowed owners to reconsider the nature of the development and proceed on a different path, an outcome that would not be facilitated by the issue of a direction.

## **10. Fire safety**

There was general support for the identified regulatory changes for fire safety systems. The Society of Fire Safety suggested that it may be better to have an independent peer review of fire safety systems rather than certification.



## 9.2 Public hearings

There was broad confirmation that the issues identified in the discussion paper were the key areas of concern and general support for the reform options identified in the paper. The key feedback obtained can be summarised as follows:

- consistent criticism of the level of complexity and difficulty to comprehend both the existing legislation and the relevant codes. The Codes appear to be a significant barrier to the up-take of complying developments
- general support for the consolidation of the building regulation and licensing/accreditation functions, though with concern expressed at a number of meetings at the possibility of the consolidation occurring through Fair Trading owing to a concern that Fair Trading does not have a commitment to professional development.
- distinct differences in views and issues between the regional areas and the metropolitan areas.
  - A consistent view expressed in the regions was that there was a good working relation between private certifiers and councils which enabled the system to work effectively. This would appear to reflect two factors. First, there is greater transparency and accountability in regions and second, there are fewer private certifiers and hence there is greater power with the councils.
  - Another difference was the view expressed in the regions that the recent changes with the complying development codes requiring a process of notification had led to a major shift away from the use of complying developments by councils.
  - A third issue raised in the regions was the difficulty of obtaining access to A1 certifiers and the need for the creation of a regional version of the A1 that could handle the typical range of developments in the regions.
- there was general support for the standardisation of forms, certificates, development conditions and the use of e-technology. At the same time there was consistent criticism of the functionality and performance of e-housing and a view that it was necessary to learn lessons from that experience.
- there was general support for the reforms in the discussion paper with respect to the building regulation and certification process, with the following specific feedback:
  - the proposed practice guide was seen as a good initiative in principle but to be useful needs to contain a reasonable level of detail. Also clarification is required as to whether adherence to the guide provides legal protection to certifiers.
  - support for the proposal of a Building Manual and support for phasing in the requirement for Building Manual for existing buildings.
  - councils expressed some concern that the reforms in the discussion paper, if implemented, would result in a significant increase in compliance work load for councils for which they are not resourced.
  - support for plans being prepared and certified by a suitable qualified, accredited person.

- need for greater guidance and a clear framework to govern the interaction between councils and certifiers (this was more of a metropolitan perspective).
- some support for councils being the entity that issues the proposed Development Completion Certificates.
- some concern was expressed at giving certifiers the power to issue directions and it was felt that there is a need for suitable legal protections to be incorporated. Also queried whether there was any benefit in moving from a notice of intent to issue an order to issuing a direction.
- councils expressed the view that in general they do not require excessive detail at the DA stage. It was argued that if insufficient information is obtained at the DA stage this just leads to the need to modify the consent at a later stage.
- general support for broadening the range of certification and accreditation but clarity needs to be provided about the role and responsibility of the building certifier.
- concern at the current lack of effectiveness of the fire safety review process and the fire safety schedules.
- general support for providing clarity about the role of an Occupation Certificate and replacing the interim and final Occupational Certificates with an Occupation Certificate and a Development Completion Certificate, respectively.
- agreement that there is a need to tighten up the requirements for on- site inspections and a view was expressed that risk based inspection requirements could encourage a race to the bottom.
- a frequently expressed view from councils and other parties involved in the building sector is a need to improve the accountability of certifiers, noting the significant potential for conflict between the regulatory role and the commercial drivers.
- a commonly expressed view is that the complexity and difficulty of assessing alternative solutions creates barriers in NSW to the take-up of alternative solutions.
- in respect to the broad issue of the supply, oversight, accreditation and support for certifiers, there was general support expressed for the options in the discussion paper with the following specific feedback:
  - it is difficult and very expensive to provide suitable employment opportunities for trainees and this is leading to reduced numbers entering the industry. There is a need to take initiatives to promote training and trainees
  - concern expressed at the lack of degree courses for certifiers which is the only way to create a pathway to eventual A1 classification.
  - general support for moving away from annual accreditation and a view expressed that the current accreditation fees are too high.
  - general concerns were expressed by all at the slowness of the complaints process and a desire to resolve matters in a more timely manner at the local level.
  - the issue of competitive neutrality between private and council certifiers was raised on a number of occasions with certifiers arguing that both some

councils and private certifiers are charging unrealistically low prices. This issue was linked to a concern about a race to the bottom in the charging of fees, leading to poor quality certification work. There was support for price guidelines and a minimum schedule of fees.

- the idea of accrediting planners was raised a number of times, with the suggestion that they would be useful in the area of complying developments.
- view expressed that there was a need for the role of the certifier to be clearly defined in the legislation- noted that this has been a problem for 20 years.
- noted on a number of occasions that the ability to suspend accreditation by certifiers to take time off is not known and should be publicised by BPB.

A summary of the feedback received from the certifier survey and the general survey are provided in Appendices 4 and 5 respectively.

## 10 Assessment of the NSW building regulation and certification system

### 10.1 Introduction

This chapter draws upon the work of the review, including discussions with stakeholders, the review of building regulation and certification systems in other jurisdictions, public hearings, submissions received in response to the release of the discussion paper and the input from the two surveys that were undertaken, to assess the current system. The framework used for the evaluation in Section 10.2 is based on the principles of good regulatory practice, as set out in Chapter 5 while in Section 10.3 the actual administrative structure is evaluated.

### 10.2 Evaluation against Good Regulatory Practice Principles

Set out in Table 10.1 is an assessment of the NSW building regulation and certification system against the principles of good regulatory practice, as set out in Chapter 5.

**Table 10.1: An Assessment of the NSW Building Regulation and Certification System against Good Regulatory Practice Principles**

Principle	Assessment
<b>Market compatible</b> Every effort should be made to utilise market mechanisms and incentives and to avoid distorting the economy and markets	<p>The regulatory approach essentially relies on a national building code, supported by the EP&amp;A Act and Regulations and SEPPs, that allows for the use of deemed to satisfy prescriptive approach or a performance based approach, the latter allowing innovation in the building approach as long as it meets the performance standards. Combined with the building standards is a certification approach that assesses building plans and building construction against the building code. In that regard the approach is market compatible.</p> <p>The certification process is open to competition, involving private and council certifiers. While also market compatible, there are three weaknesses in this area:</p> <ul style="list-style-type: none"> <li>• A conflict between the accountability of certifiers to act in the public interest and the commercial pressures of operating a success business that relies on support from builders/developers.</li> <li>• A lack of transparency and review of the actions of certifiers</li> <li>• A lack of review and oversight of councils providing certifier services to ensure that they are providing these services on a cost reflective, competitive neutral basis and not cross subsidising certification services</li> </ul>
<b>Proportional</b> The scope and burden of regulatory rules and their enforcement should be proportional to the benefits that are expected to be generated	<p>Based on the available cost benefit analysis that has been undertaken, that focusses on the national building code, it would appear that that aspect of building regulation is cost effective, generating a net economic benefit for the economy and community.</p> <p>However, there has not been a cost benefit assessment to date that incorporates the costs and benefits of the certification process. It is noted that the costs of certification are not substantial compared to the</p>

Principle	Assessment
	development costs and as the process is seeking to ensure that national building standards are applied, with sustainability, amenity and safety benefits involved, the cost of the certification process is likely to conform to the proportional principle.
<b>Flexible and adaptable</b> The regulated entities have the scope to adopt least cost and innovative approaches to meeting their regulatory obligations and the regulatory system has the capacity to evolve and refine its approach over time	The availability of a performance based building code does facilitate a more flexible, adaptive and innovative approach. There are certain weaknesses in the current certification system including: <ul style="list-style-type: none"> <li>• An overly prescriptive and legally defined certification system which, because it is set out in legislation, is not able to evolve and refine its approach in a timely manner</li> <li>• A lack of clarity about the role and responsibilities of building certifiers.</li> <li>• Lack of a regular feedback loop and support for certifiers to refine and improve their approach.</li> </ul>
<b>Certain and predictable</b> Regulatory entities have certainty and clarity about their obligations and there is predictability and consistency in the action of the regulator	As noted under the principle, flexible and adaptable, there is a lack of clarity about the role and responsibility of certifiers, as well as the absence of timely review of the performance of certifiers. Hence it is not possible to be certain if the certification process is being undertaken in a consistent and appropriate approach across the building sector. In addition, there are varying practices followed by the individual councils, as consent authorities, including imposing standards above those of the national code and significantly varying development consent conditions. At the national level there is not a function in place to clarify matters of interpretation of the NCC and this can lead to varying interpretations across jurisdictions.
<b>Transparent, accountable and evidence based</b> The development and implementation of regulatory rules and enforcement should be evidence based and fully transparent	The setting of the national building code requirements is evidence based and allows for independent review and assessment, which is transparent. Once again the weakness lies in the area of certification. The complexity of the legislation and regulation underpinning the certification process acts as a barrier to understanding the requirements of the process by all parties, certifiers, builders, consent authorities and developers/owners. There is also a lack of agreement on the roles and responsibilities of councils and certifiers in respect to compliance and enforcement.
<b>Capable regulator</b> The regulator must have the right resources, skills and systems to operate an efficient and effective regulatory approach	While the staff that operate in the building regulator areas and in the BPB are well motivated and competent, there are three major problems: <ul style="list-style-type: none"> <li>• The building regulation function is fragmented into different areas which does not encourage a holistic or consistent approach</li> <li>• The focus of the host department for building regulation, DPE, is on planning and as such there is both insufficient focus on building regulation and</li> </ul>

Principle	Assessment
	<p>policy and also the approach to building regulation can be distorted by a planning perspective</p> <ul style="list-style-type: none"> <li>The resources applied to both building regulation and BPB are inadequate to the task at hand</li> </ul> <p>Councils have an important compliance and enforcement role for which they are not fully funded and hence are reluctant to undertake a compliance and enforcement role where private certifiers are involved.</p> <p>Beyond the matter of regulator capability is the need for strong market and industry intelligence. This is provided by various channels at present such as industry advisory committees and the board of BPB. It would be desirable to formalise this and also to create a channel for regular exchange of information and experience between the building regulators of the different jurisdictions.</p>
<p><b>Outcomes focussed</b></p> <p>The performance of the regulatory system should be assessed against the objectives set for the system and based on measurable outcomes</p>	<p>At present there is not a clear statement of the objectives of the building regulation and certification system which can be used to objectively assess the performance of the system</p>

### 10.3 Evaluation of regulatory administrative structure

In addition to evaluating the performance of the regulatory system, the administrative structure has been evaluated to determine whether and how it can be improved.

Set out below are a number of proposed principles which characterise good administrative practice and which it is considered should be used to determine the preferred approach to administrative arrangements. It is acknowledged that these principles can be subject to debate and, if varied, can lead to different conclusions. The proposed principles are as follows:

- 1. Separation of responsibilities for policy and operations but with strong linkage between the two such that practical 'in the field' experience is drawn on in formulating policy**

Policy formulation and assessment require quite different skills and expertise from managing operations. However, it is important that policy formulation draws on the experience of applying regulations to assess what actually happens in practice, what works and what does not work and why.

- 2. Consolidate like functions to ensure a consistent approach**

Where similar functions, such as building regulation policy or licensing/accreditation are divided into subsets and administered by different organisations it has a number of negative impacts. First, it can lead to different approaches being applied in different parts of the regulated industry for no apparent reason and hence fragmenting the approach to regulation. Second, it results in diseconomies of scale with a number of areas each operating at less than ideal scale. Third, it can lead to boundary disputes

between the overlapping areas as to which agency is responsible for a particular matter. Fourth, it can create confusion and navigation problems for consumers.

### **3. Seek to group related functions in the one portfolio area or create strong links across portfolios to facilitate proper alignment and communication**

This principle is an extension of the second principle. While certain functions should not be combined because combining may create a conflict of duty, for example, they are linked and it is best if they are located within the one portfolio area to facilitate a holistic approach. A good example is planning and local government. The State through the Minister for Planning establishes the overall approach to planning and state wide planning policies while local government acts as consent and enforcement authorities in respect to developments. Hence it is important that there is a good working relation between planning and local government while recognising the different roles and responsibilities of each. This point was recognized by IPART in its report, Local Government Compliance and Enforcement, when it advocated a partnership model between planning and local government. Whether or not related functions are in the one portfolio area, there needs to be formalised links between related functions.

### **4. Minimise navigation difficulties for consumers and the industry**

It is highly desirable that there is complete clarity for consumers and industry as to where they need to go if they wish to obtain information or have an issue addressed. The need for clarity must extend to the quality of the information and advice being provided.

### **5. Ensure that the full range of regulatory objectives are focussed and delivered**

There are a range of considerations that justify regulation but there can be a tendency to focus on a subset of these considerations, most typically to focus on those considerations that are seen by the agency to be most pertinent to its mission. For example if building regulation is assigned to a regulator whose mission is focussed on safety than other aspects such as consumer protection and encouraging innovation and research may suffer in relative terms. Hence, it is important that the host agency for the regulatory function has a broad perspective on the rationale for regulation and does not focus on just one aspect of the role to the exclusion of the broader perspective.

### **6. Appropriate level of resourcing and authority to ensure efficient and effective administration**

The most appropriate administrative structure counts for little if it is not properly resourced and given the required level of authority to undertake responsibilities. This is clearly illustrated in the case of BPB which has not had the level or certainty of resourcing necessary to undertake its designated role.

These principles have been applied to current arrangements with the results summarised in Table 10.2:

**Table 10.2: Assessment of Current Administrative Arrangements for Building Regulation**

Principle	Assessment
<p>1. Separation of responsibilities for policy and operations but with strong linkage between the two such that practical 'in the field' experience is drawn on in formulating policy</p>	<p>Transferring BPB to Fair Trading eliminates the vital link between BPU and BPB. This link was only established relatively recently through establishing a common director across the two units but has proved of value for both units. For BPU it provides a window into the operational area to test new policy approaches. For BPB it has provided the benefit of both making a contribution to policy development, and given it a broader perspective.</p> <p>While Fair Trading does have a building policy unit, its focus is on the residential dwelling sector rather than the full building sector, which is the focus of operation of both BPB and BPU. Moreover, the main area of focus of Fair Trading is on consumer protection rather than the broader area of building regulation.</p>
<p>2.Consolidate like functions to ensure a consistent approach</p>	<p>Within DPE the areas responsible for building policy and regulation are spread across three separate areas: namely BPU, BASIX and the Complying Development Codes. This leads to fragmentation in the work undertaken with limited coordination and a lack of full consistency across the building regulation function. This can be seen, for example, in the different processes followed leading up to the issue of a CC versus a CDC. Furthermore, the predominant culture in DPE is planning with no direct representation at the executive level of the building function. This means that the building function does not get the attention and priority that is accorded planning matters.</p> <p>Transferring BPB to Fair Trading has the potential to achieve consolidation of like functions, that of licensing and accreditation. However, there are no current plans to consolidate these functions, unlike the position in most other jurisdictions where the same entity undertakes the accreditation of certifiers and the licensing of builders and other trades. It should be noted though that in other jurisdictions the licensing of builders and other trades is across the building sector whereas in NSW builder licensing only applies to the residential sector, though the licensing of plumbers, electricians and other trades applies across the full building sector. This is one complication in achieving consolidation.</p> <p>It is also noted that while the rationale for accreditation of certifiers is to achieve more effective building regulation, the rationale in NSW for licensing builders and other trades is consumer protection, which further complicates consolidation.</p>



Principle	Assessment
3. Seek to group related functions in the one portfolio to facilitate proper alignment and communication	Transferring BPB to the Finance, Services and Innovation portfolio, removes the within portfolio linkage between BPB and local government and planning, both important areas of interaction. A mechanism will be needed to ensure a close working relationship continues.
4. Minimise navigation difficulties for consumers and the industry	By keeping BPB separate from the builders and trades licensing function the opportunity to achieve the maximum improvement in navigation for consumers has not been taken, though there is likely to be some improvement through the two functions being in the same broad area of government. Consumers will most likely have a complaint about an aspect of a building project, be it their own or one in their community but it is unlikely they will be in a position to assess whether the problem is due to the builder or the certifier. That is why combining the licensing/accreditation of building professionals can be so effective as it allows an upfront triaging of complaints to assess the situation and the culpable party or parties.
5. Ensure that the full range of regulatory objectives are focussed and delivered	<p>Home Building Services has a consumer protection remit while BPB and DPE have a building regulation remit. While consumer protection is an important function it does not address underlying weaknesses in the operation of the building industry. In contrast building regulation has the role of seeking to achieve an efficient and effective building industry by ensuring full transparency and accountability. It is important to have both consumer protection and appropriate regulation in place in an industry like building, but both work through different mechanisms.</p> <p>Assigning BPB, which has a building regulation role to an agency with a mission to undertake consumer protection risks reducing the effectiveness and focus of BPB. Hence, the potential conflict needs to be resolved by clear building regulation objectives, which is at present absent.</p>
6. Appropriate level of resourcing and authority to ensure efficient and effective administration	Both the building policy and regulation functions at DPE and BPB are substantially under resourced relative to their role and relative to their peers in other jurisdictions. In the case of BPB there are insufficient resources to operate an efficient and effective complaints system; no resources for an audit function to achieve greater accountability for certifiers; very limited resources to support an education and training function; and no resources to provide assistance and advice to certifiers in the field such as peer review panels and practice notes.

## 10.4 Conclusions

There is an effective and economically efficient approach to setting building standards, which facilitates innovation. The weaknesses in the overall building regulation system rest in the application of these standards to the building industry. There are a number of weaknesses in the building regulation and certification process compared with good regulatory practice including:

- conflicts of accountability for certifiers
- lack of clarity about the functions to be undertaken by certifiers, their relation to councils and what constitutes good certifier practice
- inadequate transparency regarding the performance of certifiers and inconsistency of practice
- lack of a clear statement of objectives and outcomes sought from building regulation and certification
- separation of the licensing of building practitioners from the accreditation of certifiers and hence confusion for consumers and lack of consistency with the licensing and accreditation approach
- separation of the building regulation role between two agencies, one covering the broad building sector and the other the residential building area and fragmentation of the building regulation function within DPE
- lack of close linkage between the building regulation function and the operational side
- absence of a mechanism to address interpretation issues concerning the NCC.

There is also a broader weakness with an inflexible legislative framework that does not facilitate ongoing adjustment of the approach to building regulation and certification to maintain best practice.

Finally, both the building regulation function and the accreditation of certifiers suffer from substantial under resourcing. In the certification area there is no auditing of and feedback to certifiers; and inadequate training, education and support targeted at addressing the particular needs of certifiers. With councils there is inadequate funding for undertaking the building compliance and enforcement function.

## 11 Reform of governance: legislation, regulation and administrative structure

### 11.1 Introduction

As noted in Chapter 7, administrative and legislative responsibilities are divided amongst a number of different government bodies:

- The DPE is responsible for building and planning policy and administers the EP&A Act and Regulation which is primarily planning legislation but which also incorporates building regulation legislation.
- The BPB, operating under the BP Act, administers the accreditation scheme and had secretariat support from the DPE prior to its transfer to Fair Trading.
- NSW Fair Trading licenses residential builders and trades, such as plumbers and electricians and administers the *Home Building Act 1989* and now supports the BPB and administers *the BP Act*.
- The Office of Local Government administers the *Local Government Act 1993* and the *Swimming Pools Act*, amongst other legislation, and local government (councils) which act as the principal building control authority for their Local Government Area and the keeper of public records on development matters in their LGA, provide a building certification service and have enforcement powers for building work and approvals.

There are two broad, linked issues to consider:

- the clarity of the legislative framework for building regulation
- whether there should be changes to the existing administrative arrangements to create a consolidated approach for building regulation and certification.

A third more specific issue addressed in this chapter is the appropriateness of the current governance arrangements for BPB and whether there is a case for changes in the BP Act.

### 11.2 Planning and building

A prior issue that needs to be considered is the relation between the planning and building functions. Up until 1998 planning and building regulation were operated separately, with DPE handling the planning function and local government handling the building regulation function. That changed in 1998 with the transfer of the building regulation function to DPE and the incorporation in the EP&A Act of the building control provisions from the Local Government Act, supplemented by new provisions on building certification. The rationale for the transfer was to adopt a more integrated approach between planning and building regulation.

The first issue to consider is where the benefits from integration accrue, from having one Act, from having planning and building regulation managed in one agency or through integration of the processes or a combination of all three? The broad conclusion of the review is that there is considerable merit in retaining the integration of the planning and building processes, with planning providing the strategic framework for development and, within that framework, building regulation and certification ensuring the consistency of individual developments with the framework

and with the building standards. Not only does the integration of the processes not require the integration of the building and planning legislation and agencies, but, paradoxically, such legislative and administrative integration is harmful to the integrity and effectiveness of building regulation and certification.

There is no merit seen in incorporating building regulation in the planning Act and certainly not having regard to the current state of the EP&A Act. A rewritten, consolidated part of the EP&A Act dealing with building regulation in a non-prescriptive principles based framework, supplemented by regulations and codes, would certainly be a substantial improvement on the status quo. However, it is difficult to see what advantage this would have over a separate building Act, noting that all other Australian jurisdictions follow such an approach. It is accepted that the fact that NSW is the exception is not conclusive that the NSW approach is sub optimal. However, it does require a clear demonstration of what incorporating building and planning legislation in the one Act achieves.

Building regulation is quite distinct from planning policy, with planning policy establishing the framework within which building regulation must operate. The case for or against integration of the Act mirrors the case for or against integrating building regulation in the planning agency. There would appear to be a number of strong counter arguments to such integration:

- the objectives and outcomes for building regulation are quite distinct from the planning objectives and outcomes. Building outcomes are concerned with the safety, functionality and amenity of buildings while planning is concerned with matters such as the spatial distribution of development, the height, mass and density of development and the environmental and social impacts of developments. Given these objectives and outcomes are so distinct there is every reason, based on principles of good public administration, to separate the two functions, while ensuring that the building process fully incorporates the planning framework
- not surprisingly the skills and expertise required for planning and building regulation are quite different and equally require separation of the functions.
- combining the two functions in the one agency can and has led to one function, in this case planning, dominating the other. This dominance means that the building regulation is seen through the prism of planning. As an illustration the complying development policies lack clarity for industry practitioners and the CC and CDC processes unnecessarily differ. Another example is with respect to certain classes of exempt development where the criteria has been set on the basis of low environmental impact and ignores building impact, which could be significant in the exempt development categories of changes in building use and changes in buildings.

## 11.3 Legislative and regulatory approach for NSW building regulation

An overview of the legislative structure for building regulation in NSW is set out in Table 7.1 of Chapter 7. The key legislation for building regulation and control is within the EP&A Act, supported by the BP Act in respect to the accreditation and oversight of certifiers. The EP&A Act and the BP Act are concerned with building control for the entire building and construction sector. In contrast the Home Building Act 1989 is concerned with regulating contractual dealings between consumers and builders and other trades in the residential building sector, with the broad objective of consumer protection and the proper operation of the market.

While the main focus of this review is on the BP Act, it is essential to have regard to the EP&A Act and Regulations in regard to building controls as they set out the building regulation framework within which certifiers must operate, defines the functions of certifiers and deals with other building control matters.

### 11.3.1 EP&A Act

The EP&A Act is a very complex piece of legislation and the building regulation component within it was originally transferred from the Local Government Act 1993. From the perspective of the building industry, including certifiers, it is very difficult to navigate the provisions of the EP&A Act and understand what those provisions mean. Further, many of the provisions need to be revised to reflect what would now be regarded as good regulatory practice.

There are four major concerns with the approach taken by the EP&A Act in regard to building regulation:

First, is the fragmentation of the provisions dealing with building regulation and control which are not organised in a logically robust manner and hence make navigation of the Act quite challenging.

Second, is the highly prescriptive and legalistic form of the legislation which both acts as a barrier to understanding the purpose and terms of the regulation and also creates a great deal of rigidity in the approach to regulation. It is important that there is a feedback loop from regulatory and industry practice to the form that regulation takes such that over time the regulation can evolve and become more effective and economically efficient. That feedback loop is very much constrained by the black letter framing of the current legislation.

Third, incorporating building regulation in a planning Act that is under the control of planners creates further barriers to achieving clear well-constructed building regulation. The objectives and approach of planning and building regulation are quite different and it would be much more appropriate to include building regulation in its own Act, which is the situation in all other Australian jurisdictions. This is not to deny the benefits of close linkage between planning and building which should continue. However, as noted in Section 11.2 close linkage does not require the functions to be located in the one agency or incorporated in the one Act. Integration in the one Act or agency will compromise one of the two functions.

Fourth, there is no statement of building regulation objectives in the current legislation which makes it very difficult to assess performance.

Set out in Table 11.1 is an identification of each of the provisions of the EP&A Act and Regulations relevant to the building regulation and certification function. It must be stressed that not all the provisions set out in the table are proposed to be transferred to a Building Act. For example, the various development paths, covering consent, exempt and complying developments should remain in the EP&A Act. What is proposed to be transferred are the provisions regulating building processes and controls. Further, the planning and building processes will need to continue to be coordinated. However, that coordination will achieve better outcomes if the functions are undertaken by separate agencies. The identification of subject matters and related provisions in the EP&A Act to a Building Act will need detailed consideration by DPE and the building regulator. It is intended that the identified provisions would be removed from the EP&A Act but that the provisions to be incorporated in the Building Act would be rewritten to both reflect a principles based approach and to incorporate reforms to the building regulation process as set out in Chapter 14. The detail relating to the legislation would be incorporated in a Regulation.

**Table 11.1: Key building regulation provisions of the EP&A Act and Regulations**

EP&A Act	EP&A Regulation
<ul style="list-style-type: none"> <li>• Part 4 Division 2, procedures for development that needs consent</li> <li>• Part 4 Division 3, special procedure for complying development</li> <li>• Part 4A certification of development</li> <li>• Part 4C liability and insurance</li> <li>• Part 6 Division 2A, orders</li> <li>• Part 6, Division 4, offences, including penalty notice offences</li> <li>• Part 8 Miscellaneous, Section 149A-G Building certificates</li> </ul>	<ul style="list-style-type: none"> <li>• Part 6 Divisions 8 and 8A – Clause 93 Fire safety and other considerations, Clause 94 upgrading of existing buildings, Clause 98 compliance with the Building Code of Australia (BCA), Clauses 98A-98E entertainment venues</li> <li>• Part 7 Procedures relating to complying development</li> <li>• Part 8 certification of development</li> <li>• Part 9 Fire safety and matters concerning the BCA</li> <li>• Part 12 Accreditation of building products and systems</li> <li>• Part 16 Registers and other records</li> <li>• Part 17 Miscellaneous – Clauses 280 and 281 building certificates, Clause 284 penalty notice offences, Clause 291 savings and transitional provisions</li> <li>• Schedule 1 Forms</li> <li>• Schedule 7 Penalty notice offences</li> </ul>

The EP&A Act does not acknowledge that it contains building regulation and there is no relevant statement of objectives relating to building regulation. Further, as can be seen from the above table, the treatment is somewhat fragmented and lacks a unifying structure. For example the functions of certifiers is spread over numerous provisions of the Act rather than consolidated into one section. It reflects its origins in the provisions in the *Local Government Act 1993* followed, by numerous amendments over the years as new issues or processes have been incorporated. From discussions with key stakeholders and building practitioners as well as the survey undertaken of council and

private certifiers the general view is that the building control provisions of the EP&A Act are very difficult to navigate and understand.

Beyond the issue of structure and fragmentation of the EP&A Act is the second issue of the prescriptive and detailed nature of its content. Chapter 8 of the Planning White Paper identified a large number of reforms that are needed in order to make the building regulation and certification process effective in achieving its objectives. These reforms are addressed in Chapter 14 of this report. In the event that it is decided to proceed with these reforms relating to the building regulation function it will be necessary to undertake a major rewrite of the building control provisions of the EP&A Act. However, what needs to be avoided is designing in detail a new building regulation system and then committing the detail of that system to legislation. Instead the legislation should set out the principles and broad framework and the detail should be specified in instruments that are able to evolve over time in the light of both experience and changing nature of the industry. Possible instruments to set out the detail could be regulations or, more desirably, practice codes that have legal effect.

In order to illustrate the difficulties created by prescriptive legislation and regulation, consider just one example, Clause 144 of the EP&A Regulations 2000, Referral of certain plans and specifications to FRNSW. Under this long standing regulation for buildings which meet certain criteria and involve the implementation of alternative fire solutions full details of the fire safety system, all details of the performance requirements of the alternative solution and a report setting out how the performance requirement was assessed to establish compliance with performance requirements must be provided by the building certifier to the Fire Commissioner within seven days of receiving an application for a construction certificate. The Fire Commissioner is required to provide to the certifying authority an initial fire safety report for the building and the certifier cannot issue a construction certificate until it has received an initial fire safety report or 23 days have elapsed since the material was provided to the Fire Commissioner.

The reality is that this provision is unworkable and has not been followed for a number of years. FRNSW does not have the specialist expertise and level of resources required to assess the alternative solutions reports and it is arguable whether that should be its role. A much more effective solution is proposed in Chapter 14 involving certification of fire safety systems design, installation and commissioning by suitably qualified, experienced and accredited parties, with FRNSW taking a more targeted and appropriate role. The reality is that having Clause 144 in place, even though it is unworkable, has acted as an effective barrier to developing a more effective approach because it was seen as requiring changing the existing regulation and introducing either new regulations or legislation.

A rewrite and consolidation of the building provisions in a single part of the EP&A Act would be a distinct improvement on the status quo. However, to go one stage further and establish a separate Building Act and associated regulation and codes, integrating into it the provisions of the Home Building Act would be ideal.

The reasons for a separate Act and a separate building regulation and certification agency are as follows:

- the skills, knowledge and approach for building regulation and planning are quite distinct
- matching the different skills, experience and approach with the function requires different agencies and those agencies should be responsible and accountable for their legislation
- combining the functions in the one agency or in the one Act will and has compromised one of the functions, in this case the building regulation function.

Having separate agencies and legislation will require a good working relation between the agencies but the relationship is likely to be far superior through negotiation of equals, with clearly defined roles and responsibilities, than through an integrated agency model.

### 11.3.2 BP Act

The BP Act, while having a general title referencing “building professionals” is in fact focussed on the accreditation, disciplining and general oversight of certifiers operating in the building industry. As such it is complementary to the building regulation provisions at present included in the EP&A Act. It also includes the governance provisions relating to the operation of the board.

This section identifies suggested amendments to the BP Act.

#### Reform of the BP Act

The BP Act has been reviewed to identify ways that it could facilitate a more effective operation of the BPB by removing or modifying unduly prescriptive provisions, creating greater clarity about the purpose and role of the Act and facilitating some of the reforms identified later in Chapter 15.

An important issue is the scope of coverage of the Act. The name Building Professionals implies a broad scope but at present it is limited to the accreditation of certifiers. It is proposed that the scope be extended to include all licensing and accreditation in the building sector. It is acknowledged that the scale of the current licensing function of building practitioners is substantially larger than the role of accreditation of certifiers. However, what is relevant is that the case for the use of a statutory model is equally valid for licensing and accreditation. Further, combining the licensing of building professionals with the accreditation in the one organisation will generate significant benefits. This is addressed further in Section 11.4.

Such broadening of the scope of the role of BPB will require a restructure of the organisation, including a restructure of the Board.

At the level of certifiers, the role of certifiers is not referred to in the BP Act and is referenced in multiple places of the EP&A Act in a fragmented and unhelpful manner. It is concluded that there must be a consolidated statement of the role and functions of certifiers but that this should be in a consolidated building act and cross referenced in the BP Act.

As noted in Chapter 2 there is not a statement of objectives contained within the Act. It is proposed that an objects statement be added to the Act along the following lines:



“To establish and maintain licensing and accreditation schemes for all building professionals requiring licensing or accreditation directed at contributing to the safety, health, amenity and sustainability of the design and performance of buildings through ensuring that the appropriate level of skills, experience and expertise are applied in the industry”.

Set out in Table 11.2 are proposed changes to the BP Act:

**Table 11.2: Proposed Changes to the BP Act and Regulation**

Section	Change	Rationale
<b>BP Act</b>		
New provision	Add a statement of objectives	It is difficult to assess the performance against the Act without a clear statement of what the objectives are.
New provision	Reference a statement of the role and functions of certifiers that is stated in the building regulation legislation	At present there is not a consolidated statement of the role and functions of certifiers. Instead it is referenced in numerous parts of the EP&A Act. This makes it difficult for either certifiers or the regulators to reference the role and responsibilities of certifiers.
New provisions	Incorporate in the Act coverage of the licensing of all building professionals currently covered in the Home Building Act	It is important that all licensing and accreditation for the building sector is undertaken within the one agency to allow for a holistic and integrated approach.
3: definitions	Amend “certification work” to include the issuing of development certificates and allow the Regulation to specify other inspections	In order to provide flexibility for possible future developments.
4(10): Accreditation Schemes	Delete requirement that s.41 of Interpretation Act applies to the accreditation scheme, making it (and amendments to it) a statutory rule that must be tabled in Parliament and subject to a disallowance motion	This was an opposition amendment introduced because no version of an accreditation scheme had been prepared and this allowed for an opportunity to see an initial version. No objection has ever been made to the scheme or amendments to it. The provision is now unnecessary.
5A(1)(a): applications for accreditation and 7(1A)(a) grounds for refusal of accreditation	Prohibit an A4 certifier from being an accredited certifier director of an accredited body corporate.	To close a loop hole. An A4 may only carry out building inspections and would not have the experience to properly manage the affairs of an accredited body corporate

Section	Change	Rationale
5A: applications for accreditation	Amend to provide that the Accreditation Scheme made under Section 4, and not the Regulations, may provide for different categories of accreditation.	To make it less onerous to add new categories of accreditation. New categories (not being minor amendments) would still require public exhibition and Ministerial adoption under the process in Section 4.
8: suspension or cancellation of accreditation	Amend to allow a person to request the temporary suspension of their accreditation.	Assists certifiers who may be made redundant or who have planned 'gaps' in their practicing.
8(2)(f): suspension or cancellation of accreditation	Add non-compliance with orders of the Tribunal (in addition to orders by the Board) to grounds for suspension or cancellation of accreditation.	It is anomalous not to be able to enforce orders of the Tribunal by suspension etc.
10: duration of accreditation	Amend the one year duration of accreditation-allow BPB to issue a new or renewed accreditation for a period of up to three or five years.	To allow the Board to stagger renewals to avoid peaks and troughs at renewal times. Also, allows BPB to reward low risk certifiers with less frequent renewals and focus accreditation resources on higher risk certifiers.
Division 3: powers of the Board for the protection of the public	Board should have authority to disclose information it receives from an investigation (or from any other source) to such persons or agencies as it considers appropriate (e.g. property owners, local councils, FRNSW) if it would be in the public interest to do so (egg. if a property posed a safety risk)	Current privacy provisions restrict the Board from disclosing information other than in very limited circumstances.
19: disciplinary proceedings, definitions	Amend the definition of "disciplinary action" to exclude a decision to take no further action under Sections 31 (4) and 34(2) (as amended as suggested above).	This would remove the need to include such a decision on the disciplinary register and allow a certifier to have an unblemished record where the proven conduct related to a low grade infringement.
21: procedure for making a complaint	Remove requirement that complaints be verified by statutory declaration.	Inconvenient for complainants. Results in numerous complaints being returned because of irregularities in the making of the statutory declaration. Does nothing to ensure that information is more correct
27(1): investigation by Board of complaints	Remove the mandatory requirement for the Board to investigate all complaints. Provide the discretion for the Board to assess whether an investigation is likely to be	As it is mandatory it is onerous. Does not allow the Board to determine how to apply its resources between complaint investigations and audit investigations. Provides a

Section	Change	Rationale
	justified.	public expectation that the starting point is that any complaint will be investigated.
31(4): decision after investigation of complaint and 34(2) tribunal may make certain disciplinary findings	Add new disciplinary power to allow Board and NCAT to order the cancellation of a person's accreditation and the issue of a new certificate of accreditation in a different category-with or without conditions.	To allow for 'down grading' of accreditation to a more appropriate level which matches experience/competence.
31(4)(m): decision after investigation of complaint	Remove "and that no other material complaints (whether or not the subject of a disciplinary finding) have been made against the certifier".	The provision is vague and unnecessary. It is enough that the certifier is generally competent and diligent to activate the authority to take no further action under this provision
31(4): decision after investigation of complaint and 34(s)(g) tribunal may make certain disciplinary findings	Allow Board and NCAT to order compensation not only to "complainant" but also to anyone who has suffered loss as a result of the certifier's actions.	Limiting power to make an award to a complainant only is too limiting e.g. the council may be the complainant, but the landowner may suffer the loss/damage.
34(2): tribunal may make certain disciplinary findings	Add authority for NCAT to make order for no further action if satisfied that certifier is generally competent and diligent.	To make the power of NCAT the same as for the Board.
34(2)(f): tribunal may make certain disciplinary findings	Amend to require fine imposed by NCAT to be paid to the Board, not to the Tribunal.	The Tribunal is not appropriate organisation to receive or collect fines.
40: register of disciplinary action	Amend the requirement to keep a register of all disciplinary actions for all times and allow the Board to remove matter from the register after certain time periods-subject to 'offence free' periods of behaviour.	Encourages certifiers to improve practice. Makes disciplinary register more consistent with legislation such as Criminal Records Act-which provides for 'spent convictions' to be removed from records.
66: conflicts of interest	Extend conflict of interest provision to cover "certification work".	Section 66 only covers situations of issuing Part 4A certificates and CDCs. Conflict considerations also apply in issuing Strata Certificates and in carrying out critical and other inspections and in issuing certificates of compliance under Swimming Pools Act.

Section	Change	Rationale
71: board may grant exemptions from certain provisions relating to conflicts of interest	Amend to allow the Board to grant exemption to any conflict of interest provision in Section 66-not just Section 66(1) (d). Also, allow Board to grant exemption to individual or class of individuals without the need for an application.	Increase flexibility. Assists in particular council and private certifiers in regional areas where close relations are either unavoidable or give rise to harsh outcomes for consumers of certification services.
85(3): false representations	Expand to cover the Swimming Pools Act as well as other legislation currently identified.	Generally it should be an offence to hold oneself out as being accredited to perform any sort of certification work unless they actually hold a certificate of accreditation that authorises that activity.
88: service of documents	Amend to include service of documents by electronic means including email.	The current act only recognises facsimile transmission as only electronic means of service.
BP Regulation		
19A	Amend to make the requirements for a written contract between certifiers and the beneficiaries of the development less prescriptive	Allow an appropriate level of flexibility while at the same time developing a standard contract that can be adopted, particularly in respect to single residential developments

## 11.4 Building regulation administrative structure

### 11.4.1 Current administrative structure

Responsibility for building regulation is divided between a numbers of agencies which are summarised in Table 11.3:

**Table 11.3: Current administrative approach for building regulation in NSW**

Agency	Portfolio and Minister	Function of agency
Department of Planning and Environment	Planning Portfolio Planning Minister	Responsible for building regulation and policy generally and this is effected through a number of areas in the department: Building Policy Unit which advises on building policy and regulation and on building standards, including NSW's participation on the ABCB; e-Business Branch administers BASIX, the building sustainability index; and Assessment Policy, Assessment Systems and Strategy Unit which administers complying development codes. In addition

Agency	Portfolio and Minister	Function of agency
		the Department up to recently provided support services for the Building Professionals Board.
Building Professionals Board	Finance, Services and Innovation Portfolio <sup>9</sup> Minister for Innovation and Better Regulation. Up until 31 May 2015 it was administered by the Department of Planning and Environment within the planning portfolio.	Administers the accreditation, support, compliance and disciplining of certifiers and is responsible for policy advice in regard to the certification system. At this stage it is intended to be administered as a separate agency within Fair Trading.
The Home Building Services Division of Fair Trading	Finance, Services and Innovation portfolio Minister for Innovation and Better Regulation	Administers the Home Building Act which covers providing policy advice on the Act, administering the licensing, compliance and disciplining of building practitioners engaged in residential building and administers the home warranty insurance scheme and supports the Home Warranty Insurance Board.
Office of Local Government	Planning portfolio Minister for Local Government	Administers the Local Government Act and the Swimming Pool Act and oversees the operation of local government.
Local Councils	Planning portfolio Minister for Local Government	Undertake the key building and planning regulatory function in local areas; are the principal building control authority for their respective LGAs; the keeper of the public record for all developments in their LGA; and compete for certification work.

#### 11.4.2 Identification and assessment of reform options

Each of the reform options has been assessed against the principles set out earlier in this section and in terms of ability to address the deficiencies of the current system. The set of options has been slightly broadened from that considered in the discussion paper and are summarised in Table 11.4. The options have been arranged in increasing order of change from the status quo.

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<sup>9</sup> Transfer effective from 1 July 2015

**Table 11.4: Summary of reform options**

Option	Description
1. Create overarching building regulation and policy committee	Representation on the committee would be from each of the relevant agencies, namely DPE, BPB, Fair Trading, Office of Local Government, local government and FRNSW. The purpose of the committee would be to coordinate the development of building policy and regulation by requiring all changes impacting on the building sector to be discussed at the Committee to assist in achieving a consistent approach. It would also be intended that over time mechanisms and protocols would be established for achieving a more coordinated approach across the agencies.
2. Integration of the licensing and accreditation of building professionals, including certifiers, in the one entity.	This involves the consolidation of the licensing/accreditation function relating to the building industry in the one agency, possibly the BPB. with the other aspects of building regulation remaining as they are, namely the building regulation and control function being in DPE while the responsibility for the Home Building Act stays in Fair Trading.
3. Consolidate in the one area of government the licensing/accreditation functions of the building sector and the building regulation and policy function.	Under this option both the licensing/accreditation function for the building industry and the building regulation function would be consolidated into one area of government, accountable to a minister for building regulation. This consolidation could occur in the planning or finance, services and innovation portfolios. The conditions for achieving effective reform in either portfolio are identified. In effect there are two sub options that can be considered by government for the portfolio location of the building regulation and certification function.
4. Establish a Building Commission for the building regulation function.	The Building Commission option is the same as Option 3 but with the legal form of a statutory authority, which is the approach followed in Victoria, Queensland and Western Australia. Like Option 3 the building commission could be located in the planning or finance, services and property portfolios.

### **Option 1: Coordination Committee for Building Regulation and Policy**

With the first option the first question is whether there is an existing body that could undertake the role. The NSW Building Regulation Advisory Council (BRAC) is convened by DPE and advises the DPE's Building Policy Unit, with representation from Fair Trading and other government agencies such as FRNSW. However, it has a broad representation of external industry organisations and hence is not a suitable forum to coordinate across government agencies. A separate committee, the Building Industry Coordination Committee, was established following the 'Campbell Inquiry' in 2002 with the remit of improving cross-agency coordination in the building sector. It consisted of representatives of the then Department of Planning, NSW Fire Brigades and NSW Fair Trading. However, it would appear that the Committee was largely ineffective in its mission and has ceased to function. There was also an information communication protocol in place between the BPB and Fair Trading but that has lapsed.

A new standing committee could be established with representation from the appropriate areas of DPE, including BPB, the Home Building Services area of Fair Trading and the Office of Local Government and local government, which could be supplemented from time to time when matters being discussed impacted other

agencies, for example drawing in FRNSW if fire safety certification was an agenda item. The purpose of such a forum would be to achieve a coordinated and consistent approach to the regulation of the building industry.

While the first option provides a useful mechanism to create greater coordination between the relevant agencies it does not address the problems of the current system nor advance the application of the identified principles. The current administrative arrangements would remain in place and hence the problems of fragmentation would continue, as would the lack of effective governance arrangements. Hence it should be considered as an addition to any reform, not as a complete reform in its own right. Further, the history of coordinating committees operating across agencies and portfolio areas is not overly encouraging.

### **Option 2: Consolidate the licensing and accreditation of building professionals**

This option involves the consolidation of the accreditation function performed by BPB with respect to certifiers with the licensing of builders and other building trades in the one organisation. The precondition for this occurring has been realised by the transfer of BPB to Fair Trading. However, the transfer of BPB is not sufficient as it is understood the current plan is to continue to operate BPB as a separate agency in terms of its accreditation role, though the support, disciplining and audit functions could be consolidated with those of Home Building Services and Fair Trading. Strong merit is seen in combining in the one agency the licensing and accreditation functions for all regulated building occupations, with the following benefits generated:

- consistent approach facilitated across the building professionals, to the degree appropriate. In certain areas there may be differences in approach with a greater focus on CPD for certifiers likely relative to other building professionals
- allows the support functions of accreditation/licensing systems, investigations and audits, to be applied across a larger number of accredited/licensed persons, achieving greater efficiency and effectiveness in these functions
- facilitates a more holistic approach to investigation and disciplining which will be beneficial from both an organisation and consumer/community perspective. Often it is not clear whether the complaint concerns the builder or the certifier or both and by having the complaints handled in a one stop shop the matter can be investigated without regard to boundary issues between professions

Equally, merit is seen in having the licensing and accreditation process handled by a statutory authority to provide a degree of independence from government, given that the function involves decisions that impact on the livelihood of individuals and a semi judicial function is being undertaken in regard to disciplining and investigation. In general the licensing and accreditation function is undertaken in other jurisdictions by a statutory authority and there the regulator is a statutory authority, the licensing function is handled by a separate statutory authority. Using a statutory authority also allows for the process to be oversighted by a representative board of persons drawn from associations that cover the various building professionals. The most logical organisation to handle this role is the BPB, which would require some legislative change and a reconstituted board.

Option 2 does achieve consolidation in respect to the licensing/accreditation area but not with respect to building regulation and policy. There would continue to be a policy unit in Fair Trading administering the Home Building Act and a separate series of building regulation units in DPE. Furthermore, there would be a separation between the operational aspects of building regulation which would be in the Finance, Services and Innovation portfolio, and building regulation and policy, which would be in DPE. This will make a feedback loop from operations to policy that much more difficult.

Another separation is between the licensing/accreditation function which would be in the Finance, Services and Innovation portfolio and local government which is in the planning cluster. There has been quite useful work done in the areas of a practice guide for certifiers and a Local Government - Certifier Framework for Cooperation which has been facilitated by all the agencies being in the one portfolio area. However, this could be addressed by the creation of a partnership agreement across the two portfolios.

Finally, the main focus of Fair Trading within Finance, Services and Innovation is on consumer protection within the residential building sector and may not take into account the broader rationale for why there is building regulation which extends beyond consumer protection and the residential building sector to the characteristics of the overall building industry.

If Option 2 was selected it would be strongly recommended that it be combined with the consolidation in DPE into one Building Regulation and Policy Division of the current building regulation units, BPU, BASIX and the Codes, with a direct reporting line to the Secretary, and a strong link established between the building regulation function in DPE and both the Home Building Act policy responsibility and the BPB in the Fair Trading agency.

### **Option 3: Consolidate building licensing, regulation and policy in one portfolio**

Option 3 achieves consolidation within the one portfolio by the following changes:

- consolidating the licensing and accreditation function in the building sector by combining the current separate functions in BPB and Home Building Services into a statutory authority, which logically could be a restructured BPB. This is common to Option 2.
- consolidating in one agency, an Office of Building Regulation, the building regulation functions across government, combining in the one agency the building regulation functions including the building regulation functions in DPE and administration and policy responsibility for the Home Building Act
- appointing a Minister for Building Regulation to whom both the BPB and the Office of Building Regulation would report
- re-establishing the BRAC as a committee of advice appointed by the Minister for Building Regulation.

This approach would eliminate fragmentation in respect to both the licensing/accreditation of building practitioners and in respect to building policy while retaining a close link between building policy and operations. It would assist navigation for both the industry and consumers. It also avoids the drawbacks identified for option 2.



## Option 4: Building Commission

Option 4 is the same as Option 3 but, with the legal form of an Office being replaced with that of a statutory authority. Accordingly, it is assessed in Table 11.5 in combination with Option 3. A separate assessment needs to be undertaken on the merits of a statutory authority relative to a Department or Office.

The establishment of a Building Commission was in fact recommended back in 2002 by the Campbell Inquiry<sup>10</sup> and more recently by the Collins Report.<sup>11</sup> In both cases the government of the day decided not to proceed with the proposal. The decision not to proceed with a Building Commission may in fact have been taken because of a desire not to broaden the scope of regulation, specifically the extension of builder licensing to the non-home-building part of the industry, which was part of the Building Commission proposal. In this regard, this option does differ from those earlier proposals in that it would not extend the scope of building industry regulation, but rather would consolidate in one body all regulation relating to the building industry.

There are two points to note about the consolidation options, Option 3 and 4. The first is that while consolidation may create a more consistent and coordinated approach, it is not a guarantee of success – it may be a necessary condition but is not a sufficient condition for success. In the case of both Victoria and Queensland, serious problems were identified with their building commissions which have led to significant changes. These were not problems inherent in a Building Commission model, but in the way that the Commission was administered.

Second, any restructure will have both a consolidation and a separation element, with positive and negative impacts. In the case of consolidating the building regulation function in the Finance, Services and Innovation portfolio, there is the potential for reduced linkage to planning and local government. Conversely, establishing the function in the planning portfolio would reduce the linkage with the consumer protection function.

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<sup>10</sup> Joint Select Committee on the Quality of Buildings, 2002

<sup>11</sup> *Inquiry into Construction Industry Insolvency in NSW – Final Report*, 2012

The advantages and disadvantages of each option are summarised in Table 11.5:

**Table 11.5: Summary of the assessment of each reform option**

	Option 1: Creation of overarching committee	Option 2: Consolidate the licensing/ accreditation for the building industry	Options 3 and 4: Consolidate both the licensing/accreditation for the building industry and building policy in the one area of government
<b>Assessment against principles</b>			
1. separate but linked policy and operations	Not achieved	Not achieved-building control policy is in DPE while licensing and accreditation is in Fair Trading	Achieved, with the Office having the policy role and BPB having the operational role and both being located in the one portfolio area
2. consolidate like functions	Not achieved	Achieved for the building licensing and accreditation function but not for the policy function	Achieved, with the exception of Option 4 where it will be necessary to have a policy function established separate from the Building Commission, given that it would not be appropriate for a policy function to be in a statutory authority.
3. align related functions in one portfolio	Not achieved	Achieved for the building licensing and accreditation function but not for the policy function	Achieved
4. minimise navigation difficulties for consumers and industry	Not achieved	Achieved for the licensing and accreditation function	Achieved
5. focus on and address all key regulatory objectives	Not achieved	Potentially not achieved given a consumer protection focus in Fair Trading and a planning focus in DPE	Achieved through the creation of a separate Office of Building Regulation and a Minister for Building Regulation.
<b>Advantages</b>			
	<ul style="list-style-type: none"> <li>• Potentially greater coordination and consistency across agencies</li> </ul>	<ul style="list-style-type: none"> <li>• Reduces fragmentation in the licensing/accreditation function and creates a consistent approach across the licensing and accreditation function</li> <li>• Increases clarity and ease of navigation for consumers</li> <li>• Creates a holistic approach for</li> </ul>	<ul style="list-style-type: none"> <li>• Eliminates fragmentation in both the licensing/accreditation and building policy areas</li> <li>• Creates a holistic approach for investigations and disciplining in the licensing/accreditation area</li> <li>• Increased clarity and ease of navigation for consumers</li> <li>• Establishes the building regulation and policy functions in the one portfolio</li> <li>• Creates a close linkage</li> </ul>

	Option 1: Creation of overarching committee	Option 2: Consolidate the licensing/ accreditation for the building industry	Options 3 and 4: Consolidate both the licensing/accreditation for the building industry and building policy in the one area of government
		investigations and disciplining in the licensing/accreditation area	between regulation policy and operations • Facilitates alignment between building and planning functions
<b>Disadvantages</b>			
	<ul style="list-style-type: none"> <li>• Does not address administrative fragmentation</li> <li>• Does not create greater clarity and ease of navigation for consumers</li> </ul>	<ul style="list-style-type: none"> <li>• Maintains separate policy and operations across portfolios</li> <li>• Possibly separates local government and building certification across portfolios</li> <li>• Maintains fragmentation of building policy across portfolios</li> <li>• Potential risk of the focus being on consumer protection rather than the broader reason for building regulation.</li> </ul>	Will potentially reduce linkages across portfolios. If the function is located in the Planning portfolio, there may be reduced linkage with consumer protection while if its located in the Finance, Services and Innovation portfolio, there is potentially reduced linkage with planning and local government.
	<b>Overall assessment</b> <i>Useful addition to a reformed structure rather than a reform in its own right</i>	<b>Overall assessment</b> <i>Addresses some but not all current deficiencies but creates separation between portfolios of the building regulation and policy function</i>	<b>Overall assessment</b> <i>Assessed as an appropriate reform which addresses the drawbacks of the current approach and the reform principles.</i>

### 11.4.3 Assessment

Based on the assessment set out in Table 11.5 it is concluded that either Options 3 or 4 most effectively deliver on the principles of good administrative design. There are then four matters to address:

- the choice between Options 3 and 4
- the specific factors that need to be considered in respect to the portfolio location of the building regulation function
- what functions qualify for inclusion in the building regulation area
- the relation of the building regulator to the external environment.

## Office versus Building Commission

Options 3 and 4 involve broadly the same consolidation of functions but differ in the legal structure within which the building regulation function is constituted. Option 3 incorporates the building regulation function within a department structure, though with a statutory authority in the form of BPB administering the licensing and accreditation function. Option 4 combines the building regulation function within a statutory authority with its own board of governance, with BPB handling the licensing/accreditation function.

The case for a statutory authority structure for the regulatory function, in line with the model applying in Victoria, Queensland and Western Australia, is based on the following considerations:

- highly desirable to have broad industry input to the regulatory function which can be effected through representation on the board
- view that it is desirable that there be a separation between the government and the regulator, with the government having control of policy and legislation but not of the administration of regulation. This is the logic behind establishing, for example, the Reserve Bank, the ACCC and the ATO as statutory authorities.

The first consideration is not conclusive given that having board representation is not the only way in which to obtain industry input. An alternative or additional way is through the creation of a Building Regulation Advisory Committee which is appointed by and reports to the Minister. In fact the latter is assessed to be a superior approach as industry representatives can focus on the advisory function with respect to building regulation and not get caught up in the detail and governance of a statutory authority.

The second consideration turns on the distinction between policy design and implementation, with the government being responsible for the former but not necessarily for the latter. The difference between the case of building regulation and the examples of the Reserve Bank, the ATO and the ACCC is that with the latter three statutory authorities there is a very well defined regulatory framework within which the regulator operates while in the case of building regulation the regulatory framework and approach will evolve and change over time as more information and experience is accumulated. For this reason it is considered best that the government maintains direct responsibility and accountability for building regulation.

The case for an Office rather than a statutory authority rests on three considerations:

- industry input and involvement can be achieved more effectively through a reconstituted BRAC with the benefit of broader representation than would be the case with a board
- the regulatory framework will evolve over time and hence requires close oversight and responsibility by government
- the establishment of a statutory authority would require the separate establishment in government of a building policy function, which is the case where statutory authorities are employed in other jurisdictions, and this would make the model unnecessarily complex and potentially create problems of overlap.

This favours an Office of Building Regulation rather than a Building Commission and with a Building Regulation Advisory Committee appointed by and reporting to the Minister for Building Regulation.

At the same time there is considered to be a good case for a statutory authority to oversight the licensing and accreditation of building professionals and practitioners. This is purely an administrative function without a policy element but it involves making decisions that impact on the livelihood and status of persons and has a semi judicial element to it.

### **Choice of portfolio location for building regulation function**

The choice of portfolio in which to locate the building regulation function is between Planning and Finance, Services and Innovation. Rather than provide a specific recommendation for which portfolio should be selected it is considered more useful to set out what are considered the preconditions for success in either portfolio. These are set out below:

- Consolidate licensing and accreditation in one agency in the form of a statutory authority, preferably the BPB.
- Create an office of building regulation formed from those functions in DPE concerned with building regulation and the area of Home Building Services administering the Home Building Act, the office to be separate and distinct from the consumer protection function if located in the Finance, Services and Innovation portfolio and separate from DPE if located in the planning portfolio.
- Ensure close working relationship between the licensing and accreditation authority and the Office of Building Regulation, with the latter having the regulatory design and policy function.
- Creation of a partnership model with local government.
- Creation of a mechanism for regular consultation and coordination between DPE and the Office of Building Regulation.

### **Functional responsibilities to be included in the Office of Building Regulation**

The third issue is what functions should be incorporated in the Office of Building Regulation. The specifics of what persons and funding will be allocated to the Office will require negotiation between agencies, with the involvement of the Treasury. However the functions currently undertaken by both the Home Building Services and BPU relating to building regulation (as distinct in the former case to licensing of building practitioners and consumer protection) should be in the Office.

The BASIX function is a building regulation function even though its establishment was driven by a planning objective. This function is best located in the Office particularly given the overlap between BASIX and Section J of the BCA in respect to building sustainability.

Complying Development is simply a different, simplified mechanism for progressing certain classes of development. While planning will have a legitimate interest and responsibility in the selection of areas for application of complying development, the actual design, implementation and administration of the complying development process is a building regulation matter. The development of new Complying

Development categories will require a close working relation between planning and the Office of Building Regulation as well as consultation with industry and certifiers.

### **Outward looking focus**

There is always a danger of regulators becoming inward looking, process driven and reactive. It is essential that the regulator adopts an outward looking perspective that includes:

- ongoing engagement with and monitoring of industry developments
- interaction and an exchange of learnings with other building regulators

It is acknowledged that active engagement with industry can run the risk of the regulator becoming “captured” by industry. The purpose of engagement with industry is to maintain an up to date knowledge of relevant developments occurring in the industry as well as obtaining industry views on regulatory proposals. This has to be undertaken with the knowledge and expectation that industry will seek to advance its own interests and that the role of the regulator is concerned with pursuing the public interest which may not fully align with the interests of the industry. Nevertheless regular interaction with industry may identify more effective ways to regulate or identify unintended consequences in regulatory proposals.

To date, outside the context of the ABCB forum, there appears to be little interaction between building regulators and no regular exchange of information on regulatory issues and practices. It would be very helpful to establish a forum for regular interaction so that regulators can learn from each other and, hopefully over time, move to a consistent best practice approach. This has benefits for both government and industry.

#### **11.4.4 Administrative arrangements for BPB**

##### **The BPB: to be or not to be?**

It is useful to consider the governance practice in other jurisdictions with respect to the body that accredits and oversees certifiers. The predominant model is that of a statutory authority, typically separate from the regulator. That is the case in Victoria, with the BPB having this role while the building regulator is VBA. Effectively it is the case in Queensland and South Australia where professional bodies accredit certifiers. In Western Australia the Building Commission undertakes both the role of licensing/accreditation and building regulation. In both the NT and New Zealand a separate crown entity undertakes the role of accreditation, separate from the building regulation role.

There are only two exceptions to the model of having a statutory authority handle certifier accreditation: Tasmania, where the function is undertaken by the Department of Justice and the ACT where it is handled by Access Canberra which is also the regulator.

This is the “what is” but it need not be the “what ought to be”. The question then is what are the considerations that would support the role of accreditation/licensing oversight being undertaken by a statutory authority and how persuasive are they?

The key consideration would appear to be to confer a reasonable level of independence from government on the licensing/accreditation body given that it is making decisions about the professional standing and ultimately the livelihood of individuals. The same

logic applies to the licensing of building practitioners. Typically the statutory authority draws representation from the building industry to provide both an informed perspective and independence from government.

This consideration is persuasive. The only counter consideration is that having a statutory authority may create administrative diseconomies given its relatively limited function and scale. This can be addressed by having the administrative support for the statutory agency provided by another agency. In the case of Victoria it is the VBA. This should be limited to corporate support such as human resource support, finance, payroll and other corporate services where there are economies of scale and does not compromise the independence or effectiveness of the BPB. The key point is that with a statutory authority there is an independent board with relevant industry representation and skills to oversight performance.

### **Relation between BPB and Building Regulator**

The model that has governed the relation between BPB and DPE was far from ideal. The major deficiencies with it were as follows:

- lack of financial certainty and independence for BPB
- lack of autonomy with BPB reporting to government through DPE and reporting through the mechanism of the DPE annual report
- conflict for staff between their role in undertaking their functions for BPB and their role as employees of DPE
- lack of clarity as to whether staff reported to the BPB or the secretary of DPE.

BPB was substantially funded by an allocation from the DPE budget but without an annual budgeting process and without forward estimates of future levels of funding. This made it highly problematic for BPB to undertake strategic planning and the level of resourcing was such that BPB was not able to undertake fully and effectively its role. This is fully explored in Chapter 15 but in summary it has meant that BPB has undertaken a very limited education and training and support role for certifiers, has not been able to undertake a program of proactive investigations and audits and has had a backlog of processing of complaints. It is proposed that funding be set out a level that will enable BPB to undertake its role efficiently and effectively and with reasonable certainty about the level of funding over time.

BPB also has not enjoyed a reasonable level of autonomy, despite being a statutory authority, though the DPE has sought to address this recently by entering into a governance charter between the President of the BPB and the Secretary of the DPE. A distinction needs to be made as between the board of BPB, the secretariat and the organisation. While the board and its President were able to report direct to the Minister, both the secretariat and the organisation lacked autonomy. When administered within the planning portfolio, all proposals required the sign off of DPE, including submissions to the Minister. This defeats the purpose of establishing the accreditation organisation as a statutory authority. This limitation on autonomy extended to its annual report which was incorporated within the DPE annual report. It is proposed that BPB, as an organisation, has a direct reporting line to the responsible Minister, while maintaining open channels of communication with the building regulator.

Staffing for BPB consisted of a mix of DPE staff seconded to BPB and contractors on short-term contracts. In addition, corporate support services were provided by DPE. It is efficient and appropriate that BPB does not develop its own corporate support capability but draws upon the services available within the portfolio within which it operates. However, it is important that it is able to select and employ its own core staff if it is to be accountable for its performance.

Finally, there is the issue of communication, coordination and role delineation between BPB and the building regulator. It is important that there is effective communication and coordination between the two agencies and that there is clarity about respective roles and responsibilities. There has been a lack of clarity about the role of BPB in developing building regulation policy and practice. The responsibility for building regulation must rest with the building regulator but it is important that the building regulator is able to and does draw upon the direct operational experience of BPB. It is proposed that there is a coordination committee that meets on a regular basis.

## 11.5 Conclusions

The integrated process for planning and building should continue. However, the integrated process does not require either a single planning and building Act or a single planning and building agency. Indeed legislative and administrative consolidation undermines the effectiveness of building regulation.

There is a strong case for establishing a Building Act that covers the territory currently covered by both the building control requirements of the EP&A Act and the building regulation parts of the Home Building Act, but in a different form and style to the current legislation, particularly in respect to the EP&A Act. Effective regulation needs to be flexible, adjusting as feedback is generated on the operation of the regulatory system and as information clarifies what works best. This approach is incompatible with a highly prescriptive legal approach. What is needed is broad principles based legislative framework with the detail addressed in more flexible regulation and codes.

There is a similar need to restructure the administrative structure which is characterised by fragmentation and inadequate resourcing and focus. Building professional licensing and accreditation should be consolidated in one agency which should be a statutory authority with a board representing broadly the occupations that are licensed/accredited. The most logical option would be to use BPB for this purpose but to restructure the organisation, including its Board.

Amendments to the BP Act have been identified to address a number of deficiencies and make the operation of the Act more effective and less prescriptive. The Act also needs a statement of objectives.

The current separate building regulation functions in DPE and the building regulation function in Fair Trading should be combined into an Office of Building Regulation.

Both the BPB and the Office of Building Regulation should report to a Minister for Building Regulation. The Minister for Building Regulation should appoint a Building Regulation Advisory Committee that advises the government on building regulation. The Minister, the BPB and the Office of Building Regulation could be located in either the planning or finance, services and innovation portfolios but in either location there needs to be a clear focus on the building regulation and certification function that is not



compromised by planning or consumer protection considerations. There also needs to be suitable formal links with local government and planning.

BPB needs to have autonomy in undertaking its role and responsibilities but there needs to be a regular dialogue between BPB and the Office of Building Regulation so that policy is informed by operational experience and BPB is sensitive to the broader policy considerations.

Finally, the regulator needs to actively monitor industry developments and canvass industry views on regulation as well as seeking to facilitate an active engagement and exchange of learnings with regulators in other jurisdictions.

## 12 Reform of information systems: Use of e-technology

### 12.1 Introduction

An important precondition for success in any regulatory system is the generation of information in a form that enables the tracking of the performance of the system over time, creating a feedback loop that provides the information on which changes in the system can be based. The current DPE-based building regulation and certification system is substantially paper-based, with non-standardisation of the information collected and hence does not generate, in a convenient way, the necessary data to inform evidence-based policy and monitor the effectiveness of the system.

Councils are the holders of documentation on buildings and building approvals and work undertaken but it is not complete or in a useful form.

Under the EP&A Regulation, private certifiers are required to provide to the relevant council, within two days of issue, a copy of each CC/CDC and OC and supporting documentation. If provided in hard copy form, such documents cannot be conveniently digitalised, restricting access to the documentation. Further, there are not standard forms for CCs, CDCs and OCs, and hence there is significant variation in the content of such forms.

Beyond process information there is no outcomes information generated by the system that tracks for example the level and type of building defects on a systematic basis. The only information generated is through complaints reporting to Fair Trading which is self-reported and only covers residential buildings.

Steps to improve the use of e-technology have been taken by various councils and the DPE's e-Business Branch. These include online applications and processing of development applications in a number of councils and the development by e-Business of an electronic lodgement system for complying developments. The e-Business Branch of DPE is also developing the NSW Planning Portal, which will, amongst other things, enable the content for online publication of planning services and information to include statutory planning requirements, lodgements and submissions of applications, registrations of consents, approvals and certificates. From March 2016, consents will only become effective or operate from the date the determination is registered on the NSW planning portal. Consideration can be given to the same legal requirement for certification certificates.

This chapter is only concerned with an information strategy for the overall building regulation system and not with such matters as improved information management by BPB. This latter topic will be covered in Chapter 15.

## 12.2 Information reform objectives and current state of play

Addressing the issue of information quality and accessibility is not driven by a desire to embrace the latest technology, per se, but rather is proposed to support the operation of a better functioning building regulation and certification system. The key objectives that are being targeted with improved information systems, including the use of digital technology, the desired attributes of the information system and the current state of play are set out in Table 12.1:

**Table 12.1: Information objectives, desired attributes and current gaps**

Objective	Desired Attributes	Current State of Play
1. consistency and adequacy of information	<ul style="list-style-type: none"> <li>Standard forms</li> <li>Standardised information requirements</li> <li>Data quality standard</li> </ul>	No standard formats for regulatory forms, that is DAs, CDCs, compliance certificates, OC  No standardisation of information required for the various forms
2. convenient access to information	<ul style="list-style-type: none"> <li>Digital based information</li> <li>Well defined meta-data</li> <li>File format standard</li> <li>Clearly identified individual items of data, not batched</li> <li>Access protocols</li> </ul>	Information is largely paper based and only accessible in hard copy form.  No ability to interrogate data base  No standard meta data  No access protocols  No ability for regulator to access information by LGA, region or state
3. transparency and accountability	<ul style="list-style-type: none"> <li>Documentation setting out reasons for decisions</li> </ul>	No requirement to document reasons for decisions
4. outcomes based reporting	<ul style="list-style-type: none"> <li>Identification of objectives and desired outcomes</li> <li>Tracking of progress against objectives and outcome measures</li> </ul>	No definition of either objectives or desired outcomes  No reporting on the basis of desired outcomes
5. effective monitoring of system performance	<ul style="list-style-type: none"> <li>Real time monitoring of system performance by regulator</li> <li>Ability to identify and correct poor performance in a timely manner</li> </ul>	No ability to track performance of the system in terms of timeliness of decision making and certification.
6. efficient processing of information	<ul style="list-style-type: none"> <li>Real time processing of information as received</li> </ul>	Information is processed in batch and not as received.  Processing is largely of paper based data.

Overall, the current state of play is very unsatisfactory and needs to be addressed as a priority in order to have in place a regulatory system that generates a feed-back loop, facilitating assessment of performance and evidence based reforms of the system.

## 12.3 An information systems strategy for building regulation

It is proposed that an e- Building project is committed to as a joint project between the Office of Local Government, all councils and the Office of Building Regulation, involving the certifier professional associations and working in close cooperation with the e-Business Branch of DPE. One option to explore is whether it should be integrated with the e Planning initiative or handled as a separate but linked project. The first priority for this project should be to develop an information systems strategy for building regulation that applies to both the state and local government, supported by an implementation plan setting out the sequence and timeframes within which to put in place the strategy.

The key elements of the strategy would be as follows:

**Data standardisation, coverage and access**<sup>1</sup>. Standardisation of formats for development applications and each of the part 4A and complying development certificates.

This is a precondition for any information systems strategy as without standardisation it would not be possible to digitalise information and hence facilitate data access and transparency. Importantly it also facilitates the standardisation of the processes and associated documentation for certification.

- Capture information on all Alternative Solutions in digital form

Alternative solutions do not conform to the “deemed to satisfy” building standards and hence while conforming to the performance requirements of the building code, do not have the standard attributes of a “deemed to satisfy” solution. Hence each alternative solution is unique. It is important that information is captured on alternative solutions and is available in a convenient form for future reference. Also the information on alternative solutions can be used to track trends in alternative solutions and allow for targeted investigations. This process will also facilitate review of alternative solutions and inform maintenance based on knowledge of the attributes of alternative solutions, which is discussed further in Chapter 14. Finally, by capturing the information on alternative solutions there can be broader dissemination of information on available proven alternative solutions, hence encouraging greater uptake.

- Establish electronic filing system for all certifiers

This would be undertaken in consultation with AIBS and AAC to apply to all certifiers, holding information on all building projects, including certificates issued, inspection reports and all supporting material for any assessments, with the files to be accessible by the Office of Building Regulation.

- Create an online building manual

At present there is no convenient access to information documenting the building systems, including any alternative solutions for commercial, industrial and public buildings that is BCA classification 2 to 9. It is proposed that during construction a building manual is compiled for all Class 2 to 9 buildings approved after a designated date, with the building manual to be maintained online by the owner and to be accessible to designated parties such as FRNSW and councils. It is further proposed

that there be a phase in of the requirement for building manuals for existing complex buildings.

The Building Manual would set out the building plans, documentation on all alternative solutions included within the building, the building safety schedule and the annual fire safety compliance certificate.

This proposal is addressed further in Chapter 14.

- Maintain the practice guide online

The practice guide and supporting notes need to both be regularly updated and to be fully accessible to certifiers and this is best achieved by having the guide maintained online.

- Building quality data base

Certifiers are in a unique position to monitor and generate information on building quality across all classes of buildings and identify trends in a timely manner. This resource should be utilised to establish and maintain a data base on new and redeveloped buildings, identifying defect areas. Further work is required to specify this application, working in close collaboration with certifiers.

- Define the objectives of the building regulation system and of the outcomes against which performance against the objectives will be assessed.

Without a statement of objectives for the system and the desired outcomes to be achieved, combined with a process to measure and capture data on achievements against the outcome measures. It is not possible to assess the performance of the regulatory system.

- Creation of a community notice board of developments

The Office of Building Regulation would work with local government to establish an online notice board setting out designated information on each building project subject to a DA or CDC, including the DA or CDC, the name and contact details of the builder, the name and contact details of the building certifier and the contact person and contact details for any query or complaint.

### **Digitalisation, standardisation and access**

- Digitalise all data

It is proposed to convert all development applications, complying development applications and Part 4A certificates and information on Alternative Solutions to digital form and confirm councils as the repository of these documents, with all complying development applications and certificates and Part 4A certificates to be copied to the relevant council at the time of creation.

The Building Manual would be established and maintained in an online form.

- Establish an IT standard protocol to apply across all councils

This protocol would provide for a standard metadata, file format standard, data quality standard, the consistent handling, storage and access to all building applications and certificates.

- Create a state level information portal

This portal will enable the Office of Building Regulation to access live all building applications and certificates at the LGA, regional or state level and for FRNSW to be able to access all information on Alternative Solutions for fire safety systems.

- Establish online access to all council planning and land use policies and development application reports.

At present it can be difficult and time consuming to obtain access to such information. This can hinder the work of certifiers and slow down developments. Particularly important is to have online access to site restraints such as with respect to flooding, bushfire prone areas, landslip areas etc. It is proposed that a portal be established which will provide certifiers and other relevant building professionals with ready access to the information.

## **12.4 A common approach to IT systems across local government**

At present there is no commonality or consistency of IT systems in terms of hardware and software across the 152 local government councils, despite each having the same functions, responsibilities and business model. As a consequence there is a wide range of systems and approaches and level of sophistication in IT systems and e support. This also creates challenges for seeking to access information across councils on a consistent basis such as creating a portal to access data.

While strictly beyond the terms of reference of this review, there would appear to be significant merit in seeking to coordinate the approach to IT hardware and software across councils not just to create compatibility but also to create excellence in systems. It is known that certain councils already have DA electronic lodgement and management and also have their rangers and other compliance officers with online in the field capability.

Merit is seen as part of the IT information strategy in creating a common IT platform and approach across local government directed at applying best practice across the system.

## **12.5 Conclusions**

An effective information systems strategy, based on the key features of standardisation of all regulatory forms, digitalisation of information, accessibility of information and efficient and transparent processes will make a significant contribution to improving the performance of the building regulation system and the building industry.

The design and implementation of the strategy needs to be a joint exercise of the Office of Building Regulation, together with BPB, local government and the associations of certifiers, working with e-Business Branch of DPE.

The full implementation of the information strategy will take considerable period to effect but it is important that a strategy is developed as soon as possible to provide a framework within which regulators and the industry can work to common goals. It is important that there is a move to standardisation in approach to both IT hardware and software across local government and the creation of compatible systems and approaches. There is no point in each council seeking to develop its own particular system and approach.

A working party should be established drawn from the Office of Building Regulation, BPB, the Office of Local Government, representatives from councils and representatives from e-Business Branch of DPE to develop the Information Systems Strategy.

## **13 Reform of roles and responsibilities: clarification of roles of certifiers and councils**

### **13.1 Introduction**

There are two key areas of weakness in the current system relating to roles and responsibilities:

- lack of clarity about what is good practice for certifiers in undertaking their functions: there is no broad guidance material available which certifiers can draw on or which can act as a benchmark to assess the performance of certifiers
- areas of uncertainty about the relationship between councils, as consent authorities, and certifiers, particularly with respect to private certifiers in the area of enforcement power and responsibility.

Following on the Maltabarow Report, the BPB has taken the initiative and established two reference groups: one to prepare a practice guide for certifiers and the second to address the areas of uncertainty concerning the relationship between councils and certifiers. Well advanced documents have been produced by both reference groups. There is relevant stakeholder representative on the two reference groups, including councils and certifiers.

### **13.2 Documentation of the role and functions of certifiers**

The draft practice guide that has been prepared by BPB sets out an overview of the NSW building certification system and provides a series of Practice Notes that set out what would be regarded as good practice across the functions and activities of certifiers.

There are a number of general issues to consider with respect to documenting the role and function of certifiers, acknowledging that this is an important requirement for an effective and accountable system.

First, this report documents in Chapter 14 an extensive number of changes which it is considered need to be made to the building regulation and certification system.

Thus a first key issue is whether the practice guide should reflect the system as it operates at present or as it is proposed to operate in the future. The BPB practice guide exercise has followed the approach of developing a guide based on how the system ought to operate. It has adopted some but by no means all of the reforms set out in Chapter 8 of the Planning White Paper and Chapter 14 of this report, largely the changes that can be easily implemented without major system changes. These changes include:

- changes in mandatory inspections
- adopting a “consistency” test rather than the current “not inconsistent” test
- moving from the “notices of intention to issue an order” to the issuing of directions
- changes to the Occupation Certificate process
- establishing the enforcement role of certifiers versus councils



The second key issue is the status of a practice guide and in particular the level of obligation that certifiers have to adhere to the approach set out in the practice notes. The term practice guide tends to give the impression that it simply acts as a guide and there is no obligation to put into effect the approaches documented. However, the intention of developing the Guide has been that it should have a statutory effect. In effect, the documented approach will act as a benchmark for good practice. If certifiers conscientiously follow the approach set out in the document, applying their own sound judgment and experience, it will be regarded as prima facie evidence that the certifier is acting appropriately. Conversely if a certifier does not consistently follow the practice set out in the document it is prima facie evidence that the certifier is not acting appropriately.

While recognising that the practice guide in its current form reflects only some of the reforms required, it is nevertheless important that a practice guide is available to certifiers as soon as possible and that thereafter it is adjusted to reflect the additional reforms, as they are approved. Further, the proposals on clarification of the role of councils and the relation between certifiers and councils is closely linked to the reforms in the practice guide and should be progressed at the same time.

Accordingly, the following approach is proposed:

- the Minister for Business Regulation and the Minister for Planning sign off on the changes in the practice guide that will require legislative or regulatory change and the two Ministers together with the Minister for Local Government sign off on the proposals set out in the following Section 13.3 in regard to clarification of the role of councils and the relation between certifiers and councils
- the practice guide together with the proposals set out in Section 13.3s are released as an initial reform step for industry and council consultation and refinement in the light of the feedback received, noting that a separate consultation process will be undertaken on the broader range of reforms of the building regulation and certification process
- concurrent with that process of consultation, a discussion paper is released with the broad range of building regulation and certification reforms for broader industry and community consultation. This would broadly cover the proposals set out in Chapter 8 of the Planning White Paper and Chapter 14 of this report.

### **13.3 Clarification of role of councils and the relation between certifiers and councils**

Critical to the success of the building certification process is having an open and cooperative relationship between private certifiers and councils. Unfortunately, the evidence provides mixed examples, with some instances of a good working relationship but also many examples of a poor or less than fully effective relationship.

There seemed to be an inverse relationship between the size of population centres and level of effectiveness of the relation between councils and certifiers. In regional centres outside of major cities such as Ballina, Bateman's Bay, Dubbo and Tamworth the relation seems to work well and hence the overall building regulation and certification process works effectively. However, in larger metropolitan areas of Sydney, Newcastle and Wollongong, the relation is far less effective and hence building regulation and

certification is correspondingly less effective. Nevertheless, there are individual council areas within larger metropolitan areas where the relation between the council and certifiers works better than for the overall metropolitan area as a whole.

The reason for this inverse relation appears to be due to a number of factors but the main one is the greater visibility and accountability experienced by both the council employees and the certifiers in a smaller regional setting and hence an obligation is felt to make the system work in a timely and effective manner. There appears to be more interaction between councils and certifiers and certifiers contact the council when there are difficulties being experienced which could benefit from council input. The other relevant factor is that there is a more balanced involvement of private certifiers and council certifiers in the certification process, with council certifiers having a larger market share than is the case in the larger metropolitan areas.

A key fault line in the relation between certifiers and councils is with respect to enforcement. Private certifiers in NSW have limited enforcement powers. Apart from drawing the developer's attention to a matter not in conformity with the development approvals or the Building Code of Australia (BCA), the only actions available to a private certifier are to issue a 'notice of intention' to issue an order', or to decline to issue certificates. Such a notice is generally provided to the builder, with a copy sent to the relevant council. Any enforcement action beyond that is at the discretion of the council.

Some private certifiers are reluctant to issue notices of intent as it could create a direct conflict with the builder, while at the same time there is no certainty that the council will act on the matter. Also, there is currently no obligation for a certifier to issue a notice of an intention to issue an order if a non-compliant matter is identified. Councils have advised that such notices are issued quite infrequently and, when issued, often contain significant errors. If the council is to take action, these errors require the council to commence the process again, issue a new notice and bear the cost of compliance. As a result, councils do not often take action upon receipt of a notice from a private certifier and where they do they recommence the process as noted above. This further diminishes the incentive for certifiers to issue a notice and means the process is largely ineffective.

What needs to be recognised is the key role of councils in the planning and building approval system. This role covers:

- acting as a consent authority in accordance with both the requirements of state and local environmental planning instruments
- using their inspection and enforcement powers to achieve consent compliance (this may be a combined responsibility between the council and private certifier appointed as the PCA), and protecting local communities from the environmental impact of the building and construction process, including responding to residential complaints
- providing advice and assistance to residents and developers in assisting them undertake developments
- acting as a data custodian for all building matters for the council area.

Complying developments do not require the submission of a development application and hence council review and consent (although councils can and do issue CDCs).

These constitute approximately 29 per cent of all developments. Hence local government continues to be the consent authority for the majority of development in NSW and provides a vital role in ensuring that developments conform to local, state and national development policies. Moreover, even in respect to complying developments, which are subject to certification, the relevant council has an enforcement role where there is a dispute between the developer and the building certifier regarding conformity with the requirements pertaining to development.

The key issues with the current approach are:

- the lack of a defined protocol and process for the relationship between private certifiers and councils
- the absence of any obligation on certifiers to take a “first instance” enforcement action and inform the relevant council
- the lack of a viable enforcement process available to private certifiers
- the cost to councils of undertaking compliance actions in cases involving private certifiers
- confusion and frustration in the community about the roles of certifiers and councils.

### **Proposed reform**

The Independent Pricing and Regulatory Tribunal (IPART), in its draft report *Local government compliance and enforcement*, proposed a partnership model between State Government agencies and local government, noting that in many cases there was a lack of coordination between the two levels of government which adversely impacted on public administration. IPART cited as best practice the Food Regulation Partnership between the NSW Food Authority and local government, which has the following characteristics:

- clear delineation of roles and responsibilities
- clear guidance and assistance from the State agency, such as standard forms, templates and guidance
- two-way exchange of information, with councils providing feedback on actual practice which informs policy
- dedicated forums for strategic consultation, such as on proposed regulatory reforms.

IPART identified planning, including building regulation, as an area with large potential gains from the adoption of this model.

In the spirit of this recommendation the BPB’s Local Government Reference Group was established, based on a recommendation from the Maltabarow Report, to seek to develop a suitable framework for cooperation between private certifiers and councils. The Reference Group has representation from BPB, local government, private certifiers and Local Government NSW (LG NSW). The Reference Group has developed a number of working papers which address specific issues, including enforcement and compliance responsibility, the use of the occupation certificate, use of Section 96 and other topics. In many ways these matters are really part of the practice guide and are directed at clarifying the building regulation and certification process.

What is required is a broader agreed and documented framework which sets out the roles and responsibilities of private certifiers and councils and the basis of their interaction. It is proposed that this be established as a memorandum of understanding which is executed between LG NSW, the two professional associations of certifiers and the BPB. The broad matters to be covered would be as follows:

- roles and responsibilities of private certifiers, which could cross reference the practice guide
- roles and responsibilities of councils as consent authorities
- communication protocol between private certifiers and councils
- setting out the roles and responsibilities for compliance and enforcement
- establishment of a review and reference group drawn from the parties to the agreement which will seek to address any issues referred to it and on a regular basis assess the working of the process and make recommendation for any changes to the process and the Memorandum of Understanding.

There are three critical matters that need to be addressed up front:

- enforcement and compliance responsibilities and powers
- a communications protocol between councils and certifiers
- cost recovery for compliance work.

### **Enforcement and compliance responsibilities and powers**

There is a lack of clarity about the enforcement process to be followed by councils and certifiers and the respective obligations of certifiers and councils to address non-compliance matters. While it is clear that councils have enforcement powers, it is not clear at what point they should exercise their powers. Councils can be reluctant to get involved in compliance matters where a private certifier (or indeed a certifier that is not an employee of the consent authority) is involved. This is partly because councils believe that where there is a private certifier involved that party should have prime responsibility for compliance. There is also additional cost incurred in undertaking compliance actions for which there is no or limited compensation.

Conversely, certifiers appear reluctant to get involved in enforcement as it creates tension with their commercial relations with the builder; imposes additional costs that they may not have allowed for in their fee; and there is uncertainty of what powers they do have and in particular as to whether the relevant council will take supporting enforcement actions. Further, there is currently not an obligation on a certifier to issue a notice in the event of unrectified non-compliance.

In addition, where a council proceeds with compliance actions it must have the consent of the development owner/occupier or else have a warrant in order to enter the property. This creates another barrier to compliance action.

At present a certifier can issue a 'notice of intent to issue an order which identifies a matter of non-compliance and states that if this is not rectified within a defined period of time, an order will be issued by the relevant council, the order having legal force. A notice must include a copy of the proposed order which will identify what is required to be done, the reasons for the required actions and the compliance timeframe. A copy of the notice is sent to the council. The difficulty with this power is that it is quite

uncertain whether the notice will be backed up with an order, given that the order can only be issued by the relevant consent authority. From the perspective of a certifier the issue of the notice creates commercial tension with the builder with no definite prospect that the matter can or will be resolved. From the perspective of the council, it receives a copy of the notice but without any necessary knowledge or background with respect to the matters. In most cases the notice has various legal deficiencies which mean that if the council wishes to act, it has to reissue the notice and if it proceeds in that direction it will incur an unknown level of compliance costs.

Consideration was given to converting from the notice to a direction, to give greater certainty of corrective action occurring. The discretionary direction would be to comply with the BCA or condition of consent, based on a template. There are potentially two drawbacks with such a change. First, certifiers cannot be given unfettered powers of direction and hence there would need to be a review and appeal process. Second, that the notice does provide the opportunity for the owner or builder to give consideration to alternatives that may more cost effectively address the non-compliance matter.

Compliance matters can be broadly divided into a number of categories:

1. matters relating to the building/development, onsite
2. matters relating to conditions of operation onsite such as noise, hours of operation etc
3. offsite matters impacting on other properties and public infrastructure such as runoff waste, damage to footpaths etc.

It is proposed that in respect to Category 1, the certifier has the obligation to take first action which will require the issue of a notice of intention to issue an order and to copy that notice to the owner and the council. The certifier will have a responsibility to inform the council of whether the action set out in the notice was acted on or not within the compliance timeframe. In turn the council will be required within a defined period to inform the certifier of whether or not it intends to issue an order and the reason for that decision. It is further proposed that the notice be standardised to minimise the possibility of errors in its content or form.

In regard to items in Categories 2 and 3, the council will have the first enforcement responsibility but the certifier is obligated to inform the council if any non-compliance is identified in these areas.

In summary, the changes from the current approach are as follows:

- establishing first enforcement responsibilities for each category of non-compliance
- making it an obligation for a certifier to issue a notice when an on-site development non-compliance is identified
- requirement for council to inform the certifier of what action it will take when a notice is issued and the required action has not been taken
- standardising the notice.

## Communication protocol between certifiers and councils

It is proposed that the following communication protocol be followed by councils and certifiers.

Certifiers are to:

- inform the relevant council as soon as they are appointed as a CA or PCA and provide all contact details
- copy the council (as well as owner) in on all notices issued to the builder in respect to compliance matters
- inform the council immediately once a notice period has ended in respect of a “notice of intent to issue an order” of the situation and whether it is now necessary for the council to issue an order
- immediately inform council as soon as it becomes aware of a non-compliance matter, being in any of the three categories listed above.

Councils are to:

- acknowledge in writing all communication received from certifiers
- at the end of the notice period, if the matter of non-compliance is not rectified, inform the certifier of what action it proposed to be taken and why
- copy the certifier in on the issue of an order to the builder following up the issue of the notice of intent to issue an order.

In regard to access to the property, it is proposed that it be made clear in legislation that the council has the power to enter the property after first informing the owner/occupier of its intention to do so where it has reasonable basis to believe that there are non-compliant matters that need to be investigated.

## Compliance cost and compensation

It is proposed that certifiers be required to include in any fee provided to an owner/developer client a schedule of additional charges that will be levied in the event of work required to address any non-compliances or missed inspections where the responsibility for missing the inspection rested with the builder. It would be a commercial matter for the builder and owner to determine who would bear these additional charges.

For councils there is a need for a mechanism to broadly cover the cost of compliance actions. It would seem appropriate in most cases that this cost should be passed onto developments rather than funded by the rate payers. This matter is further addressed in Chapter 16.

As noted in Section 13.2, it is proposed, subject to Ministerial approval, to have the above matters handled as part of the accelerated consultation and approval process also involving the practice guide.

## 13.4 Partnership agreement

The discussion paper identified the IPART proposal of a partnership between councils and the State in respect to building regulation. It is notable that the Local Government and Shires Association (LG NSW) and a number of councils rejected the concept of such an arrangement on the basis that building regulation was not analogous to food

regulation which was the model that IPART highlighted. The argument rejecting the analogy was that in building regulation the relation was between councils and private certifiers and it was a competitive relationship. This ignores the fact that in the area of building regulation there is a complementary relation between the state and local government: the State establishes and maintains the planning and building regulation framework and policy while councils act as consent and enforcement authorities. While private certifiers have a competitive relation with council certifiers, there is a broader and more important role of councils as consent and compliance authorities.

Complementary to the proposal to develop a protocol in respect to enforcement and compliance roles and responsibilities of councils and private certifiers, it is also proposed that a Partnership Agreement be entered into between the State and local government to facilitate working together on the operation and reform of planning and building regulation. Under that agreement it is proposed that a monitoring committee consisting of representatives from the proposed Office of Building Regulation, the Office of Local Government, LG NSW, AAC, AIBS and a number of metropolitan and regional councils with significant building activity be established and meet on a quarterly basis. The role of the Committee would be to monitor how the protocol between councils and private certifiers was performing and to identify and recommend any changes to address weaknesses in the system.

## **13.5 Conclusions**

An important part of achieving best practice in building regulation and certification is to have clarity about the roles and responsibilities and functions of the key regulatory parties. This is not the current situation and hence needs to be addressed as a priority. It is proposed that there be a partnership agreement entered into between the State and local government in respect to consultation and communication on planning and building regulation operation and reform.

It is also proposed that a protocol be executed involving councils, the State and private certifiers which sets out roles and responsibilities of certifiers and councils and in particular first enforcement responsibilities and communication arrangements between certifiers and councils.

The practice guide that has been prepared by a Reference Group should be progressed as an interim reform, together with a protocol covering the clarification of the role of councils and the relation between councils and private certifiers set out in Section 13.3 subject to adjusting to be in conformity with the proposals set out in this report, involving consultation with industry once the Ministers for Building Regulation and Planning (and the Minister for Local Government in regard to the protocol in respect to the clarification of the role of councils and the relation between councils and private certifiers) have signed off on the changes contained in the Guide that require regulatory or legislative change.

## 14 Building regulation and certification process

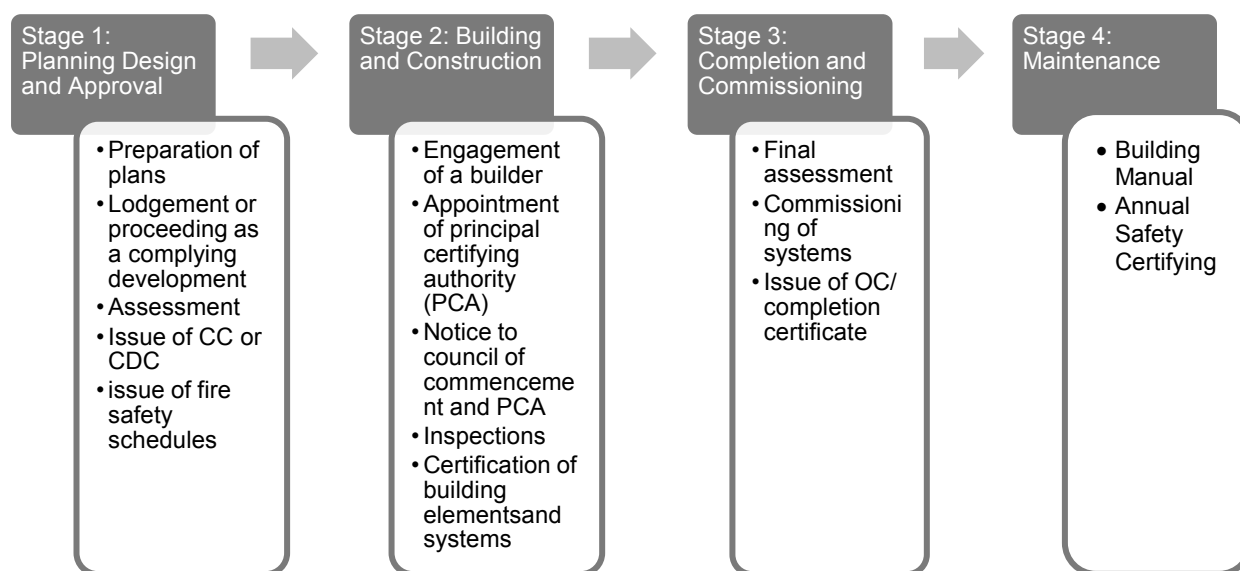
### 14.1 Introduction

The building regulation and certification processes seek to ensure that buildings are designed and constructed in accordance with approvals and are safe and fit for purpose and remain safe over time. The NSW building regulation and certification process has already been explained in Chapter 7. This chapter reviews each stage of the building regulation and certification process, identifies problems and issues with the current process and sets out reforms that seek to address the problems and issues.

This chapter has drawn on Chapter 8 of the Planning White Paper, Building Regulation and Certification, as well as the extensive work that has subsequently been undertaken by BPU and BPB. It seeks to identify and assess the key issues but is not meant to be fully comprehensive. There are other issues that have been identified that require reform which should be considered for inclusion in a comprehensive reform discussion paper which it is suggested should be the next stage in the reform of the building regulation and certification process.

Figure 14.1 summarises the four key stages of any building and construction project. As shown in the figure a development proceeds in several major stages, from planning to construction, to certification at completion and then ongoing maintenance. Each step is not necessarily discrete – for instance, an applicant may begin building and then lodge an application to amend part of the approved plans or a condition of the approval or an interim occupation certificate may be issued while minor building work is still underway.

**Figure 14.1: Stages of development**



Source: Building Professionals Board



The key issues that impact on the effectiveness of building regulation and certification at each stage are set out in the following sections, together with an identification of reforms to address the issues. Two other categories of issues have been addressed separately as they impact on the various stages of the building and development process. These are fire safety and subdivision and strata certification.

What is apparent from assessing the current process, drawing upon past reports, the work of BPB and BPU and talking to professionals that operate in the industry is how much of the process needs to be redesigned if it is to be effective in achieving its objectives. These deficiencies are well known and have been identified over a considerable period of time but have not been addressed to date. The reasons for the lack of rectification action would appear to be a combination of the following:

- inherent complexity and technical nature of the area which creates a barrier to understanding
- fragmented nature of building regulation, inadequate resources applied to it and inadequate focus on it within government
- the black letter law, highly prescriptive nature of the legislation which sets out the building control function, creating its own difficulties in both understanding the system and barriers to changing the system.

In the remainder of this chapter the key issues and proposed reforms for each of the stages of development are set out. As noted above, this is not meant to be comprehensive and cover all issues, only the more significant issues.

## **14.2 Stage 1: planning, design and approval**

### **Issue 1.1: Exempt developments**

Exempt development typically includes very low environmental impact development including the following:

- Advertising and signage
- Aerials & antennas
- Balconies & decks
- Carports & garages
- Driveways
- Fences
- Pathways and paving
- Patios & pergolas
- Terraces
- Satellite dishes
- Certain building use changes
- Certain alterations to existing buildings

Providing the building project meets specific development standards, approval from the local Council is not needed.

The concept of exempt development is a valid approach which seeks to restrict regulatory involvement with matters with insignificant impacts. The only issue is that the criteria for exempt developments has been based on low environmental impacts and does not take into account whether or not a particular development has a low building impact. At present there are types of exempt developments with safety or performance impacts that require some level of independent assessment. This is likely to be the case with the categories of balconies, building use changes and changes to existing buildings. In addition there is not a notification requirement attached to exempt developments and hence records are not created and held for future reference. What appears to have happened is that the planning system has trumped the requirements of the building regulation system. Developments that do not have significant environmental impacts have been classified as exempt developments without consideration of whether there are building control considerations that would justify greater external scrutiny. It is therefore difficult for prospective purchasers and others to determine what development has been undertaken on exempt development and what implications these may have.

### **Proposed reform**

It is proposed that for those categories of exempt development with potentially significant building safety and performance implications a requirement be established for an independent building assessment to be undertaken and a complying development or construction certificate required to be issued before work can commence. It is further proposed that the relevant council is notified of specified kinds of exempt development and that these be determined by the Office of Building Regulation.

### **Issue 1.2: Changes of existing building or use**

Both consent and certifying authorities presently have a role in assessing changes to existing buildings and their use and their responsibilities are spread across the DA and certification stages. Consent authorities, when assessing alterations and additions, must consider the current safety conditions of the existing building and can require its upgrading if it is assessed as necessary.

Certifying authorities, when assessing CCs and CDCs for changes to an existing building or use, are required to be satisfied that building work will not reduce existing levels of fire protection or structural capacity and that building work involving a change in existing building classification under the BCA can be safely made.

When an existing building has its use or form changed or if changes are proposed to key regulated building services, the changes needs to be properly assessed. Many older buildings were constructed at a time when standards for health, safety and functionality were lower than today or did not explicitly exist. Hence it is important when an existing building is being changed that is properly assessed to ensure safety.

## Proposed reform

It is proposed that:

- all material building and use changes require approval, that is all building and use changes that have significant potential implications for building safety and performance. A consistent set of change impact assessment principles for proposed material building and use changes should be introduced
- the detailed change impact assessment is undertaken at the certification rather than planning approval stage
- a more structured approach for the approval and certification of material changes to buildings and use be introduced.

### Issue 1.3: Quality of building and critical element design and certification of design

There are no requirements about who can prepare building design plans, apart from residential flat buildings under *State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development*.

In addition, there are no requirements as to who can design building services and critical building elements, such as air handling systems and fire protection systems, or who can certify such systems.

The lack of requirements for either building design or for the design of critical building elements can result in poorly designed buildings and critical building elements (such as hydraulic, geotechnical, mechanical and stormwater designs and fire protection systems), and poorly installed critical building elements, producing ongoing problems and costs. Many problems at the construction and maintenance stages have their origins in poor design.

It is noted that there is certification for building design in place in Victoria, Queensland, Tasmania and Western Australia and the ACT is examining the matter. Furthermore, architects are already the subject of an accreditation scheme and Building Designers Australia has an accreditation scheme open both to its members and more generally to suitably qualified and experienced building designers.

## Proposed reform

The Planning White Paper proposed that building plans should be prepared and certified by appropriately qualified persons for complex buildings. In addition it was proposed that, for critical building systems and elements, there should be a requirement for submissions of plans and that appropriately qualified persons that are accredited to undertake the certification of design and installation. At present, certification is often provided by the party responsible for that building element, but without any accreditation for those persons which means that the building certifier has no party to rely on, thus exposing the certifier to additional and unwarranted liability.

In order to extend the certification process to both design of complex buildings and to the design of critical building systems and elements, it would be necessary to accredit suitable professionals to undertake the certification. It would be desirable to draw upon relevant professional associations and accreditation schemes that they have developed, subject to the Government assessing the suitability and robustness of the accreditation schemes and in having a role in overseeing the scheme.

It is proposed that:

- Certification be required for building plans by appropriately qualified and experienced persons who are accredited or recognized under the BP Act. Consideration should be given to providing BPB accreditation to persons that are accredited by the Board of Architects and Building Designers Australia.
- Building plans must show key regulated measures and features and the supporting specifications to the plans include sufficient detail to evidence design compliance with the standards.
- Building plans involving staged development must show each stage's relationship to the overall development and details of the sequencing path.
- While it will be possible at the DA/CDC stage to provide statements of design intent on the building plans, before work on that aspect can commence, the certified plans for the design will need to be submitted.
- Suitable qualified and experienced persons who are accredited or recognised under the BP Act be required to certify the design of all critical building elements in Class 2 to 9 buildings. It will be necessary to identify the necessary skills and experience and, if possible, professional associations that accredit such persons. There are two priority areas that should be addressed as soon as possible, these being fire safety and waterproofing.

#### **Issue 1.4: Development approvals- information requirements and conditions and consistency of conditions across councils**

For developments that are neither complying nor exempt developments, there is a requirement under the EP&A Act to submit a development application to the relevant consent authority. This approval stage is intended to review the development to assess whether it is in accord with planning laws and requirements. There is a subsequent approval stage for developments that obtain development consent, which is to obtain a CC which deals with the detailed design of the development. The CC is required to confirm that the building design and specifications are in accord with, among other requirements, the standards set out in the BCA.

There are a number of issues that have been raised by the industry concerning the current process:

- There is a lack of clarity and consistency about what information needs to be submitted in support of a development application.
- There is a tendency at the development application stage, even for proposed new buildings, for consent authorities to require very detailed plans, specifications and reports and to impose a range of building requirements as conditions of the development consent. Not only does this create an overlap with the subsequent CC stage where the building is assessed, it can create unnecessary delays and increase costs, particularly if the proposed development will not be approved or not approved in the form sought. At the same time councils have submitted that in order to provide planning approval it is necessary to have sufficient detail about the nature, design and layout of the development to assess it against planning requirements.

- It is normal practice to set out construction management conditions under the DA/ CC approach and the CDC approach. These typically relate to matters such as hours of construction, security fencing around the site, on-site facilities and waste management. For complying developments there are a set of standard construction management conditions, while no such state-wide standard conditions apply for DA/CC approvals. Variations in conditions across local government areas can impose delays, additional costs and add to the complexity of the certification process.

More generally, concerns have been raised that development consent conditions can be overly complex, restrictive, unnecessary and inconsistent across councils and even within councils. There may in fact be special circumstances that apply for a specific type of development or location but these should be the exception rather than the rule. By creating a standard set of conditions a discipline is imposed on councils to seriously consider the justification for imposing additional conditions outside of the standard set. Further discipline could be imposed by requiring councils that add non- standard conditions making public disclosure that such a condition has been imposed and the reason for it.

### **Proposed reform**

Chapter 8 of the Planning White Paper proposed that:

- approval for a development application should return to being a concept approval for the development and not enter into detailed design and building standard requirements, such as required by the BCA, which are handled at the construction certificate stage
- a standard set of development application conditions be established based on the existing CDC conditions, and that the first step be a standard set of construction management conditions.

It is proposed that a working group of metropolitan and regional council planning and building officers be convened by the Office of Building Regulation to develop in stages the following:

- a standard set of information requirements to support development applications
- a standard set of construction management conditions
- a standard set of Development Approval headings and conditions but with flexibility to add to or vary those conditions where a case can be established for so doing which is subject to peer review
- guidelines on how to reduce the need for detailed building information requirements at the DA stage.

### **Issue 1.5: Imposing standards in excess of the BCA**

In its review of building regulation the Productivity Commission noted that there were cases of councils imposing standards in excess of the BCA which, if more broadly extended, could have the effect of undermining the concept and benefits of national building standards.

The Productivity Commission proposed that where a council wishes to impose a higher building standard than the BCA, it must undertake a cost-benefit assessment and submit the assessment to an independent party such as IPART for review and approval.

What needs to be distinguished is imposing standards above the BCA in specific circumstances and applying such standards more generally such as to a class of building. In a case like a heritage building there is a clear rationale for departing from the BCA. Special circumstances like these involving existing buildings are not the issue; the issue is when a council decides to impose a standard higher than the BCA across a class of building such as requiring higher ceiling heights than the BCA for all residential dwellings.

Councils can and have imposed higher standards than the BCA in their Local Environmental Plans and Development Control Plans. Unlike the BCA local councils that impose higher standards do not at present go through a formal review process to justify the change. While there may be a valid reason for variation from the BCA, there needs to be a process for establishing that there is a net benefit and this process needs to be transparent.

### **Proposed reform**

It is proposed that councils that wish to apply a standard higher than the BCA to a class or classes of building must establish a case for so doing, supported by a benefit cost analysis and the review must be published and submitted for assessment by a suitably independent party.

### **Issue 1.6 Accreditation of town planners**

This is an issue that extends beyond the planning and approval stage but is addressed here for convenience. At various times it would be helpful for a certifier to be able to draw upon the expertise of a town planner and rely on the professional advice provided. This may occur at the CC/CDC stage when it is necessary to assess the development against development conditions or it may involve interpretation of various planning policies or codes.

Another possible area of application is in respect to work on Section 96 modification applications where it may help to expedite the Section 96 application process by identifying design changes which an accredited planner can certify, avoiding the need for the council to consider such applications.

### **Proposed reform**

It is proposed that BPB allow for the accreditation of town planners who building certifiers can draw on for expert advice.

### **Issue 1.7: Peer review and decision support**

Certifiers are required sometimes to determine the compliance of proposals that involve complex technical design and may have to rely on advice from others about whom they may not have sufficient information to assess their competence and in any case cannot legally rely on the certification provided. This is a major issue with Alternative Solutions which need to be assessed against BCA performance standards and require considerable technical expertise and experience to assess. In Victoria, the VBA has a Peer Panel process of review for complex buildings and building elements and systems and on whose assessment and advice the certifier can rely.

Such a process provides a number of significant benefits:

- provides greater confidence in the alternative solutions that are implemented
- provides protection for certifiers with the Panel signing off on its assessment
- generates documentation on alternative solutions and facilitates the transmission of information on alternative solutions to the industry, encouraging greater take up.

### **Proposed reform**

It is proposed that the Office of Building Regulation, establish a Peer Review Panel for alternative solutions and other matters relating to critical building elements and systems.

### **Issue 1.8: Section 96 approvals**

Section 96 of the EP&A Act allows an application to be made to the consent authority to modify a development consent without the need for a new consent. The reasons that qualify for a Section 96 variation include correction of errors or mis-descriptions or making minor modifications to the consent.

While the idea is to allow for a fast track process, occasionally councils can take considerable time to process a Section 96 application which can generate additional costs for the owner/developer.

### **Proposed reform**

It is proposed that:

- agreement be reached with councils as part of the partnership agreement for target turnaround times for Section 96 applications
- consideration be given to allowing accredited town planners to handle routine Section 96 applications provided they copy the council in on both the application and the certification.

## **14.3 Certification to allow commencement of building work**

Before construction can commence, either a CC or CDC must be issued, stating that the proposed development will comply, if erected, with the certified plans and specifications. The CC or CDC can apply to the entire building or part of a building (such as when the building is constructed in stages).

There are a number of issues which impact negatively on the effectiveness of the certification process to allow commencement of building work and a number of these are addressed in this section.

### **Issue 2.1: Clarity of requirements for issue of construction certificate or CDC**

There is a lack of clarity about what information is required to support the issue of a CC or CDC and information submitted to support certification can be inadequate. CCs and CDCs do not always include all the information required by the legislation. Further, copies of the CC/CDC documentation need to be provided to both the applicant and the builder, the latter to ensure that the builder is fully informed about the approval.

Another problem with CCs and CDCs is that there is no standard format for such documents.

**Proposed reform**

It is proposed that:

- the information requirements to support a CC or CDC are codified and provided to all applicants
- that the process for management of certification documentation for developments that are subject to more than one CC or CDC be codified
- in line with the proposals for information systems reform, a standard format is established for CCs and CDCs and that the information contained therein be enhanced to improve approval transparency
- both the applicant and the builder are provided with the full CC/CDC approval documentation prior to commencement of building work.

**Issue 2.2: Need for consistency in the CC and CDC process and sufficient supporting information**

Both the CC and CDC certify that the proposed building, if built according to the plan, would conform with the BCA standards or the requirements for complying developments, respectively. However, the processes defined for CCs and CDCs have been developed separately over time and are now not fully consistent. There is no reason for the process of certifying a building to differ simply because it proceeds through a CC or CDC process. The processes should be the same. What differs is the requirement for an initial development approval which does not apply for a CDC.

**Proposed reform**

It is proposed that the CC and CDC building review processes be fully brought into alignment.

**Issue 2.3: Assessment and certification of alternative solutions**

The Building Code of Australia (BCA), part of the National Construction Code (NCC), is a national construction standard adopted under NSW planning and building legislation. It is mandatory to comply with the performance standards in the BCA. This can be achieved using its 'deemed to satisfy' prescriptive standards or via an 'alternative solution', which is a non-standard design, material or construction method. Where an alternative solution is proposed, it is mandatory to meet the performance standards in the BCA. However, there is evidence that alternative solutions are not, in all cases, fully evaluated, documented or maintained and that the records of approved alternative solutions are poor. There is also a degree of uncertainty about what is the exact performance standard, given that they are usually expressed in qualitative terms. ABCB has committed, as part of its forward work program, to developing quantitative performance standards for alternative solutions.

Further, the documentation and record keeping of alternative solutions is not adequate which means that building owners are not always aware of alternative solutions that are embedded in a building they own and the requirements for maintenance of the alternative solution. An alternative solution, while achieving the performance standards set in the BCA does not adhere to the standards of the BCA and hence each BCA may be unique in design. It is important that the details of alternative solutions are captured and are accessible both to future owners and to appropriate authorities such as the



Office of Building Regulation and in the case of fire safety alternative solutions, to FRNSW. It would be very useful for the Office of Building Regulation to track the trends in alternative solutions identifying their frequency, the areas of application and the class of buildings involved, amongst other matters.

Alternative solutions provide the flexibility and benefits of innovation and as such should be encouraged. However, there needs to be a discipline in the system to ensure that the alternative solutions meet the national standards and have been properly evaluated for this purpose.

### **Proposed reform**

The Planning White Paper proposed standardised reports (to the extent possible, noting the variety in buildings) on any proposed alternative solution to accompany an application for a CC or CDC, with a requirement for the certifier to confirm that the report contains all required information and whether it demonstrates conformity with the performance standards. It also proposed that a mechanism be introduced to capture, assess and record all alternative solutions for a project

It is proposed that:

- standardised report requirements be developed for all classes of alternative solutions
- each alternative solution subjected to a standardised report that will be part of any application for a CC or CDC, with a requirement for the report to be certified by a properly accredited person
- councils capture information on all alternative solutions and that a portal be established as part of the Information Technology Strategy to allow access to the information by relevant authorities for both auditing and research
- documentation on the approved alternative solution and any conditions attached to it be included in the building safety schedule and to be incorporated in the building manual (see Section 14.6).

### **Issue 2.4: The ‘not inconsistent’ test**

The EP&A Regulation incorporates a ‘not inconsistent’ test, whereby it is required to be determined whether the project is not inconsistent with the development consent. In Clause 145 of the EP&A Regulation the test is required to be applied at the time of assessing a CC, while in Clause 154 of the EP&A Act the test is required to be applied when assessing an OC. There has been considerable criticism over the years of the not inconsistent formulation. As a double negative requirement there is inherent uncertainty about how to assess it. In that sense it is a vaguer requirement than the alternative formulation of requiring consistency with the development consent. In fact, proposed amendments to the Regulation in 2008 included amendments to transform the not inconsistent requirement to a consistent requirement, but these amendments have yet to be enacted. Over time, legal cases have established interpretations of what “consistent” and “not inconsistent” mean. The concern is that “consistent” is interpreted by the courts to mean “the same” and hence it could mean that there is no flexibility to accommodate minor changes.

## Proposed reform

While there is in principle merit in enacting the 2008 amendments to the EP&A Act to change from a not inconsistent test to a consistent test for both the issue of the CC and the OC, there is a concern that this could remove any flexibility in the system.

Accordingly, rather than leaving the matter to the discretion of courts to interpret, it is proposed that:

- the “not inconsistent test” be replaced with a “consistent test” and that a formal criteria be set out in code or regulation for what is required for a development to meet the consistent test.

## Issue 2.5: Distinction between certifying authority and principal certifying authority

Certifying authorities (CAs), which can be the local council, the Minister for Planning or an accredited certifier, are responsible for issuing the CC or the CDC. A PCA must be appointed prior to the commencement of building or subdivision work and has the role of inspecting building and subdivision work during construction to ensure that it complies with regulatory requirements. The PCA will issue the OC and the subdivision certificate where relevant. The purpose of the distinction between the CA and PCA was to provide an opportunity to have a different certifier for the construction stage compared with the design and approval stage. However, it also creates the potential for a disconnect between the certification of a building’s design and the oversight of its construction, particularly when plans and certification for critical aspects of work are not submitted with the application for a CC or a CDC and when projects are the subject of multiple CCs or CDCs issued by different certifiers. In addition, the distinction between the CA and the PCA creates confusion amongst consumers.

## Proposed reform

The Planning White Paper proposed that the CA and PCA be combined as one certifier. There are two offsetting considerations in deciding which is the better approach the status quo or combining the roles:

- separation of the two roles provides flexibility for a certifier with the relevant skills at the two stages to be appointed, noting that there are different skills required in assessing for issuing a CC or CDC relative to supervising the construction stage and issuing an OC
- combining the two roles in the one person ensures a continuity of involvement of the certifier from the design and planning stage through to the construction stage which means that at the construction stage the certifier has full knowledge of and has had full involvement in the design and planning stage.

It is noted that it is normal in practice for the CA to be appointed as the PCA.

On balance there is not a compelling case for combining the roles, noting that the current practice is for the same party to normally have both roles but with the flexibility for a change to occur.

## **Issue 2.6: Accessibility of building plans**

At present the building plans provided with a CC or CDC can consist in part or whole of statements of intention rather than fully specified plans. The proposed reforms set out under Issue 1.3 seek to ensure that there are fully specified plans at the CC/CDC stage.

In addition, before building work commences, it is important that the builder has the development consent, including any and all 'Section 96' modifications, the CC and the CDC and associated building documentation and plans. This does not always occur, with builders sometimes working on a different version of the plan to that certified.

### **Proposed reform**

It is proposed that:

- it be required that a fully specified building plan accompany all CCs and CDCs
- the owner/developer has responsibility for ensuring that the builder is provided with the CC or CDC and all supporting documentation including the approved plan at the time of certification or at the time the builder is appointed, if that is after certification, with the certifier to confirm this has occurred.

## **Issue 2.7: Building in stages**

Buildings can be developed in stages with multiple CCs/CDCs, one for each stage. This can create both complexity and a lack of understanding of how each stage relates to earlier and later stages. It is important that there is clarity about the relation of each stage to the development as a whole.

### **Proposed reform**

It is proposed that where building work is to be constructed and certified in stages that it be a requirement that the certifier take full account of and documents the proposed work's relationship with the overall project.

## **Issue 2.8: Implications of the Burwood Council versus Ralan Case**

This court case was brought first in the Land and Environment Court and then taken by the Council to the Court of Appeal. The Land and Environment Court held that the CC was not inconsistent with the development consent and that if there had been an inconsistency then the council could issue an order under Section 121 B of the EP&A Act. The decision in the Court of Appeal is that persons having the benefit of a DA will not be adversely affected where a lawful CC is issued where the CC is inconsistent with the development approval. In the legal case, plans contained in the CC omitted or substantially modified a number of features relating to the façade of the building. The Court of Appeal found that the CC was inconsistent with the development consent but that this does not invalidate the CC as the legislation does not contemplate a process of invalidation of the CC other than where it was issued after construction started. The conclusion of the Court of Appeal is that failure on the part of an accredited certifier to issue accurate CCs that reflect the development approval becomes an issue that attracts personal disciplining sanctions rather than one that renders a CC void. The Court argued that consent authorities obtain a copy of the CC upon its issue and it is at that time that the consent authority should have challenged the CC. This would appear to mean that developers are absolved from any liability where the CC is inconsistent

with the DA. The High Court subsequently refused leave to the council to appeal in June 2015.

It is proposed that DPE undertake a review of the legal and policy implications of the case and determine whether it is necessary to effect legislative change or have the process of issuing CCs clarified.

### **Issue 2.9: Conditions for CC and CDC**

The philosophy for the separation of the development approval of certification stages was that while conditions could be attached to the DA, the determination of a CC or CDC was to avoid any discretion or judgment and be a binary outcome: issue or do not issue.

It would be useful to have the ability to set conditions for CCs and CDCs. This would provide clear guidance as to what needs to be addressed in order to qualify for a CC or CDC. At the same time there is a concern that the certifier should not have full discretion in setting conditions and must only set conditions in a prescribed number of areas.

### **Proposed reform**

It is proposed that accredited certifiers be given the ability to place conditions on the issue of CCs or CDCs provided these conditions conform to a prescribed set of conditions.

## **14.4: Building construction stage**

Once the CC or CDC has been issued and the builder and the PCA appointed, construction work can commence. This section identifies the main issues that need to be addressed to improve the regulation of the building construction stage.

### **Issue 3.1: Specific matters impacting on strata and community title developments**

With most developments there is an owner/ beneficiary of the development present. Certainly that is the case with most single residential developments, commercial and industrial buildings. In the case of single residential developments the owner may not be fully informed or experienced but is nevertheless present and has an incentive to achieve a good building outcome. In the case of commercial and industrial buildings, the developer can be the owner. Where that is not the case the owner is nevertheless fully informed, resourced and incentivised to act as a knowledgeable counterparty in the contract with the builder/ developer. For this reason, commercial and industrial buildings are not subject to consumer protection legislation in NSW.

However, in the case of strata and community title developments, the ultimate owner of a unit is not present at the design, planning or construction stages but enters the picture following the completion of the project or buys off the plan. Furthermore, under the *Home Building Act 1993*, for residential buildings with a rise in storeys greater than three, participation in the Home Building Compensation Fund is not available. The stated rationale of not having Home Building Compensation Fund coverage for residential buildings above three storeys is that the counterparty to the builder, the developer, is a professional and does not need the protection afforded by insurance. While this is true during the construction stage, it means that there is no back up home building insurance to underpin the obligations of the builder once the units are sold.

For strata and community title buildings three storeys or less, the developer may delay selling many of the lots until the statutory warranty period has elapsed, meaning the developer and owners' corporation are, at first, the same body. The former practice of developers retaining the proxy votes of lot owners is no longer allowed under the *Strata Schemes Management Act 1996*, with a developer prohibited from casting a proxy vote on behalf of an owner if the proxy was given pursuant to the contract for sale.

However, developers are reportedly getting around this provision by requiring owners, in the contract for sale, to vote in the same manner as the developer. To overcome this new scenario, proposed strata reforms include making such a provision in a contract void and unenforceable. The reforms also propose prohibiting developers from voting on motions involving defects.

These factors may reduce the ability of owners' corporations to address rectification of building defects during the crucial two-year period after the Occupation Certificate is issued. Further, the statutory warranty begins when the OC is issued, but months may pass until the first annual general meeting of the owners' corporation, limiting the time to investigate defects.

In summary, the eventual owners of strata and community title developments may not have their interests properly protected. They do not appoint the certifier or have any involvement with the certifier. They do have legal recourse for up to 10 years against the builder to address defects but this needs to be legally pursued which is expensive and time consuming.

A related issue is the role of inspections during construction, and annual reinspections of building systems, to help identify non-compliance. More inspections could be required, while existing inspections could be made more effective. For instance, annual fire safety inspections could be made to focus on a different part of the building each year, avoiding the risk that non-compliant elements are undetected simply because the same elements in an adjacent storey are instead reinspected every year.

Finally, for off-the-plan purchases before construction starts, another issue that may arise is consistency of the final product with the initial approved design. Proposed reforms such as the practice guide will help to address this issue.

### **Proposed reform**

A general objective of reforms set out both in this chapter and in the report in general is to improve the quality of the building product through measures such as robust certification by properly qualified and experienced persons; more effective inspections; and seeking to improve the quality of building plans and the design of critical building elements and systems. These proposed reforms should all assist in improving the quality of the building product and reducing building defects, hence protecting the interests of consumers and reducing the need for measures to address defects and resolve disputes about the building product.

The Government has set out in a position paper<sup>12</sup> a possible approach to provide greater consumer protection in the area of strata and community title developments. In addition to a series of changes to improve governance arrangements there is a proposal for having a defects bond for strata schemes, which would be set at two per cent of the value of the construction and held for a period of two years after the completion of the building. No longer than 12 months after completion of the building, a building inspector would be appointed to undertake an inspection and produce a defects inspection report. The cost of repairing any defects would be deducted from the bond. Such an approach acts as a form of consumer protection, seeking to fund correction of building defects without the need to take action through the courts. There is a separate process for consultation on these reforms and hence no commentary will be provided on these reforms in this report.

However, it is desirable to supplement such a reform with an approach that seeks to improve the level of independent certification of strata and community title developments. Many of the reforms canvassed in this chapter will improve the effectiveness of building regulation and hence the quality of the building product and that should assist in improving the quality of the strata building product. However, there is a case for considering whether there is a case for a specific initiative directed at strata and community title developments should be undertaken to provide greater confidence in the quality of the certification process during construction.

One approach that recognises the special circumstances of ownership with strata and community title developments would be to require greater involvement by the BPB in appointing and auditing PCAs involved in community and strata title developments. This was proposed by the Campbell Inquiry. It should be noted that this will not necessarily address problems of building workmanship – which is not the role of a certifier – but instead seeks to ensure conformity with the planning approval and the BCA.

In regard to the option of having additional mandatory inspections, the risk based approach set out under Issue 3.3 addresses this matter.

It is proposed that for strata and community title developments:

- it be a requirement that the appointment of the certifier is approved by the BPB, which will be required to assess the experience and performance of the nominated certifier with respect to relevant developments
- a higher incidence of audits be undertaken of the certification of strata and community title developments in recognition of the higher risk factor due to the absence of the ultimate owner during the construction stage
- note that the risk based approach to determining critical inspections will require the certifier to assess whether there is a need for more inspections than the mandatory number and this will have regard to the nature of the development .

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<sup>12</sup> Strata and Community Title Law Reform Position Paper, November 2013

### Issue 3.2: Improved information for the community

When a complaint is not directed to the correct party, it causes confusion and frustration for complainants (such as neighbours) who may feel powerless to have their concerns resolved. Unnecessary delays caused by complaints being referred to various parties exacerbates the original problem and can reduce confidence in the certification system, whether or not the certifier is at fault. Ultimately, the risk is of poor built outcomes due to complaints not being resolved and construction continuing whilst the complaint is investigated.

Where private certifiers are involved with a development, an additional barrier is created to effective communication with the community and that is occasioned by the relation between the private certifier and council. This broader issue was addressed in Chapter 13. The problem is that members of the community tend to make contact with the local council when information is sought or concerns are expressed. However, it is not unusual for the council, in the case of developments being certified by private certifiers, to inform the community members that the council is not involved with the project and any concerns, issues or queries should be either raised with the certifier or the BPB. While it may be appropriate to refer the member of the community to the certifier in the first instance, there is little point in referring persons to the BPB unless there is a clear basis for a complaint against the certifier.

More generally there needs to be both information available, about the development in an accessible and convenient form and a protocol in place with the front desk of councils to better assist members of the community with queries or concerns about developments, regardless of whether the project is certified by a private or council certifier.

#### Proposed reform

Providing more information on development site signs can help improve general awareness of 'who does what' in development, so that concerns about development are directed to the most appropriate party in the first instance and problems are resolved without unnecessary delay. The site sign may be the main information source that a member of the public has for the development – a good sign is certainly the most immediately accessible source. A sign template could even be mandated as a new requirement for complying development. However, while builders and certifiers are each required to place signage on sites where they are working, it is a practice not generally followed by certifiers. While builders generally do provide signs on sites the signs are designed for the purpose of improving the accountability of the builder and do not address the more general requirement of providing useful information to the community.

It is proposed that:

- an electronic notice board be established once a project proceeds to construction stage, such that each development in a council area, be it exempt, complying development or subject to a DA, be electronically listed with the following information provided: copy of plan and supporting information on the development; name of the owner/developer; name and contact details of the

builder; name and contact details of the certifier; and contact person if further information is required or a complaint to be registered

- an agreed protocol be documented for council staff for dealing with queries regarding developments in the council area.

### **Issue 3.3: Adequacy of mandatory building inspections**

There are a prescribed number of stages of construction that must be inspected. The critical stage inspection triggers do not state what must be inspected but only when the site should be inspected, leaving open the flexibility for a broader inspection. The number of actual inspections carried out will be dependent on the construction type and how the construction is staged. Clause 162A of the Environmental Planning and Assessment Regulation provides for critical stage inspections (CSIs) to be conducted on buildings as follows:

**For a Class 1 or 10 building (i.e. single residential buildings or a non habitable building or structure),** the critical stage inspections are:

- after excavation for, and prior to the placement of, any footings
- prior to pouring any in-situ reinforced concrete building element
- prior to covering of the framework for any floor, wall, roof or other building element
- prior to covering waterproofing in any wet areas
- prior to covering any stormwater drainage connections
- after the building work has been completed and prior to any OC being issued in relation to the building.

**For a Class 2, 3 or 4 building (i.e. multi resident buildings),** the critical stage inspections are:

- after the commencement of the excavation for, and before the placement of, the first footing
- prior to covering of waterproofing in any wet areas, for a minimum of 10% of rooms with wet areas within a building
- prior to covering any stormwater drainage connections
- after the building work has been completed and prior to any OC being issued in relation to the building.

**For Class 5, 6, 7, 8 or 9 building (i.e. commercial, institutional or public buildings)** the critical stage inspections are:

- after the commencement of the excavation for, and before the placement of, the first footing
- prior to covering any stormwater drainage connections
- after the building work has been completed and prior to any OC being issued in relation to the building.

The regulations do not set out the purpose of a critical stage inspection or what is expected of a certifier in undertaking the inspection. The practice guide being developed by the BPB seeks to address this deficiency.

There are a number of issues with respect to critical stage inspections which reduce the effectiveness of the requirement.



The first issue is the absence of a pre- commencement critical stage inspection at which the certifier and the builder can check the location of the planned building against boundaries and confirm the timing of the development and particularly the critical stage developments.

The second issue is the lack of specificity about critical stage inspections for class 2 to 9 buildings. These are commercial, industrial, institutional, and multi residential buildings and the general presumption is that a commercial and professional approach will be taken to inspections and it is best not to over specify mandatory inspections. While there is some merit in this philosophy, it is felt more guidance for certifiers would be helpful, in the form of encouraging a risk based approach to inspection.

The third issue concerns missed mandatory inspections which can and do occur, either due to failure to communicate by the builder or inaction by the certifier. Where the inspection is “unavoidably missed” it is still possible to issue an OC but otherwise it is not possible to issue an OC. Hence missed inspections can undermine the effectiveness of the certification regime.

It is not clear, what is an “unavoidably” missed inspection and in any case, regardless of the reason for the inspection being missed, it is important that all mandatory inspections are undertaken. At present, where an inspection is “avoidably” missed, there is not an assessment of the development for an OC but, instead, the developer will seek to obtain a “building certificate” from the relevant consent authority at the completion of the project. A building certificate is not an appropriate alternative to an OC as all it states is that the consent authority will not take action against the building in question for a seven year period in regard to matters arising from wear and tear.

### **Proposed reform**

It is proposed that:

- an additional pre-commencement site inspection be required for all classes of buildings
- certifiers be required to undertake a risk assessment for any building that they are to certify at the commencement of the construction stage and determine, based on that risk assessment, what additional inspections above and beyond mandatory inspections, would be appropriate and prudent
- The practice guide set out clearly the requirements for undertaking a risk assessment of a building
- certifiers be required to prepare and issue an inspection schedule with each CC/CDC for building work in order to clearly communicate to the builder what is expected by the certifier
- require the certifier to confirm and document during each critical stage inspection that the work is consistent with the development consents
- remove the “unavoidably missed” inspection process and require that all buildings must be assessed for a completion certificate
- where a building has a missed critical stage inspection, it is a requirement that notification is issued to the local council and the BPB within 24 hours of the missed inspection and work cease on the site relating to that missed inspection until an inspection is undertaken. The certifier is required to undertake the

inspection using whatever additional means are necessary to assess the work. Any additional cost caused by the missed critical inspection is to be borne by the party responsible for the missed inspection.

### **Issue 3.4: Improving the certification process for critical building elements**

It was noted in Section 14.2 that there is a gap in the certification process in that it is possible for certain critical building systems and elements to be designed and certified by persons without necessarily having the required skills and experience. In any case the building certifier is not able to legally rely on such certification because of the lack of recognised accreditation by the parties involved. In that case it was proposed that accredited persons be designated who can design and certify critical building systems and elements.

A similar situation arises at the construction stage when the critical building systems and elements are constructed, installed and commissioned. The building certifier has to rely typically on the party that installs and commissions the critical building system and element. However, the certifier is not able to rely on the work and any form of certification as the party undertaking the work is not subject to a form of licensing or accreditation, backed by insurance.

In many cases the building certifier does not have the required specialist expertise to certify the critical building systems and elements and yet is not in a position to rely on a suitably qualified and accredited party. This creates a significant weakness in the certification process. The obvious solution is to identify and accredit suitably qualified and experienced persons to install and commission critical building systems and elements. In some cases these will be the same persons who designed the particular system. While there is provision in the EP&A Act for the issue of compliance certificates in which the issuer assumes full legal liability, these impose too onerous a legal liability and have not been taken up in the building industry.

It is important that any reform in this area does not diffuse accountability or create more layers of regulation. Hence it is not proposed to require independent third party certifiers to certify the work of others in respect to the installation and commissioning of critical building elements. Rather, it is proposed that for critical building systems and elements for commercial buildings there is a requirement for those that design, install or commission such work that they are suitably accredited, have professional indemnity insurance cover and certify their work. Every effort should be made to utilise, where appropriate, existing professional associations and related accreditation schemes.

At the same time it is important that the building certifier's role is not reduced to that of a collector of certificates. There is an important role for the certifier and it is vital that it is not deskilled. The certifier is the expert on the BCA and the building regulation and certification process and hence the certifier needs to accept an appropriate level of responsibility even where an accredited person is certifying critical building systems and elements. This is not to propose that the certifier undertake a complete review and assessment of all the technical work involved. This will not be possible in most cases and would duplicate the role of the accredited critical building system or element certifier. However, the certifier needs to critically assess the work that has been undertaken, inspect certain aspects that are visually observable within the capability of the certifier to check and in particular to ensure that it is consistent with the BCA.

There is substantial work involved in the implementation of this reform. In view of the importance of fire safety and the frequency of waterproofing defects, it is proposed that these two areas be prioritised and act as a test case.

### **Proposed reform**

It is proposed that:

- suitably qualified and experienced persons are accredited to install, commission and certify critical building systems and elements
- in identifying the skills and experience to be accredited the BPB makes every effort to draw upon existing professional associations and their accreditation systems
- the certifier be required to critically review the work and certification of any critical building system and element to ensure it is consistent with the BCA and meets the approval requirement
- critical building systems be defined for Class 1b to 9 buildings to include structure and electrical, mechanical and hydraulic systems and measures and waterproofing
- early priority be given to the implementation of an accreditation and certification scheme for the design, installation and commissioning of fire safety systems and measures and waterproofing
- documentation on the critical building systems and elements is incorporated in the building manual.

### **Issue 3.5: Fire safety schedules**

The fire safety schedule is designed to identify a building's essential fire safety measures (normally for buildings classified 1b to 9) which are required to be maintained by the owner and certified by an annual fire safety statement. The fire safety schedule is issued when the CC or CDC is issued for a new building or development consent is provided for a change in classification of the building under the BCA. There are a number of problems with the fire safety schedule and the associated process:

- it is prepared at the time of the issue of the CC or CDC and need not be updated to reflect any subsequent changes in design
- there is a fire safety schedule required for each CC or CDC and hence there can be multiple fire safety schedules for projects with multiple stages
- it is limited to fire safety whereas ideally it should address all aspects of building safety
- fire safety schedules can be difficult to locate, particularly where a building has been subject to multiple CCs or CDCs.

## Proposed reform

It is proposed that:

- the fire safety schedule be replaced with a building safety schedule which is created at the time of the issue of the CC or CDC and which is updated throughout the construction period to record all relevant building safety features including, but not limited to fire safety.
- At completion of the building project the building safety schedule and the information collected is incorporated into the Building Manual for ease of reference.

## 14.5 Issue of occupation certificates

The issue of an OC marks the end of the construction stage, at least when the final OC is issued. There are a number of problems and areas of confusion with this part of the process. One of the confusions is the title, OC, which implies that it authorises the occupation of a building. However, not all buildings are subject to occupation and hence it is not quite clear what the OC certifies. Beyond the problem of terminology there is a distinct lack of clarity about what is the purpose of an OC and what happens when, under current arrangements, an OC cannot be issued owing to a missed mandatory inspection or unauthorised building work. Further, it is not uncommon for an interim OC but not a final OC to be issued.

### Issue 4.1: Clarifying criteria for the issue of an occupation certificate

At present there is a lack of clarity about the purpose of an OC and the tests for its issue. OCs are required for all types of new buildings and structures, including structures which cannot be occupied such as swimming pools. They are also issued for modifications to existing buildings. Further, there is confusion about what an OC actually certifies. Consumers generally assume a very broad scope whereby an OC means that the building or structure complies with the relevant planning approvals and the BCA, with the rationale of linking the development back to the consent once construction is completed.

However, under the EP&A Act, an OC authorises occupation of the completed building or structure, and certifies non inconsistency with applicable conditions of consent, but does not necessarily confirm that it is in accordance with the planning approvals and BCA. Further, there is provision in the EP&A Act for both an interim and final OC. An interim OC authorises the occupation or use of a partially completed new building or new use of part of a building resulting from a change of use. A final OC authorises occupation or use of a new building that is completed or a new use of a building resulting from a change of use.

It is also not unusual for an interim OC to be issued but for a final OC not to be sought.

There is a need for the certification process to complete what was started and that is to assess and confirm whether the completed building conforms to the planning and building approvals. The current OC does not achieve this requirement.

## Proposed reform

It is proposed that the current requirements for an interim and final OC be abolished and the following arrangements be introduced instead, with grandfathering provisions as appropriate:

- all developments approved by a development consent or CDC, once completed, to require a Development Completion Certificate(DCC) which will certify that all planning conditions have been met and that the completed building is in accord with the approved plan. Where a development is staged, a DCC can be issued for the completion of each stage
- where a building is capable of occupation and it is desired to occupy it in part or whole ahead of full completion, an OC can be applied for. An OC will certify that the building is safe and fit for its approved use. The OC will be required to include a report on all outstanding matters that need to be completed before a DCC can be applied for and the timetable that will apply for completion. There should be a general requirement that a DCC be issued within a defined period of the issue of an OC
- where the building is of a nature that will not be occupied or is not required to be occupied prior to completion, for example, a fence or swimming pool, all that will be required will be a DCC
- it will be a statutory offence to not obtain a DCC by the required time
- the Conveyancing Act 1919 be amended to require that a DCC be provided as part of any conveyancing transaction
- home insurers be encourage to require that an OC or a DCC be provide by applicants for home and content insurance.

### **Issue 4.2: Issue of development completion certificates where there is unauthorised work**

An OC cannot be issued unless the PCA can say that all mandatory and critical stage inspections have been carried out or that an inspection has been “unavoidably missed”. This issue has been addressed at Issue 3.3.

A similar issue occurs where building work is undertaken either in a manner contrary to the approval or without all approvals obtained in advance. This is referred to as unauthorised work and is not an uncommon occurrence. In such circumstances, under the current system, it is not possible to issue an OC for the unauthorised parts.

Where there is a missed mandatory inspection or where there are unauthorised works and it is not possible to issue an OC, the normal course of action is for the developer/owner to seek a building certificate from the relevant council. The building certificate was not designed for this purpose and only certifies that the council will not take action against the building for a seven year period. The problem with this approach is that the denial of the ability to obtain an OC does not appear to act as an effective sanction, given the apparent ability to obtain a building certificate and the reluctance of courts to impose meaningful sanctions in the case of unauthorised work. Indeed there is some evidence that builders/developers are deliberately proceeding with developments without approvals or not conforming to the approvals obtained as a

more cost effective approach than obtaining or adhering to an approval or seeking a Section 96 approval of a variation.

### **Proposed reform**

There is a balance that needs to be drawn in providing access to OCs/DCCs for buildings with unauthorised work. On the one hand it is desired that all buildings are evaluated in the same way. On the other hand it is not desirable to create an incentive for up front approvals to be avoided or the approval to be varied on the basis that it will be regularised at the end of the process. The way this apparent conflict can be addressed is by requiring one process to be followed by all developments and imposing substantial penalties on those who choose not to adhere to the process.

It is proposed that in respect to buildings that have unauthorised work, that is the work has not been authorised or else the work has materially deviated from the approval, the following approach is applied:

- it be required that a DCC/OC must be applied for and no occupation of the building or conveyancing can be undertaken until a DCC/OC is issued
- the ability of councils to issue building certificates in such circumstances is removed
- the builder/developer owner must have the building assessed for a DCC which will require that it meet all relevant planning policies and adhere to the BCA
- provision be made for the imposition of penalty fines set as a proportion of the development cost of the project in order to act as a substantial disincentive.

## **14.6 Building information and maintenance regulation**

There are responsibilities in regard to certain Class 1b-9 buildings to keep fire safety measures in place and in a functional condition and for affected building owners to routinely submit certification to the council and a copy to Fire and Rescue NSW, confirming that they are meeting this responsibility, usually via an annual fire safety statement.

The owners of complex buildings are required to ensure that the council and the FRNSW are provided with annual certification of fire safety measures. In reality many owners are not able to make assessments about the competence of people they employ to provide the annual certification.

There are also responsibilities imposed on consent and certifying authorities, when assessing proposed building alterations and changes of use. To properly fulfil these responsibilities there is a need for access to an adequate level of information about the existing building. However, in many cases there is insufficient information available about existing buildings (including the alternative solutions that apply to them; indeed, many older buildings may have no documentation whatsoever) and their safety measures to allow the responsible persons to undertake their full responsibilities.

The current fire safety schedule is considered generally insufficient for the reasons set out under Issue 3.5.

At a more general level there is a lack of readily available, up to date information on the maintenance requirements of Class 1b-9 buildings and over time, as the buildings age and undergo modifications, this inadequacy becomes more acute.

The Planning White Paper proposed that a Building Manual be created for all new Class 1b-9 buildings, which would hold all relevant information relating to the ongoing safety and compliance of the building. The manual would be created at the end of the project and issued with the OC/DCC. This was designed to address the problem of a lack of accessible information on buildings and building systems. While councils in theory are provided with certificates and information on buildings, it is neither comprehensive nor readily accessible.

### **Proposed reform**

The proposal to require a building manual be produced for all commercial buildings has considerable merit. The building manual would consolidate all relevant information on the building to facilitate future management and maintenance, including an up to date building plan, information on all critical building elements, including the fire safety system, detailed information on all alternative solutions and the annual building/fire safety review. In line with the philosophy of efficiency and accessibility though the use of e-Technology it is proposed that the building manual be maintained online.

It is proposed that:

- it be a requirement that a building manual be created for all new Class 1b to 9 buildings that would include all relevant information relating to safety systems and compliance of the building, with the manual issued in conjunction with the DCC
- the manual be maintained online with access available to the relevant council and FRNSW
- the manual be updated for any additions or alterations to the building and include the annual certification of building safety systems
- the requirement for a building manual be phased in for all existing Class 1b to 9 I buildings
- building owners be required to obtain a certificate on fire safety from an accredited or prescribed individual with relevant experience and expertise to certify
- specify what essential fire safety measures need to be certified annually and expand the measures regulated to include certain structural safety features which can be certified less frequently than annually.

## **14.7 Fire safety certification and review**

Issue 14.6 touched on fire safety in respect to recording information on fire safety systems and annual certification of the fire safety system. There is a more general issue about achieving assurance about the suitability of the design, installation and commissioning of fire safety systems.

In order to ensure effective fire protection is in place, there needs to be the highest professional approach at the design, installation, commissioning and maintenance stages for fire safety systems.

The current approach involves the issuing of a CC or CDC based on the building plans which can include statements of intent in regard to critical building systems and elements. There is no explicit requirement that the certifier obtains plans or certification

of critical elements such as the fire safety system. Once construction starts the PCA has to assess the building against the approved plans and in doing this can draw on certification from suitable persons. Typically the PCA obtains a certificate from the party constructing/installing the fire safety system. However, there is no accreditation process for parties designing, installing, commissioning or maintaining fire safety systems and hence the PCA cannot legally rely on the certificate.

For certain classes of buildings (Class 1b to 9), a fire safety schedule is issued with a CC or CDC or certain development consents for changes of building use and with fire safety orders. The schedule is required to list all essential and critical fire safety measures and required performance standards.

FRNSW has a role defined under the EP&A Regulation which is focused on a review role for alternative solutions for fire safety systems. Under Clause 144 of the EP&A Regulation alternative solutions for fire safety systems for certain classes of buildings with certain characteristics require the certifying authority to, within seven days of receiving an application for a CC or CDC, submit the application and associated documentation (relevant to the proposed alternative solution) to FRNSW. In turn, FRNSW must provide an initial fire safety report to the certifier. The certifier cannot issue a CC or CDC before the initial fire safety report is received, or at least 23 days after the documentation was sent to FRNSW, whichever occurs first. FRNSW is then required to produce a final fire safety report. It is not mandatory for the certifier to have regard to this report, or indeed to await the report before certifying, provided the certification occurs 23 days or more after the submission of the plans.

A number of very significant issues are raised by the current mandated approach to fire safety systems:

- there is no form of accreditation of suitably qualified and experienced persons to design, install, commission and maintain fire safety systems. The current approach requires assessments be made by a 'competent person', but what is meant by 'competent' is not defined. What happens in practice is that those responsible for the design, installation, commissioning and maintenance of the fire safety system certify their work, so that what is in place is a form of self-certification but with the person doing the certification not being accredited and hence not able to be relied on by the building certifier. This means that the certifier cannot legally rely on the certification and FRNSW has no assurance that fire safety certification has any validity
- building certifiers have no ability to rely on suitably accredited persons to certify the fire safety system for building projects, and hence are liable for the actions of others without any legal or financial protection
- FRNSW is required by legislation to undertake a role that is poorly targeted in the sense that it prescribes a subset of categories of alternative solutions and does not necessarily identify all alternative solutions which should be notified to FRNSW. At present only CC applications involving alternative fire safety solutions are required to be referred to FRNSW, not relevant CDC applications. In addition, FRNSW does not have the resources or expertise to assess the alternative solution designs and performance assessment reports and then develop a fire safety report for all notified alternative solutions. The area of



design and performance assessment of alternative fire safety solutions is highly technical and requires a qualified and experienced fire engineer to undertake the role. FRNSW has not complied with this requirement to produce an interim and final fire safety report for some time. The solution is not to require FRNSW to do this and resource them accordingly but to have an effective fire safety certification system in place that FRNSW, property owners and the general community can rely on.

- the fire safety schedules as noted at Issue 3.5 suffer from major deficiencies at present which it is proposed to be addressed through the reforms set out at Issue 3.5
- the fire industry associations state that there is evidence of a growing trend for fire protection in new and existing buildings being certified even though they are not compliant with relevant standards. This concern has been reinforced by evidence provided by FRNSW to this review of installed fire safety systems which are clearly non-compliant.

It should be noted that there is an existing licensing scheme administered by Fair Trading for the trades and installation work on fire protection systems involving water plumbing. However, there is no general licensing or accreditation system in place.

The dangers inherent in the current situation is well illustrated by the tragic event of the Bankstown apartments fire which occurred in September 2012, resulting in the death of one young woman and the crippling of another and which is the subject of a current coroner's inquest. From the evidence tendered to the inquest the building did not appear to have compliant fire safety systems and the apartment in particular had been modified by unauthorised building work which trapped the two young women. It is essential that there is no repeat of this tragic event but the current system provides no assurance that this will not re-occur in this or any number of other locations in Sydney and NSW.

### **Proposed reform**

Fire safety is a paramount concern in building regulation and there is clear evidence that the current system of checking to ensure the proper design, installation and maintenance of fire safety systems is not working. Indeed the design of the current regulatory system is quite inadequate and is not capable of delivering on its objective of the assurance of having in place effective fire safety systems.

The current system imposes a prime responsibility on FRNSW in regard to assessing the fire protection systems for Class 1b-9 buildings in regard to alternative solutions and there is not an adequate system of review of fire protection systems for other complex buildings. The prime responsibility for review of fire safety systems should rest on suitably qualified and experienced accredited certifiers, with FRNSW able to rely on this system and undertake targeted risk based assessments.

The Planning White Paper and FRNSW have both proposed reforms to make the approach to fire safety assessment more effective. In the case of the Planning White Paper, these were directed at addressing broader problems than fire safety systems, with consideration given to prioritising safety issues, given the limited resources available to implement regulatory reforms. In the case of FRNSW, the proposals were directed at achieving a more appropriate and effective role for itself.

It is proposed that the fire safety regulation and certification system be reformed by the following measures:

- accreditation of suitably qualified and experienced persons for the design, installation, commissioning and maintenance of fire safety systems and that these same professionals be required to certify their work, preferably drawing upon the existing accreditation schemes developed by the relevant professional associations
- provide for Peer Review panel assessment of alternative solutions for fire safety that involve a significant risk, with guidelines to be developed to identify what types of alternative solutions would be reviewed
- reform of the fire safety schedules on the basis set out under Issue 3.5
- incorporate the *International Fire Engineering Guidelines* or an alternative equivalent requirement as a mandatory referenced document for the purposes of pursuing an alternative solution for fire safety systems and for the certifier to be required to declare that for the alternative solution this document has been followed, or to detail in what aspects it has been deviated from and for what reason
- provide access to FRNSW to all information on all alternative solutions for fire safety systems through the local government portal, including all Fire Engineering Briefs and Fire Engineering Reports of alternative fire safety solutions that affect a performance standard related to fire and, in particular, where fire brigade intervention is explicitly mentioned. Pending the implementation of the portal an interim solution will need to be developed
- amend the EP&A Regulation to remove the requirement for FRNSW to produce an initial (Clause 144) and final (Clause 152) fire safety report
- provide FRNSW with the power to issue penalty infringement notices for non-compliant fire safety systems.

## 14.8 Subdivision and strata certification

The subdivision of land requires development consent from the consent authority which is typically a council or the state government, with the only possible application of a CDC for subdivisions is with respect to minor boundary adjustments. Strata subdivision of a building can be approved by either development consent or a CDC. Only a consent authority such as the relevant council can issue a DA while either a council or an private certifier can issue a CDC.

A CC is required before subdivision work such as construction of roads and stormwater drainage can proceed which is line with the requirements for building certification. Once a CC is issued a PCA is required to be appointed for the development. At the conclusion of the development a strata certificate or a subdivision certificate is required to be registered with NSW Land and Property Information. A strata certificate is issued under the relevant strata legislation while a subdivision certificate is issued under the EP&A Act.

While private certifiers can act as a PCA for a building project there are barriers to private subdivision certifiers acting as a PCA for a subdivision development. Private certifiers are in general excluded from being appointed as a PCA for subdivision work or issuing a subdivision certificate under the EP&A Act unless a council's local

environment plan allows this to occur. Only one council in NSW has allowed this to occur.

This restriction on the involvement of accredited private certifiers is inconsistent with the approach followed with building certification and acts to restrict trade. This in turn places limits on the speed and effectiveness with which subdivision work can proceed, given that it requires the involvement of council.

Another problem in the subdivision area is that while private certifiers are able to issue construction certificates and compliance certificates, a number of councils either inform developers that this is not the case or else indicate that the council would expect to have this role, noting that it has an effective monopoly on the PCA role.

Council subdivision certifiers, unlike council building certifiers, are not required to be accredited with BPB and hence are not subject to the requirements of an accredited certifier, including participation in a CPD. There is no reason why council subdivision certifiers should be treated differently to council building certifiers and is inconsistent with the principle of competitive neutrality.

Councils may have a direct interest in a subdivision owing to the dedication of certain assets such as roads, drainage to the council. This should not form the basis of requiring the council to take on the role of the PCA. The council's interests are protected whether or not they act in the role of a PCA. It should also be noted that the State government appoints private certifiers to act as the PCA for major developments with no concern that this would compromise its interests in the development.

Another issue is that under Section 88B of the Conveyancing Act 1919, property cannot be registered with the Register General unless it records any restrictions or covenants. The Register General in turn has required in this situation for councils to check and certify the wording. Some councils use this as leverage to get more broadly involved in a development. Councils should simply check that the wording is in accord with the wording of the relevant council policy. Ideally the wording should be made common across councils.

Finally, each council tends to develop its own engineering design requirements for subdivision, covering such matters as road, drainage and earthworks. These range from the sketchy to the very detailed. In line with the principle of greater consistency there would be merit in developing a national standard or at least, initially, a NSW standard.

### **Proposed reform**

It is proposed that the current restrictions on the participation of accredited private certifiers in subdivision work be placed on a like basis to the approach applying to private builder certifiers by the following actions:

- remove the requirement for councils' local environment plan to approve of private subdivision certifiers being able to be appointed as PCAs or issue subdivision certificates and simply allow accredited private certifiers to act as PCAs for subdivisions and issue subdivision certificates
- Recognise in the partnership agreement with councils that private subdivision certifiers are fully entitled to issue construction and compliance certificates and councils are not to represent to the contrary

- councils be directed that their only role in respect to a Section 88 B strata or subdivision certification is to confirm the wording of the condition or restriction.

In addition it is proposed that:

- council subdivision certifiers be required to be accredited with BPB on the same basis as council building certifiers are accredited
- NSW work with the ABCB on developing a standard for engineering design requirements for subdivisions.
- 

## 14.9 Other building regulation issues

There are three other issues that relate not directly to certifiers but to builders. These issues are as follows:

- whether all builders in NSW and not just residential builders should be licensed
- access to Australian standards relevant to building work
- interpretation of Australian Standards and the NCC

### Licensing of commercial builders

As noted in Chapter 8 NSW is unique among the States and Territories in having a licensing requirement for residential builders but not requiring builders who specialise in commercial, industrial and public buildings to have a building licensing. The issue to consider is whether that exclusion has an adverse impact on the ability of the building regulation system to fulfil its objectives.

In this regard it should be noted that all buildings are subject to building regulation and require development approval and certification. Building licensing is rather directed at consumer protection considerations. As noted in Chapter 5 there are three, rationale for building regulation, including consumer protection:

- complex and asymmetric information in the building sector
- spill over or external impacts
- environmental and social policy concerns

Licensing is only directed at addressing in part the first rationale and not the other two, which are addressed through other regulatory instruments. In essence then the issue is whether there is an imbalance in the relation between builders on the one hand and owners/developers on the other in respect to the operation of the non-residential building sector? In principle there should not be an imbalance between buyers and suppliers in this market segment. It is a competitive market and the buyers that is owners/developers, are in general professional and knowledgeable participants in the market who are able to assess the capability and capacity of builders and oversight the project to ensure the desired building outcome is achieved.

### Access to Australian Standards

A second issue is access to Australian Standards in respect to building work. Effective from this year the ABCB approved releasing the NCC online, free of charge as a way to facilitate full access and hence adherence to building standards. This was a very worthwhile initiative but there remains an impediment to the building industry having full access to information on the Australian building standards. The NCC cross

references a range of standards, including standards relevant to building released by Australian Standards, a Commonwealth agency. This imposes a cost and hence an impediment on access to the information as Australian Standards has entered into an agreement with an overseas organisation whereby a charge is levied on access to Australian Standards information. It is understood that the agreement by Australian Standards with the overseas entity is subject to review in the next couple of years.

While the charging for access to the standards is designed to make Australian Standards commercially viable, it imposes a cost on industry and, more importantly, acts to restrict access to and use of the relevant standards which imposes a significant cost on the economy which is likely to be significantly in excess of the revenue generated.

### **Interpretation of Australian Standards and NCC**

The third issue is that there are frequently matters of interpretation raised by both the Australian Standards and the NCC. Both Australian Standards and the ABCB take the position that addressing issues concerning interpretation of the standards is not their role and that if there is a need for such assistance for industry that should be undertaken by the States and Territories. The problem created by this approach is that if the various jurisdictions take up this role it is likely to lead to multiple interpretations of the standards and hence break down the concept of having national standards.

### **Proposed Reform**

It is proposed that:

- the NSW Government formally raise with the Commonwealth Government the proposal of Australian Standards making its information on standards available free of charge to industry in general
- the NSW Government raise through the Building Ministers Forum the need for a process to clarify interpretations of the Australian Standards and the NCC.

## **14.10 Conclusions**

The reforms to the building regulation and certification process set out in this chapter are extensive but have been identified as necessary for a number of years and have been canvassed in various documents and forums, including Chapter 8 of the Planning White Paper and the discussion paper which was released ahead of this report for public consultation.

While there are different views about some aspects of the proposed reforms there is general recognition of the need for broad based reform and a reasonably high level of agreement about the key elements of that reform.

The reforms should be considered as an integrated package conforming to the following principles:

- holistic approach: the reforms have been developed by assessing each stage of the development process to identify areas of weakness and lack of clarity
- risk based approach: the focus has been on identifying areas of the highest risk and placing greater responsibility on practitioners to apply a risk based approach

- alignment of accountability and responsibility: it is important that the practitioners are held fully accountable for the effective undertaking of their roles and responsibilities
- outcomes based approach: it is important that the performance of the building regulation and certification scheme is assessed relative to the objectives set for the scheme and in particular against measurable outcomes. It must be acknowledged that there is not in place a satisfactory information system or measurable outcomes but the Information Systems Strategy that is recommended in Chapter 12 is capable of addressing this deficiency
- transparency: ensuring that there is full information available that is accessible to the relevant parties to monitor the performance of the system.

The key elements of a reform package for building regulation and certification would include, but not be limited to the following:

#### **Improved planning and approval process**

- certification of building plans for Class 2 to 9 buildings by an accredited person
- certification of the design of critical building elements and systems by an accredited person
- standard information requirements and conditions for DAs
- require an independent assessment for any proposal by councils to impose standards in excess of the BCA for a class or classes of buildings

#### **Certification to allow commencement of building work**

- active role for BPB in the selection and monitoring of PCAs for strata and community title developments
- establish a robust process for assessing alternative solutions, such as a Peer Review Panel, and capture information on all alternative solutions
- establish a “consistent” test, with supporting guidelines
- allow prescribed conditions for CCs and CDCs

#### **Building construction stage**

- mandate pre-commencement inspection, a risk assessment of what additional critical stage inspections should be undertaken and remove the ability to have missed inspections
- the installation, commissioning, maintenance and certification of critical building elements and systems to be undertaken by accredited persons

#### **Occupation stage**

- redesign the occupation certificate/completion certificate and limit the ability of councils to issue building certificates
- require all buildings, including those with unauthorised work or missed mandatory inspections to obtain an occupation/completion certificate, with substantial economic penalties for unauthorised work

#### **Building maintenance**

- require building manuals are established and maintained online for all Class 2 to 9 buildings

- establish accreditation for persons providing annual certification of fire safety systems

**General**

- reform the fire safety review process, including accreditation for the design, installation, commissioning, maintenance and certification of fire safety systems; provision of information to FRNSW on all alternative solutions for fire safety systems; remove the requirement for FRNSW to produce fire safety reports; and provide FRNSW with the power to issue penalty infringement notices for non-compliant fire safety systems
- remove restrictions on participation by accredited private certifiers in subdivision certification and require council sub division certifiers to be accredited.

It is also concluded that there is no in principle reason to extend building licensing to include builders operating exclusively in the non -residential building segment.



## 15 Reform of accreditation, accountability, discipline and support of certifiers

### 15.1 Introduction

The previous chapter examined the building regulation and certification system to identify ways in which its effectiveness and efficiency could be improved. This chapter examines the system that accredits, educates and trains and oversees the performance of certifiers to determine if there are ways to improve the effectiveness of the certification process. The two areas of reform are complementary.

### 15.2 Accreditation of certifiers

The accreditation process is undertaken annually with all accredited persons required to apply for a further extension of accreditation. The process requires those that are accredited to renew their insurance and meet a fit and proper person test, including a review of any complaints or relevant investigations. The annual fee is \$750 for category C certifiers (various specialist engineers) and \$1,500 for categories A, B, D and E (building certifiers, strata and subdivision certifiers, and swimming pool barrier certifiers).

There are a number of issues with the current accreditation process, including:

- **The appropriateness of an annual accreditation process:** Whilst annual accreditation ensures certifiers are meeting the aforementioned accreditation criteria and is superior to the “set and forget” process followed for example in Victoria, it is onerous to administer both from a regulatory and individual certifier perspective. The issue is whether to extend the period of accreditation for certifiers with a history of sound professional practice and current program of continuing professional development and insurance for administrative efficiencies, as well as focussing more attention on certifiers with a less satisfactory history.
- **Expansion of qualifications for building certifiers:** At present only those persons with a qualification in building surveying can qualify for accreditation as a building certifier (categories A1 to A3), noting that builders, civil engineers, architects and environmental health qualifications are recognized for the A4 category. This would appear to be unduly restrictive as there are other professional qualifications, beyond building surveying, that could be considered for building certifiers including such as civil engineers, architects and construction managers, though there will be gaps between the professional qualifications and the knowledge required of various categories of certifier. These gaps could be identified and courses established to address these gaps, such that a combination of the professional qualification and the identified courses would meet the knowledge requirements for categories of certifier. It is likely that in most cases the main gap will be in respect to knowledge of the BCA and the building regulation framework and associated legislation. The benefit of

such an approach is that it would provide a broader range and larger number of potential certifiers and not be dependent on one stream of qualifications.

- **Lack of objective means of assessing gaps in knowledge of certifiers:** At present there is a requirement for certifiers to meet both a knowledge and experience requirement with the knowledge requirement based on formal qualifications. Assessing on the basis of formal qualifications is a necessary but not a sufficient test and it is desirable both for certifiers wishing to progress to higher categories and certifiers in general to have their knowledge and judgment objectively assessed from time to time.
- **Manually based accreditation system:** the existing manually-based accreditation system is labour intensive, inefficient and does not conveniently link to the information on complaints and disciplinary action, the latter information is held on a separate register.
- **Lack of a fit and proper test for directors of companies providing certification services:** Companies can provide certification services through two avenues: the company is accredited under the Act, as well as individual certifiers employed by the company (termed corporate accreditation) or the company may not be accredited but provides certification services through individual accredited certifiers under its employ. The issue is that there is no fit and proper test for the directors, officers and associates of the company under either avenue. While it is true that these persons need not be undertaking certification personally (and would be subject to individual accreditation if they were), the point is that the principals of the company have a major influence on its approach to certification and the values and culture of the company and its employees. There would seem to be merit in having a fit and proper test applied to persons of influence in the company utilising provisions of the Corporations Law to define such persons.

### Proposed reform

It is proposed that the following reforms be undertaken to further improve the operation of the accreditation system:

- extending the range of professional and academic qualifications that can be considered for building certifiers by identifying what professional qualifications have a reasonable mapping with the knowledge required of certifiers, what the gaps in knowledge are and what training programs would be required to bridge the gaps, with a view to extending the range of qualifications that can be considered for accreditation as a certifier
- expanding the accreditation scheme to recognise nationally recognised training organisations and universities. Where a registered training organisation is accredited with the Australian Skills Quality Authority to deliver nationally recognised qualifications in the vocational education and training sector, there should be no need for those organisations to go through another accreditation process with the BPB
- working with relevant tertiary institutions to develop a tool that can assess the knowledge of certifiers in each category against what is required for that category, as well as identifying the gaps that need to be addressed to move to a

higher category and using this tool as an objective means to assessing the knowledge of certifiers

- extending the current annual accreditation system from an annual scheme to allow for accreditation for periods of three to five years for certifiers with a satisfactory history, with provision to continue with annual accreditation where a certifier has a less satisfactory record, until such time as there is evidence of an improvement in performance
  - replacing the current manual accreditation system with a fully online system which consolidates, in one database, information on certifiers including qualifications, accreditation history, history of continuing professional development, complaints lodged and outcomes
- introducing a fit and proper test for all persons of influence in companies providing certification services.

### 15.3 Scope of Accreditation

At present while there are a large number of categories of certifiers, the largest and most active categories are with respect to building certifiers (category A), together with specialist compliance certification in the roads, drainage and stormwater areas.

As noted in Chapter 14, there has been a restriction placed on private certification in the certification of sub division which it is proposed to remove.

More generally it has been noted in Chapter 14 that there are a range of more specialised, technical areas where a building certifier needs expert input from parties who are able to certify their work and are accredited for this purpose. Areas include town planning and the design, installation and commissioning of critical building systems and elements in complex buildings. The process of providing compliance certificates does not work owing to the onerous legal obligations imposed and the better solution is to accredit experienced persons who can certify this work. Rather than creating a separate class of certifier to those that undertake the design, installation and commissioning of critical building systems and elements, it is proposed that the persons who undertake this work be accredited to certify their own work.

It was also identified in Chapter 14 that it would be highly desirable to accredit persons who can undertake building design and prepare building plans with the intention to require all complex buildings to have certified building plans prepared by architects or accredited building designers.

#### Proposed reform

It is proposed that the scope of accreditation of certifiers be broadened to address the needs for certification in respect to building plans, the design, installation and commissioning of critical building elements and systems and town planning and that BPB with the Office of Building Regulation assess which other areas would benefit from accreditation.

## 15.4 Accountability of certifiers

Private certifiers undertake a regulatory function and under the *Independent Commission against Corruption Act 1988* are classified as ‘public officials’.

The EP&A Act requires the beneficiary of development consent, normally the property owner, to appoint a certifier. However, certifiers, both council and private, compete for appointments with the decision on appointment normally made by the builder on behalf of the owner (for single unit housing developments) and by the owner/developer (for larger developments). Often, owners are not advised by the builder of the options available to them in appointing a certifier as there is a working relationship between builders and certifiers.

There is an inherent conflict in the regulatory role undertaken by the certifier, and the commercial driver of securing appointment from the builder/developer (on behalf of the owner) whose interests may not coincide with regulatory requirements. This conflict, while still present with certifiers employed by council, is less pronounced than for private certifiers. Council certifiers are employees of the council which is normally the consent authority for developments. Thus, while the certifier may have a professional and commercial interest in securing appointments, there is a clear accountability to the council as the consent authority. For a private certifier there is no such mitigation of the private, commercial interest.

The BP Act was amended to require a written contract between the development beneficiary and the certifier. The purpose of this was to cement the relation between the certifier and the beneficiary of the development. This is rarely done in the single unit housing sector and does not address the underlying conflict regardless of which part of the building sector. Further, there is an appearance of conflict in the arrangement as a commercial contract implies that the certifier is acting as the agent of the owner/developer whereas the certifier is a regulator.

The key issue is whether it is possible to ensure that certifiers act on the basis that their prime duty and obligation is to undertake a regulatory responsibility in the public interest, and that commercial interests are a secondary consideration.

A number of changes to the current approach have been considered to assess whether they effectively address the current conflict of accountability and what consequences flow from those changes.

The most radical approach would be to revert to council certifiers only. This approach has been followed in New Zealand following the “leaky building crisis” of 2004. This does not appear to be a realistic option for NSW, where the current system is heavily reliant on private certifiers, particularly in major metropolitan areas, and most councils would not have the resources to take up the full function. This approach also ignores the various problems which were experienced when the system relied exclusively on council certifiers which included delays in obtaining building approvals.

A second approach would be to remove the power from owners, developers and builders to appoint certifiers, and have certifiers assigned on the basis of eligibility lists constructed by the BPB. The eligibility lists would need to have regard to the skills and experience relevant to different types of buildings. While this would remove the direct commercial influence of the builder/developer on the certifier it does so at a

considerable cost as it completely eliminates the market mechanism and replaces it with a queuing system. Under such an approach, there is no basis on which highly motivated and capable certifiers can develop and grow a business, hence undermining certification as a business.

A third approach would be for councils, as consent authorities, to create a panel of recommended certifiers based on the track record of the certifiers in undertaking a professional approach to their role and working effectively with the council. Any approach of this nature would need to address the potential for bias, in that councils would continue to provide certification services and hence compete with private certifiers on the panel.

On balance it is concluded that at this point in time in the operation of the building certification system, it is best to seek to improve the operation of the existing system by increasing the accountability of certifiers to act in the public interest as regulatory agents.

An issue related to accountability is the requirement under the BP Regulation for there to be a written contract between certifiers and the owner/developer. This was incorporated as an amendment in 2013, in Clause 19A. This requirement was enacted in order to make clear that the relationship was between the certifier and the owner/developer and not with the builder. This arrangement was reviewed in the Maltabarow report which argued that there was an inherent conflict between the certifier being a “public official” and operating in the public interest on the one hand, and on the other having a commercial contract between the certifier and the beneficiary of the development. The report recommended the repeal of the mandatory written contract.

While it is accepted that there is an apparent conflict between the public interest role and responsibility of certifiers and entering into contracts between the certifier and the beneficiary of the development, this is not considered a sufficient reason to repeal the provision. The requirement needs to be clearly expressed in the form of a regulatory requirement evidencing the role and responsibility of the certifier and the owner/beneficiary of the development, supported by a handout that explains very simply the role and responsibility of certifiers and compares and contrasts this with the role of a builder. There is also merit seen in changing the provisions in Clause 19A of the BP Regulation to make clearer the regulatory nature of the letter of engagement. Finally, there needs to be enforcement action taken to ensure that contracts are being executed.

### **Proposed reform**

A number of the reforms identified in this report will have the desired effect of improving the accountability of certifiers to act in the public interest. These proposals include:

- establishing and maintaining a practice guide to create a benchmark for the process that should be followed by a certifier, with the Guide given legal effect
- creating a program of proactive investigations and audits of certifiers and certification as practiced in the building sector. This provides a means for the regulator to monitor the approach taken by certifiers and other building

professionals in the field and to increase the risk to certifiers and other building professionals of doing the wrong thing

- providing greater clarity to the community about the role and responsibility of certifiers, to reduce or eliminate misconceptions. In this regard it is proposed that each building contract provided to an owner be accompanied by a leaflet which sets out the role and responsibilities of a building certifier and compares and contrasts this with the roles and responsibilities of a builder
- creation of a tripartite partnership arrangement between councils, certifiers and the State to monitor and assess the working relation between private certifiers and councils.

In addition it is proposed that the provisions requiring a contract be entered into between the owner/beneficiary of the development be restructured as a letter of engagement required as a regulatory instrument and the execution of such letters of engagement be enforced.

## **15.5 Handling of complaints and disciplining of certifiers**

Investigations, handling inquiries, addressing complaints and undertaking disciplinary action are all linked. Inquiries can be just a means to seek information, or can be a form of informal complaint, which could lead to a formal investigation. Audits can be targeted based on the information identified from complaints.

For the sake of clarity, investigation and audit have the following meanings in this report:

- Investigations are the process of following up on information provided or concerns raised to assess the facts and determine what action needs to be taken in the particular matter.
- Audits are a process of assessing both particular topics or issues or individual certifiers to determine how well the process or matter is handled and to identify ways that the overall process or topic can be improved.

There are two dimensions to investigations and audits:

1. A monitoring, control and disciplinary aspect whereby the investigation of complaints, and some targeted investigations based on intelligence gathered, is undertaken and, where the investigation identifies wrongdoing, suitable penalties are applied.
2. A continuous improvement approach whereby audits are undertaken on practice and performance in the field against a benchmark such as the practice guide. This could be targeted at specific aspects of the role where there is a concern that practice may be less than ideal, or it could involve a more general assessment of certifier practice. The intended outcome from such audits would be to identify ways in which certification practice could be improved which would flow through to the practice guide, the program of continuing professional development and training programs.

The BPB does have an investigation and audit function and has, in the past, undertaken a successful state-wide program of advisory reviews of certification practices of private certifiers and of councils in their role as a certifying authority. The program comprised

desktop reviews with debriefing sessions, and follow-up correspondence and education aimed at improving practice and compliance with legislative requirements. Advisory reviews did not result in penalty, but did provide for further investigation where significant breaches were identified and the certifier did not take action to improve practice.

However, the level of resources available to BPB combined with the level of complaints that need to be investigated, means that most if not all of the work undertaken is in the nature of reactive investigations of complaints. There are no audits being undertaken at present.

The BPB has available to it a number of disciplinary powers which distinguish between unsatisfactory professional conduct and professional misconduct. In regard to the former, the BPB can issue a caution or reprimand; impose conditions on accreditation; order undertaking of training; order reporting on practice; or impose a fine of up to \$110,000. In regard to professional misconduct the BPB can impose a fine of up to \$110,000; suspend or withdraw accreditation for a period; or cancel accreditation.

There are four key issues identified with the current approach followed by BPB in the oversight and disciplining of certifiers:

#### **1. Disciplining versus timely problem resolution**

Most fundamentally the current complaints system is targeted at disciplining certifiers where they are found to have acted inappropriately and not with addressing the underlying problem that motivated the complaint. In most if not all cases a complaint is motivated by a concern about an aspect of a particular development and the complaint concerning the certifier is a way to initiate action. Hence rather than engaging in a relatively long process based on principles of natural justice to the certifier, the first stage should be to assess the nature of the underlying problem, whether there is a valid concern and, if there is, to address that problem. This will require direct communication with the complainant and may require a site inspection and liaison with Fair Trading if the problem rests more with the builder than the certifier. The approach taken should be holistic and not be concerned about agency boundaries. Combining the functions of BPB in regard to certifiers with Home Building Services in the role of licensing builders and trades will facilitate such a holistic approach. It is only once the underlying cause of the complaint is addressed, if valid, that the culpability of the certifier needs to be fully assessed.

At present the average time taken to investigate and resolve a complaint is six months but it is not unusual for the process to take twelve months or longer. The consequence is that regular participants in the process such as councils give up making complaints and hence a vital feedback loop is lost to the system, while occasional complainants get annoyed and frustrated. If the process is recalibrated such that the first priority is problem identification and resolution, then it will not matter to the community if the second stage of potentially disciplining the certifier takes longer.

It is acknowledged that improvements have been made, with more effective upfront triaging of complaints and early follow up with those that are more urgent. However

there is still a significant backlog which should not have been allowed to occur in the first place but was by under-resourcing of the BPB. Furthermore, the underlying philosophy and approach to complaints needs to be recalibrated.

## **2. A largely manual, outdated system for processing and managing complaints**

The current system is manual with the information inputted to a database and there is not an effective system for managing the outstanding complaints online.

Furthermore, the register of accredited certifiers is a separate database to the register of complaints and disciplinary actions whereas they should be in the one data system.

## **3. A lack of in-the-field investigations and audits with a feedback loop of communication and training of certifiers**

At present investigations of complaints are largely desk based and are concerned with gathering information concerning the conduct of certifiers. There are no proactive audits or investigations undertaken. This is despite the plan at the time of the approval of BPB for an active audit and investigation program that would audit each year 1 in 66 developments. Audits can be used to focus on what are identified as problem areas, such as the assessment of Complying Developments, with investigations taking place in the field of how the process is undertaken and in what ways it can be improved. Action that can be undertaken includes the issue of case studies and advisory notes to certifiers and follow up training to improve practice. Unfortunately the lack of resources means that such activities are not undertaken at present.

The other dimension to proactive audits and investigations is to increase the risk to certifiers who are doing the wrong thing. It is important that certifiers are accountable for their actions and that there is a reasonable risk of inappropriate behaviour, practice and repeated poor conduct, being identified and punished. At present, this risk is limited to the risk of a complaint being lodged and upheld. The number of complaints lodged with the BPB each year is relatively small and even smaller are the number that are investigated and upheld. Hence the complaints mechanism does not provide a significant risk to certifiers who act unprofessionally, engage in professional misconduct or display repeated poor conduct.

Complaints investigation could be supplemented by an active program of field investigations undertaken either at random or based on intelligence gathered.

## **4. A limited range of penalties that can be or is applied**

At present penalties are in the main restricted to fines or suspensions of accreditations that are applied after a full investigation. There is the power to impose PINs but this is rarely applied. There needs to be penalty mechanisms that can be applied where there is evidence of poor practice or administrative failure which does not require an investigation or may not be subject of a complaint but requires a speedy and effective penalty to be imposed. It is suggested that a combination of PINs and demerit points should be actively used in combination with proactive audits and investigations.



It is noted that the Walmsley review of the complaints system did not recommend a demerits point system on the basis that there was no evidence that such a system was effective. It is suggested that the experience that all motorists have of the demerits system attached to driving licenses indicates that such a system is in fact quite effective for what it is designed to do. The approach is to send signals to persons that their behaviour needs to change, with a ratcheting up of the consequences if evidence accumulates that the desired behaviour change is not occurring. Discussions have been held with QBCC which operates a demerits system directed at all building professionals. The scheme has been assessed as successful and in June this year it was decided to increase the number of demerit offences and an increase in the demerit points attached to some offences to further improve the effectiveness of the scheme.

### **Proposed reform**

It is proposed that the following reforms are made to the investigations, inquiries, complaints and disciplinary system:

- while continuing to investigate and assess possible professional misconduct or unsatisfactory professional conduct by certifiers, the complaints system should prioritise an upfront, timely assessment of the matter of concern regarding the development, regardless of which category of building practitioner or professional is being complained about
- more timely and effective handling of complaints, through both the application of more resources, more effective management of complaints and clear advice to the community about the process and potential outcomes
- establish a less prescriptive approach in the legislation to the handling of complaints to facilitate a more streamlined administrative approach
- establish an online complaints lodgement and management system, which should also include creating an integrated database of all the information on accredited certifiers, including complaints and disciplinary actions, and this information, should be accessible to potential clients
- establish and resource an active audit program which is informed from complaints and investigations and targets problem areas, with the results of the audits linked to communication and education of certifiers
- broaden the range of penalties that can be imposed, covering not just certifiers but all building professionals, to include:
  - making greater use of an existing system of penalty infringement notices to address detected administrative and procedural errors
  - Introducing a demerits point system, noting a demerit system is in place in Queensland and the ACT and has the benefit that it takes account of an individual action that of itself may not justify a fine or suspension of accreditation, but may justify more serious action if it becomes part of a pattern.

## **15.6 Education and training**

The BPB oversees a continuing professional development program and as part of that program is developing a training module on complying development for certifiers; has

provided occasional advice on suitable practice to certifiers; and is working with key stakeholders on developing a practice guide that will set out the approach to be followed in undertaking the certification role. In addition to a general overview of the building certification system, the draft practice guide provides practice notes on each major area of a certifier's responsibility.

There are limited resources applied to this area with only four permanent persons, supplemented periodically by contractors, covering the annual accreditation process and education and training. The main area of educational support is through the requirement for certifiers, as part of the conditions of accreditation, to undertake a Continuing Professional Development program which is expressed in a set number of hours per year undertaking recognised training courses. A number of the professional associations such as AIBS, AAC and Engineers (Australia) offer courses which are recognised by BPB. At this stage there is not the capacity to tailor requirements to individuals, addressing particular gaps or areas of relative weakness.

Education and training is vital for certifiers and needs to be effectively linked to the requirements of the regulator and regulation, given that certifiers are on the ground regulatory agents. In this regard there is a significant contrast with building and trades practitioners where the prime responsibility for professional development can be left to the relevant professional and trades bodies. In that regard, if combined with the licensing function for builders and trades in the Finance, Services and Innovation portfolio, it is vital not to lose sight of the specific requirements of certifiers.

The level of resources applied in this area is very limited and as a consequence there are deficiencies that should be addressed including:

- no process of linking the major issues raised in complaints and inquiries to training and education programs directed at improving certifier performance in the field
- lack to date of BPB targeting training on important topics (but BPB now has a course on Complying Development under development)
- excessive level of reliance on the professional associations to deliver appropriate training under the CPD program
- fragmented approach to advisory services for the industry, with the BPB, and the DPE's Building Policy Unit, BASIX and Codes Unit, each maintaining an advisory service. This means there is no oversight across the building industry of requests for advice being received.

It is not proposed that BPB become a training and education provider. However, BPB needs to take an active role in ensuring the proper training and education is provided to each of the different categories of certifiers to ensure they can and do their work effectively.

### **Proposed reform**

It is essential that there is a continuous improvement philosophy embedded in the work of BPB. To that end it is proposed that the following reforms to the education and training process for certifiers be implemented by BPB:

- BPB take prime responsibility for the design and content of the continuing professional development (CPD) program, including standards to be met by

training providers for each category of certifier, working in concert with the relevant professional associations

- developing a continuous process of establishing education and training needs for certifiers based on evidence such as data from investigations and advice from certifiers and their professional associations. This would include a range of different education options such as producing regularly a practice guide or information sheet on contemporary topics of interest and importance or sending a direct email to certifiers to advise them of an important change to relevant legislation or preparing and delivering an information session or consulting with professional associations and training providers on relevant courses and training they will provide as well as CPD
- establish and actively maintain a panel of suitable training course designers and providers who will work closely with BPB to address any gaps in training needs of certifiers
- monitoring of training and education including CPD to ensure relevance, currency and achievement of expected learning outcomes, with audits to focus on content and quality of learning material, suitability of lecturers/trainers/educators
- establish an online system for management of CPD including a list of CPD training approved by the Board for certifiers to choose from and an online diary system for certifiers to record their training in real time
- establish criteria and a process for the assessment and recognition of qualifications
- develop and provide an online Accreditation Exam which can be used to allow both self-assessment and BPB assessment of the knowledge of certifiers in various categories.

## 15.7 Other support for certifiers

In addition to education and training, there is a need for support for certifiers as they go about their functions. The practice guide will make a substantial contribution to assisting certifiers in undertaking their functions but it will not be able to anticipate all situations that occur in the field. BPB does provide some resources to answer phone queries but this is a relatively limited service owing to resource constraints. In addition BPU, the Codes Unit and BASIX each provide a limited inquiry line service but each focussing on their specific area of responsibility.

What would be helpful as well would be the establishment of advisory and review panels, composed of senior and highly experienced certifiers. Advisory panels would be available to certifiers to refer a certification matter to where there is some level of uncertainty about the approach to be taken which would benefit from the panel input. As such the individual certifier initiates the process of review. In contrast review panels would be used where there is a regulatory requirement to have certain complex matters referred to a Review Panel by certifiers, such as certain categories of alternative solutions, where there may be a need for a broader range of skills and experience to be applied. Under both the advisory panel and reference panel it would be necessary for the certifier to be able to rely upon the assessment of the panel, which is the approach taken in Victoria.

## Proposed reform

It is proposed that support for certifiers be expanded by:

- establishing, maintaining and publicising a single dedicated hot line for all building regulation and certification inquiries, consolidating the advice function currently being provided separately by BPB, BPU, BASIX and the Codes Unit
- establishing in conjunction with the certifier associations both an advisory panel and reference panels consisting of experienced certifiers who can provide more in depth guidance to certifiers, with the advisory panel available to be accessed by certifiers at their initiative while the review panels would be required to be referenced for certain categories of certification matters.
- Certifiers being able to rely on the assessment provided by advisory and review panels.

## 15.8 Certifying fees

There is reasonable evidence of quite marked variations in certifier fees that at the lower end of the range are inconsistent with undertaking the required work of a certifier. The concern is that competition in respect to fees can and has produced a rush to the bottom in terms of the scale and quality of the work undertaken by the certifier. Such an occurrence can happen when either the person paying for the service or that person's advisor does not value the certification service.

One approach to address this issue would be to establish a standard schedule of fees. However, this is not compatible with the operations of a marketplace and moreover could have the consequence of discouraging the provision of higher quality, higher cost work. Further, such standard fees are easily circumvented by side deals involving fee rebates.

The proposal to have a practice guide and to hold certifiers to account for following the process in the guide, backed up by regular audit will assist in addressing the problem of inappropriate fee setting. This could be supplemented by BPB publishing indicative fees for building certification for different classes of building work, based on the work set out in the practice guide. The intention of this approach would be to educate owners on the fair cost of the provision of certification services. This indicative fee schedule would need to be suitably qualified to recognize that there is a range of costs and that events can occur with buildings that require greater certification involvement than may have initially being planned for. In this regard it is suggested that the BPB work with the two certifier associations on the exercise of the indicative fee schedule and supplement this with a schedule of supplementary charges.

## Proposed reform

It is proposed that:

- a schedule of indicative fees is established to provide guidance as to the broad level of fees that would be consistent with a certifier undertaking their responsibilities as set out in the practice guide
- certifiers be required to establish and publish their fee structure and include in that fee structure additional fees for addressing non complaint matters

- BPB undertake occasional audit of the fee structure of councils and private certifiers.

## 15.9 Competitive neutrality

Given that council and private certifiers do directly compete for business, it is important that there is a reasonable level of competitive neutrality, to avoid giving one group a systematic advantage over the other. It is also important that certifiers in a council operate as a separate commercial unit from the council's compliance area which is understood to be the case.

However, there are aspects of the current arrangements which mean that full competitive neutrality cannot be achieved fully, in particular:

- council certifiers are council employees and hence have an obligation and responsibility to the council as the consent authority
- council certifiers are better placed to obtain council enforcement action
- council certifiers are not required to hold professional indemnity insurance
- private certifiers can negotiate fees on a case by case basis while council certifiers are subject to a schedule of fees which is approved by council annually
- council fees in certain cases appear to not reflect the costs that should be incurred in undertaking the certifier role
- builders and developers, in general, prefer to deal with private certifiers rather than council certifiers given the association of council certifiers with the consent authority and enforcement, as well as the potential availability of certifiers outside office hours
- private certifiers have freedom to operate throughout the state
- private certifiers have discretion to accept or not accept appointment as PCA whereas councils ultimately have to provide the service.

These deviations from competitive neutrality appear to be inherent in the nature of the two classes of certifier and as such are not able to be addressed. The only way that full competitive neutrality could be achieved is if there were only private or council certifiers. Neither approach is proposed in this review. What is needed is greater transparency and accountability for the setting of fees which has been addressed in Section 15.7 where it is proposed that BPB undertake occasional audits of the fee structures of councils and private certifiers.

## 15.10 Professional indemnity insurance

A requirement for accreditation as a private certifier is holding professional indemnity insurance (PII) to provide cover of at least \$1 million (exclusive of a certifier's legal expenses of defending a claim) or \$2 million (inclusive of defence costs) for any one claim, up to a maximum of \$2 million (exclusive of defence costs) or \$4 million (inclusive of defence costs) for all claims for a year. A certifier who works for a certification company is covered by that company's PI policy. There is no such requirement for insurance for council certifiers who are covered by the council's PI policy.

While PII protects the financial position of the certifier, the main reason for requiring PII is to protect financially the position of the clients of the certifier by having a backstop to any liability incurred by the certifier.

Policies are written on a “claims made” rather than “liability incurred” basis so certifiers are only covered while they continue to hold insurance. It is not a requirement of the accreditation process that insurance be maintained to cover run off claims, that is claims relating to events that occurred while the insurance was in place but the claim arose post the period of insurance. This can become an issue when a certifier decides to exit the industry.

BPB’s objectives for the requirement for PII for certifiers would appear to be as follows:

- establish and maintain a sustainable and stable insurance environment for certifiers
- maintain protection of consumers of certifiers’ services
- enhance industry performance through cost reflective premiums and suitable risk training and advice.

## **Key Issues**

There are a number of issues relating to professional indemnity insurance of private certifiers which are set out below.

### **1. Cost, availability and sustainability of PII**

As individual certifiers transact the insurance policies there is not available data on the overall premium pool, claims and trends. From partial data it would appear that the annual claims cost averages between \$1 million and \$2 million per annum, with a total premiums pool of the order of \$2 million to \$3 million. Premiums for sole practitioners are of the order of \$2000 to \$5000 per annum. The insurers appear to at best break even in this class of insurance which is broadly reflective of the entire PII market.

The survey of certifiers identified that nearly 60% of certifiers who responded to the survey had experienced increases in premiums over the last two years of at least 50%.

It has been reported that in other jurisdictions insurers are withdrawing from the industry and a number of certifiers have been refused cover. The AIBS sent in May 2015 a letter to the Prime Minister highlighting what it described as a potential crisis concerning the ongoing availability of PII for building certifiers. The AIBS is of the view that the problem resides in a misconstruing of the role and liability of the certifier relative to other building professionals. No evidence has been presented to the review that would indicate that there is a general problem in NSW with the availability of PII.

It is important for the BPB, together with the Associations, to closely monitor the state of the certifier PII market. The proposed reforms contained in this report, which are directed at improving the operation and quality of the building industry and building regulation, should assist by having a beneficial impact on defects and building quality and hence should reduce the risk factors associated with certification. Specific reforms will have a more direct favourable impact on the liability position of certifiers include the following:

- broadening the extent of certification to include certification of building plans and critical building systems and elements design, installation and commissioning

by accredited persons. This not only spreads risk and responsibility more broadly but also will reduce the overall level of risk and improve outcomes by improving accountability

- the practice guide will provide clear guidance on the approach that should be followed by certifiers
- an active audit program will both provide feedback to certifiers about appropriate and inappropriate practice in the field and identify certifiers who are acting in a way that creates undue risks
- certifier education and training and support functions such as a help line and advisory and review panels.

## **2. Run off insurance**

As PII covers only claims made during a period and does not cover insurable events that occur but are not claimed in that period, there is the issue of “run off” cover. When a certifier leaves the industry through retirement or change to consultancy or other role there is a potential liability when the certifier does not maintain insurance cover and that liability relates to claims that will arise in the future regarding past work undertaken. In theory certifiers can purchase what is termed run off insurance which will cover this liability for a defined number of years. However, the provision of this insurance is at the discretion of the insurer. Moreover, while in the certifier survey current certifiers indicated a relatively high proportion intended to take out such insurance after retirement or leaving the industry, the reality is that a relatively small proportion of exiting certifiers take out such cover. Also such cover is at the discretion of the insurer and may not be available for an individual certifier or may not be available for the full liability period, noting that certifiers (and building professionals in general are liable for a 10 year period).

This exposes exiting certifiers to personal liability which potentially could be significant but, more particularly, it undermines the level of consumer protection available.

A related issue occurs where certifiers are employed by a certifying company which ceases to operate. In these cases the individual certifiers are required to purchase current insurance each year they are accredited to cover their past work for the previous company and if they are unable to obtain the insurance they are unable to practice in the industry and are exposed individually to any claims arising from past work in which they were involved.

One option that has been explored by the BPB and the certifier associations is creating an industry based scheme which would address any current gaps such as run off cover. There are various options for paying for the cost of run off cover, which could be built into the cost of current insurance or prepaid at retirement or a combination of other approaches. It is estimated that broadly 40 certifiers exit each year and this number will increase over the next five years as the cohort of older certifiers reach retirement age.

## **3. Inappropriate exclusions and restrictions**

From discussions with the industry, there would appear to be cases of certain insurers imposing inappropriate insurance policy exclusions that unduly restrict the cover of the policy. The corollary of this is that a greater liability then rests on the certifier, though with the benefit of a lower insurance cost, and there is less consumer protection.

One way to address this is for BPB to take a more active approach to PII and establish in conjunction with the certifier associations a panel of approved insurers based on assessed financial capacity, risk management capability and appropriate insurance conditions.

#### **4. Lack of alignment with other building insurance**

There is a statutory limit on liability for building work under Section 109ZK (1) of the EP&A Act, 10 years from the date of completion of the project. This is general, applying to all parties involved in building work, not just to certifiers.

Under the Home Building Act there is statutory home warranty insurance for residential buildings up to three storeys in height which is required to be taken out by the builder. The insurance operates on a last resort basis once any action against the builder or other relevant party has been exhausted.

The statutory period of cover under the home warranty insurance is six years for structural defects and two years for non-structural defects from the date of completion of the work. It has been argued that the 10 year liability limit under the EP&A Act exposes certifiers to what is described as the “last person standing” problem whereby once the statutory period of cover under the home warranty insurance ends at either two or six years, there is an incentive to take action against the certifier given that the liability period and insurance cover continues for 10 years. This has been raised anecdotally with the reviewer but to this stage no data has been provided to quantify whether and to what extent a “last person standing risk” exists. However, there is an in principle objection to the “last person standing” argument and that is that the 10 year liability period applies to builders as well as certifiers. Builders can have legal action taken against them for up to 10 years after completion. The two and six year only applies to home warranty insurance and that only applies once action against the builder is exhausted. The one difference is that the certifier is required to have PII cover which is not the case with builders. On this basis there appears to be no need to align the 10 year statutory limit on liability with the coverage period for home warranty insurance. However, there is the issue of whether run off cover is available for the full 10 year period and thus whether certifiers can cover their liability. This is currently being explored as part of the negotiations on the industry PII scheme. If insurance cover is not available for the full 10 year period this may justify reconsideration of the 10 year liability period under the EP&A Act.

A specific area of non-alignment is with respect to commercial buildings and residential buildings in excess of three storeys where there is no requirement for builders’ insurance and hence the risk that legal action will in substitution be taken against certifiers on such building projects. Associated with this is the not in frequent practice of developers establishing sole purpose companies to undertake particular building projects and liquidating the company once the project is completed. Once again this potentially leaves the certifier exposed with no recourse to the builder. However the certifier is only exposed proportionately, that is to the extent that the actions or inactions of the certifier contributed to the liability.

It should be noted that the Home Building Act has been amended to address the issue of phoenix builders and companies. As at 15 January 2015, notification arrangements have been extended for licensed builders so that licence holders must notify Fair



Trading when a licensee becomes bankrupt or insolvent or compounds with their creditors. If the licence is held by a corporation, it must notify Fair Trading if it is wound up or de-registered. There are offences that apply in the event of non-compliance. These changes mean that directors, close associates or those who managed the former company before it was “phoenixed” will be closely scrutinised and is directed at stopping such parties from re-entering the industry under other names.

## **5. Industry and BPB Involvement in PII**

The fact that it is a condition of accreditation for a certifier to hold a suitable level of PII has required BPB to take a more active role in the functioning of the PII market for certifiers which it did by convening an Insurance Committee. This has led on to discussions with the insurance industry about an industry based PII scheme.

An industry based scheme provides the opportunity to establish a more structured scheme that meets both the needs of individual certifiers but also reinforces good certification practice. There are a number of matters that it would be desirable to include in an industry scheme, including:

- ensuring that the insurers are providing a suitable level of protection and are not imposing inappropriate exclusion clauses in insurance contracts
- incorporate run off cover, providing cover to match the liability obligations of certifiers and acting as a backstop to protect consumers
- having experienced certifiers monitoring and assessing significant insurance claims before they are processed by insurers in order to both keep track of the trends in the level and the form of claims and provide expert input to the insurance claims assessors
- creating an active risk management component to the scheme which provides feedback to certifiers about the factors driving claims and how to avoid or minimise the risk of incurring claims.

It is also important that an industry based scheme does not equalise away the impact of claims experience on individual certifiers. There needs to be a clear linkage between the claims experience of individual certifiers and the premiums charged.

### **Proposed reform**

Noting that the proposed reforms to transparency and accountability of certifiers, including the practice guide, a proactive audit and investigation program and the extension of certification by accredited parties will all improve the availability and terms and conditions of PII, it is further proposed that:

- BPB and the certifier associations proceed with the establishment of an industry insurance scheme that provides the full range of cover, including run off cover, with agreed policy conditions and exclusions, an active risk management program and cost reflective insurance premiums at the individual certifier level an insurance claims review panel be established to have experienced certifiers monitor and evaluate claims and provide their expert assessment to the insurers<sup>4</sup>. further consideration be given to the issue of the statutory liability period under the EP&A Act for building professionals in the light of negotiation

with the insurance industry about the time frame over which run off cover can be provided on reasonable commercial terms

## 15.11 Improving the supply and career path of certifiers

### Key issues

Across NSW there are approximately 1,600 certifiers, comprising 750 private certifiers and the balance being council certifiers. The issues that need to be considered are:

- whether, in view of the scale of the certification task, there is an adequate number and type of certifiers, in total and by region
- whether the demographic profile is such that there will be a significant decline in certifiers in the future unless corrective action is undertaken
- the trend in the number of certifiers, and whether it is seen as an attractive profession and is attracting the right sort of expertise and experience.

The evidence is that, at this point in time, there is an adequate supply of certifiers in the major metropolitan areas and some regional centres, but in smaller regional centres and country areas, the supply is more restricted (having regard to the level of building activity).

A second observation is that there is a demographic bulge with respect to certifiers, both private and council, in the 50 to 60 year age group, and that as these persons move to retirement, there are insufficient certifiers entering the profession to maintain an adequate supply. A projection has been made of the situation over the next 10 years allowing for projected retirements, normal levels of intake of new certifiers and the normal levels of certifiers who exit the industry for reasons other than retirement. This information is set out in Table 15.1 below.

**Table 15.1: Indicative trend in certifier numbers June 2015 to June 2025**

	Assuming retirement at age 60	Assuming retirement at age 65
Number of certifiers as at end June 2015	1600	1600
Projected retirements	(710)	(422)
Projected non retirement exits based on historic experience	(650)	(650)
Projected intake based on historic experience	490	490
Projected certifier numbers at June 2025	730	1018

The numbers presented in Table 15.1 are projections not forecasts in that they are based on certain assumptions based on historic experience and do not allow for possible strategies to increase recruitment. In that sense they are projections of what could occur without corrective actions. Depending on whether certifiers on average retire at 60 or 65, it is projected that there could be a drop in certifier numbers of between 580 and 870 over the next 10 years, without corrective action to increase annual intake.

When council certifiers were brought into the accreditation scheme, existing certifiers were 'grandfathered' in the sense that they did not have to acquire the new qualifications for accreditation, but this does not apply to new council certifiers. In the main, councils have not been recruiting and training in sufficient numbers new certifiers to replace those that will retire. Private certification practices have been recruiting and training entry level certifiers but not at a level sufficient to sustain the necessary supply of certifiers.

The third observation, based on speaking to certifiers and drawing on the survey of certifiers, is that the career of a certifier is not seen by current certifiers as attractive, with certifiers seeking to move away from certification to a consultation role. Further, a majority of certifiers express the view that they would not recommend a career in certification to young people.

There is a need to address the prospective shortage of certifiers through both seeking to broaden the range of qualifications that qualify for the role (a supply side response) and by increasing the attraction of certifying as a career (a demand side response), particular emphasis needs to be placed on increasing the attraction of a career in certification and making it a respected profession.

Specific issues that can impact negatively on potential new entrants include the following:

- cost of obtaining professional indemnity insurance
- legal exposure of a certifier, given the range of matters they are responsible for assessing without reliance on the persons providing the certification
- general lack of understanding in the community about the role and responsibilities of certifiers
- lack of support available for certifiers who mainly operate as sole traders
- inadequate career pathway.

### **1. Improving the attraction of a career in certifying**

The attraction of a career in certification will be improved by a number of the reform proposals identified in this report, such as:

- extending the scope of certification to include building design and the design, installation and commissioning of critical building systems and elements, with a corresponding expansion in accreditation. This would mean that building certifiers could rely on accredited third party persons to certify these key elements of the building process. At the same time the certifier will have a definite role and responsibility which is to critically assess the certifications relative to the requirements of the building standards. This would impact favourably both on the legal liability of building certifiers and the cost of insurance
- educating the general public as well as industry on the role of certifiers and how it differs from a builder's role
- documenting the role and responsibility and the process to be followed by certifiers which will give both greater clarity to the functions and approach to be followed and greater legal protection

- greater education and training support provided to certifiers and greater support in their role in the field.

## **2. Facilitating industry training and a career pathway**

The entry point for building certifiers is the A4 category which allows entry under different pathways:

- qualified and no experience
- student or qualified builder which requires the certifier to work under supervision of a A1 to A3 certifier
- building qualifications and minimum six months experience in building surveying
- experience only which requires a person to have twelve months building surveying experience.

Currently there are 83 certifiers graded A4 that are undertaking training to enable them to progress to higher classifications. Of these 83, 32 are working for private certifiers and 51 are working for councils.

For the B, C and D categories, the applicant would need to follow the pathway of becoming an engineer, land surveyor or hydraulic consultant by obtaining a qualification and experience. For category E an applicant must either hold a licence as a builder, pool builder or structural landscaper that authorises them to construct a pool fence or have two years of employment with a council carrying out inspections of at least twenty pools for compliance under the Swimming Pool Act 1992.

Traditionally, local government has been the area for providing training opportunities given that they have a larger corporate capacity than private certifiers who often operate as sole traders or small companies. However, there is a significant cost involved in employing certifiers beyond the salary involved which includes the accreditation fee, insurance and training costs.

What is required is the active involvement of BPB in a leadership role, in concert with the certifier associations, to improve the opportunities for traineeships for certifiers and to facilitate opportunities for certifiers to pursue a career path through the categories of certifier.

Particular initiatives that would assist include the following:

- establishing work experience opportunities for university students doing building surveying and other relevant courses. Work experience is a requirement for these courses and universities and their students are finding it difficult to arrange work experience with suitable organisations. This is likely to be acting as a disincentive for students enrolling in courses
- providing suitable financial incentives for councils and private certifiers to take on trainees, including a substantial discount on the accreditation fee for trainees or even providing a credit
- working with the councils to provide the opportunity for regional certifiers to be seconded to metropolitan or major regional councils to obtain suitable work experience that will enable them to progress to higher categories
- working with the Certifier Professional Associations and private certifiers to offer traineeships as well as opportunities for certifiers to progress to higher

categories by having a broader range of experience through secondment to major certifier companies with a broad range of development types

- providing a modified A1 category building certifier for regional areas that can undertake work on the range of typical building work that occurs in regional areas.

### Proposed reforms

It is proposed that:

- BPB work with local government to facilitate an exchange program and secondment to allow regionally based council certifiers to obtain a broader range of experience through attachment to metropolitan councils
- BPB work with universities providing building surveyor courses, councils and private certifiers to develop a work experience program for trainees
- consideration be given to concessions for accreditation fees and other incentives to encourage take up of traineeships
- BPB work with the certifier associations, councils and private certifiers to develop a more structured career path for certifiers involving secondment of A2 to A3 certifiers to larger metropolitan certifiers with a broad range of development experience
- consideration be given to the creation of a building certifier classification A1R, that is A1 Regional, that would provide sufficient capability for a certifier with suitable experience to certify for the typical range of building work undertaken in regional NSW.

## 15.12 Conclusions

An extensive reform program is proposed for the operation of the BPB. This should not be interpreted as criticism of the performance of the board and staff of BPB. Rather it reflects a major under resourcing of BPB, a lack of any forward budgeting process to enable BPB to engage in effective forward planning and an administrative structure which has constrained the ability of BPB to manage its functions.

Further, BPB has identified a number of the major deficiencies discussed in this chapter and has undertaken work to seek to address some of these areas of concern, such as in the insurance area, the relation between certifiers and councils and documentation of good practice in certification.

There are seven core priorities to enhance the functioning of the BPB and the certification system it supports:

- a simplified and more effective accreditation process, including a longer accreditation period
- enhanced role for BPB in the professionalization of certifiers through targeted education, training and support
- enhanced accountability of certifiers to act in the public interest
- improved handling of complaints and disciplining of certifiers, with the priority to be given to “in the field” identification and resolution of the building problem, combined with a more flexible range of penalties, including a demerits point system and greater use of PINS

- boosting the number of trainees and improving the career path for certifiers
- ensuring a sustainable personal indemnity insurance scheme that covers liabilities including providing run off cover, provides reasonable consumer protection, fairly prices risk and inculcates a culture of effective risk management
- an effective proactive audit and investigation program.

Other initiatives that are proposed include expansion of the range of qualifications that are recognised for building certifiers, in order to increase the supply of certifiers; applying a fit and proper test for persons with influence and control in respect to certifier companies; objective assessment of the knowledge of certifiers; and indicative schedule of certifier fees.

## **16 Reform of the resourcing and funding of building regulation and certification**

### **16.1 Introduction**

The NSW building regulation system is both more fragmented than in other jurisdictions and appears to be less resourced.

The BPB is, in the main, funded by a grant provided by the DPE with accreditation fees being the other major revenue source. There is no revenue source from the building industry in general. Compared with other jurisdictions, there is a higher reliance on government funding and limited recourse to industry funding. Both the Victorian and Queensland systems are fully funded by industry in the form of a charge on development applications.

Further, in NSW the Government funding is not directly appropriated from the budget but has been provided in the form of an annual grant by the DPE. This leads to significant uncertainty about the level of funding available from year to year. It also means that when building activity is high, and demands on the regulatory system are also correspondingly high, there is no flow-through of additional funding to handle the regulatory demands generated by increased building activity.

Councils undertake an important compliance role in the building regulation sector, but are not fully funded for this role in terms of charges that they can impose. This is particularly the case when there are enforcement matters that arise with the certification process. There are also caps in the EP&A Regulation with respect to charges and fees that councils can impose, which restrict the ability of councils to recover costs.

### **16.2 Current approach to industry funding**

At present there is a combination of avenues for industry funding of the building regulation and certification process.

Both Fair Trading and BPB levy licensing and accreditation fees respectively to assist in funding their activities. In addition both organisations are able to levy PINs.

Set out in Table 16.1 are the levies applied to development activity in NSW, to which agency they accrue and for what purpose.

**Table 16.1 Industry Levies Applied to the Building Activity**

Levy / fee	Approval stage levied at and rate structure	Who collects	Who receives funds
Planning reform fund (Clause 256A EP&A Reg)	Lodgement – DAs valued over \$50,000 have a rate of 0.064% applied	Councils	DPE
DA, certificate fees (EP&A Act)	Lodgement	Councils for local development, DP&E for major development	Councils DPE
BASIX certificate Clause 262B EP&A Reg.	BASIX certificate issue	DP&E	DPE
Fees for State significant development and State significant infrastructure (EP&A Regulation)	Lodgement	DP&E	DPE
Long service levy (EP&A Act, Long Service Levy Corporation Act)	Building and construction work costing \$25K or above  Construction certificate  Complying development certificate  Subdivision certificate	Pay online to Long Service Levy Corporation or pay councils as the collection agent	Long Service Levy Corporation
Section 94 development contributions (EP&A Act)	Development consent condition, CDCs – usually payable at construction certificate / Occupation certificate stage	Councils and private certifiers	Councils



### 16.3 Proposed funding and resourcing reform

Councils undertake the major part of the compliance function with respect to building regulation but are not adequately financially compensated for their activities. It is estimated that the levies on DAs applied by councils fund broadly 40% of building compliance costs. The corollary is that the balance of the cost is met by general tax payers, which is not necessarily an equitable outcome.

While there is a strong case for the compliance function for councils being self-funded, a balance needs to be drawn between charging all developments for compliance cost and targeting those developments that are non-compliant and hence disproportionately contribute to compliance costs. In principle a distinction can be made between a base level of cost to administer the building compliance system and the additional costs generated by non-compliance. The former costs should be funded by a levy on developments while the latter should be recovered by PINs or similar revenue. This approach is not only equitable but also provides a reasonable level of certainty about the level of funding.

The level of building activity differs in both absolute and proportionate terms across councils and so there is no merit seen in having a common building regulation levy applied across councils. Rather, it is proposed that a cap should be set at a rate expressed as a percentage to apply to DA and CDCs and within this cap, councils should be able to set the level of the levy having regard to their policies and approach to funding from general taxpayers, building development in general and from non-compliant activity in the form of PINs. It is proposed that a levy apply to both DAs and CDCs on the basis that both generate compliance demands on councils though the rate should differ between the two to reflect the relative contribution to compliance cost.

Different councils will have different views about the appropriate mix of funding sources:

- some may wish to fund all compliance activity from the levy
- some may wish to maximise the reliance on PINs with the balance funded by the levy
- some may wish to rely for a core level of funding on rate paying revenue and fund the balance from a mix of PINs and levy.

With regard to the State, in addition to fees for services such as the fee for accreditation of certifiers, the only general levy applied by the State on the building sector is the planning reform fund levy which it is estimated to generate for DPE revenue of \$28.1 million in 2014-15. There is a lack of transparency and accountability with respect to the use to which the funds raised by the levy are applied which should be addressed.

The level of resourcing provided by NSW for building regulation and certification is compared with the level for Victoria and Queensland, the two most comparable states, as well as Western Australia in Table 16.2:

**Table 16.2: Resourcing of the Building Regulation and Certification Function**

Jurisdiction	Staffing FTE	Funding \$m
NSW	192	24.2
Victoria	243	46.5
Queensland	358	30.0
Western Australia	115	26.8

It should be noted that for NSW the resourcing shown is the sum of resourcing for BPB, the various areas of DPE undertaking a building regulation function (BASIX, BPU and the Codes) and the Home Building Services area of Fair Trading. By far the larger part of the resourcing is accounted for by Fair Trading, some 157 staffing and \$18.5 million funding. The above estimates of resourcing and staffing for the building regulation and certification function are likely to be an overestimate as part of the Fair Trading resourcing relates to consumer protection rather than building regulation while part of the DPE component will cover planning functions.

There are two issues to be addressed:

1. The appropriate level of resourcing for the building regulation and certification process.
2. The appropriate sourcing of the funding, that is the mix of budget funding, user funding and broad building industry funding.

Until recently there has been a division in funding and resourcing between Fair Trading and DPE. If the recommendations contained in this report are adopted, the various building regulation functions will be brought together and it will be necessary at that stage to assess the level of resourcing against what is required to ideally fund the function. Once the resources for the various areas relating to the building regulation function are pooled, the first priority is to determine what is the most appropriate and effective allocation of the resources across the various functions.

The second stage is to establish the required level of resources to undertake effectively and efficiently the defined role of the Office of Building Regulation and BPB and the gap between the target level of resources and the actual available level of resources.

The third stage is to assess the appropriate funding sources to address the resourcing gap which can be sourced from the budget, from a levy on DAs and CDCs or a combination of both. The benefit of a levy on DAs and CDCs is that it generates revenue that reflects the level of activity generated from building activity. However, there is a need to have a less volatile funding source than that generated from a levy on building activity, given that there is a core level of staffing and activity that needs to be maintained, regardless of the activity level of the building sector. It is proposed that as a priority Treasury work with Fair Trading, BPB and DPE on developing a model of the

required level of resourcing to undertake the proposed functions, identify a gap, if any, and then determine the mixture of funding that will be needed to fund the required resourcing.

The sources of funding to be taken into account are as follows:

- Level of budget funding
- Level of fees levied
- Fines etc.
- Levy on DAs and CDCs

It is assumed that the levy on DAs and CDCs will be a residual once the level of the other items is determined.

## **16.4 Conclusion**

There needs to be an agreed level of resourcing funding arrangement for both councils with respect to the building compliance function and the Office of Building Regulation and BPB.

It is proposed that a cap be set for councils for the maximum levy that they can impose on DAs and CDCs, with individual councils able to determine the mix of penalty fine revenue, use of ratepayer revenue and the building levy to fund the building compliance function.

For the State's building regulation function it will be necessary to assess the level of resourcing required against the current level of resourcing and its allocation between functions. Once that assessment has been undertaken the second matter to address is the funding sources to be used and their relative contribution. The funding sources for the Office of Building Regulation and BPB are service charges, a building levy applied to DAs and CDCs and budget funding.

## **Part D: Findings, recommendation and implementation**

In this part of the report, the broad findings made have been drawn together and recommendations made on the basis of the analysis, directed at improving the effectiveness of the building regulation and certification system. An assessment has been provided of the targeted outcomes that the recommendations, if implemented, would achieve. The recommendations and targeted outcomes will be used as input in the cost benefit analysis that is currently being undertaken and will be reported on in the final report.

The final chapter provides an overview mapping of how the recommendations should be sequenced. It is not possible to implement the recommendations in one stage for the following reasons:

- many of the recommendations require varying degrees of preparatory work before they could be implemented
- some of the recommendations require other recommendations to be implemented as a precondition.
- some of the recommendations can only be implemented through legislative change

Based on these considerations a sequenced implementation plan has been prepared which divides the implementation recommendations into three stages: short term implementation, medium term and longer term. This is set out in Chapter 18. The implementation plan is only indicative and will need further refinement in the light of the Government's consideration of the recommendations in this report.

## 17 Findings, recommendations and target outcomes

### 17.1 Findings

The key findings from the review of the NSW building regulation and certification system in general and the Building Professionals Act in particular are as follows:

#### Specific requirements of terms of reference

In respect to specific matters set out in the terms of reference (refer to appendix 1), the following findings are made:

- **Terms of reference 3a(i):** The reviewer's conclusions as to which of the policy objectives of the Act continue to be valid

**Finding :** As noted earlier there are no policy objectives in the BP Act and as a consequence a set of objectives were inferred from the second reading speeches introducing the legislation. These are set out in Chapter 2. All the inferred objectives continue to be relevant with certain qualifications. There is a broad qualification that if the recommendations contained in this report are proceeded with and in particular the recommendation to combine the functions of licensing of building practitioners and the accreditation of certifiers in one statutory authority and the authority chosen is BPB, then the objectives will need to be broadened beyond certifiers and certification.

At a specific level the objective "improve the quality and safety of all building work" needs to be qualified in recognition that this would also be an objective of the proposed Office of Building Regulation. It is proposed that the wording be changed as follows: "Contribute to improving the quality and safety of all building work through the operation of an effective certification system".

- **Terms of reference 3a(ii):** The reviewer's conclusion as to which of the policy objectives are no longer valid.

**Finding:** This has been addressed above. None of the objectives is invalid but all will need some level of re-expression to reflect a possible broader role for BPB beyond the accreditation of certifiers.

- **Terms of reference 3a(iii):** The reviewer's recommendations as to whether the current provisions of the Act are appropriate for serving those policy objectives which remain valid.

**Finding:** Set out in Table 11.2 in Chapter 11 are proposed changes in the provisions of the Act and Regulations to facilitate more effective operations of BPB. As noted above, the changes will be more comprehensive if it is decided to assign to BPB the role of licensing building practitioners as well as its current role of accreditation of certifiers.

#### Rationale and approach to building regulation

1. There is a persuasive rationale for governments undertaking the function of building regulation and certification in order to address the safety, health, amenity and sustainability of the design and performance of buildings.
2. While consumer protection is an important function of government which in NSW applies to the residential building sector, the rationale for building regulation is both broader and distinct from consumer protection, given that it

seeks to improve the overall building product and its performance and hence reduce the concerns and complaints of consumers.

3. The approach to building regulation and certification in NSW is broadly consistent with the approach applying in other Australian jurisdictions, New Zealand and Europe, the latter being an example of developed economies with a different history and traditions. The approach involves three foundations: a national building code that is or is becoming performance based; third party certification of building plans and construction against the requirements of the building code; and the licensing and accreditation of building professionals.

### **Performance of the NSW building regulation system**

4. While there is a deficiency in the level of information on building quality and defects, the available evidence would indicate that there is a significant incidence of building defects in Australia, particularly in the residential building sector. A number of high profile incidents in recent times has highlighted deficiencies in the system, including the Bankstown apartment block fire and resulting death and injury, the Lane Cove balcony collapse, the failure of a high level balustrade in Macquarie Park resulting in a death, the Melbourne wall collapse and resultant deaths and the building façade fire in Docklands, Melbourne.
5. There is a significant level of concern by industry and the community about the current state of play with building regulation and certification and a reasonable consensus about how it should be reformed, which is broadly in accord with the proposals set out in Chapter 8 of the Planning White Paper.
6. The approach to building regulation and certification in NSW is handicapped by a highly fragmented, prescriptive and unclear legislative and regulatory framework compounded by a fragmented and under resourced building regulation function.
7. There is a lack of clarity about the role and responsibility of certifiers and of the appropriate relation between councils, as building and planning consent authorities, and certifiers. This needs to be addressed by the clear documentation of the role, functions and activities required of certifiers in the form of a practice guide to which certifiers are held to account as well as an agreed protocol governing the relation between certifiers and councils.
8. An important issue with respect to the certification system is the conflict between the accountability of certifiers for acting in the public interest and their commercial drivers for commercial success, including maintaining good relations with builders and owners/developers. While consideration was given to alternatives to private certification, it was concluded that the majority of certifiers are seeking to do the right thing in the right way and it is better to improve the accountability and transparency of the certification process.
9. A major deficiency in the current building regulation and certification system is the approach to the regulation of the design, installation, commissioning and maintenance of fire safety system and the handling of water proofing which both need urgent reform.

## Governance reform: legislation and administration

10. The integration of the planning and building regulation functions in NSW is fully supported. However, paradoxically, integration of building regulation legislative provisions into the planning Act and building regulation administration into DPE is counterproductive in that it reduces the effectiveness of building regulation, without any gain to planning.
11. It is vital that the building regulation legislation is rewritten on a principles based approach with the flexibility to provide for changes in the detail of the approach to building regulation through changes in regulation and codes. This could be achieved through a new, integrated part to the EP&A Act, with its own statement of building regulation objectives, but ideally should be a separate Building Act that incorporates the Home Building Act.
12. The building regulation function, which is currently divided into various areas in DPE and in Fair Trading, should be consolidated into one government agency. This agency must operate independently of either DPE or Fair Trading, though maintaining close linkages to both organisations. Building regulation has functions and objectives that are distinct from both planning and consumer protection and focusses on the quality of the building outcome.
13. The current licensing of building practitioners undertaken by Fair Trading and the accreditation of certifiers, undertaken by the BPB should be combined in one statutory body in order to create a consistent approach to occupation licensing and accreditation across the building sector. The BPB is the obvious entity to undertake this role.

## Performance of BPB

14. Considered against the *objectives identified for the BP Act, the performance of BPB* is assessed as follows:

BP Act objective	Does this objective remain valid	Do the terms of the Act intended to achieve this objective remain appropriate
1. create a simpler regulatory system (including by establishing a single, independent government authority to accredit all certifiers in NSW).	<p>The objective of creating a single, independent authority to accredit all certifiers was achieved, replacing the system that involved four different accreditation bodies.</p> <p>However, the broader objective of creating a simpler regulatory system has not been achieved with the system notable for both its legislative and administrative fragmentation. Including:</p> <ul style="list-style-type: none"> <li>Separation of licensing of building practitioners from the accreditation of certifiers, resulting in different policies, processes and practices being applied between certifiers and building practitioners</li> </ul>	<ul style="list-style-type: none"> <li>Integration of licensing of building practitioners and accreditation of certifiers in a statutory body.</li> <li>Integrate residential building policy and overall building regulation functions in one building regulation agency.</li> <li>Create a principles based Building Act, integrating the roles of the building controls provisions of the EP&amp;A Act and the Home Building Act</li> </ul>

BP Act objective	Does this objective remain valid	Do the terms of the Act intended to achieve this objective remain appropriate
	<ul style="list-style-type: none"> <li>• Separation between residential building regulation and associated national standards and overall building sector regulation and non-residential building standards</li> <li>• Complex, prescriptive and hard to navigate legislation for building regulation contained in the EP&amp;A Act.</li> </ul>	
2. establish a uniform and robust accreditation scheme.	<p>There is a well-documented accreditation scheme that applies across all classes of certifiers, with requirements defined for conflicts of interest, CPD, qualifications and required experience.</p> <p>However there are weaknesses in the current system:</p> <ul style="list-style-type: none"> <li>• Building certifiers are required to hold a tertiary qualification in building surveying which appears unduly restrictive in that there should be other qualifications, in combination with additional training, that provide the necessary qualifications and knowledge</li> <li>• The review of certifiers performance is reactive, responding to complaints</li> <li>• BPB does not undertake an active role in education, training and support for certifiers</li> </ul>	<ul style="list-style-type: none"> <li>• Broaden the qualifications that qualify for building certifiers, addressing knowledge gaps with additional courses</li> <li>• Proactive audit program of the performance of certifiers, linked to the education and training program</li> <li>• BPB undertake a more active role in the education, training and support of certifiers system</li> </ul>
3. promote and maintain standards of independence and professionalism in certification.	<p>This is an area of weakness, given that certifiers have an inherent conflict between their regulatory responsibility and their commercial interest which depends on being recommended for their role by the builder. There is a need to improve the level of accountability, independence and professionalism. BPB is acting on some of these requirements.</p> <p>Deficiencies in the current approach include the following:</p> <ul style="list-style-type: none"> <li>• Lack of a clear benchmark for how a certifier should undertake its functions- BPB is preparing a practice guide which seeks to address this need</li> <li>• Lack of a proactive, risk based</li> </ul>	<ul style="list-style-type: none"> <li>• Develop and maintain a practice guide which sets out good practice requirements for certifiers, and is regularly updated and supported by a training program</li> <li>• Proactive audit program of certifiers</li> <li>• Community education of the role and responsibility of certifiers</li> <li>• Active program of education, training and support of certifiers, including Peer Review Panels</li> </ul>



BP Act objective	Does this objective remain valid	Do the terms of the Act intended to achieve this objective remain appropriate
	audit and investigation program <ul style="list-style-type: none"> <li>Limited education, training and support program</li> </ul>	
4. provide for the BPB to have strong investigative, disciplinary and emergency powers to protect the safety and property of the public.	BPB has these powers but due to both constraints on resources and a particular philosophy for dealing with complaints, it does not have an effective investigative program, aimed at both increasing the risk for certifiers doing the wrong thing and creating a feedback loop in terms of how the certifier function is operating in the field and how it can be improved.	<ul style="list-style-type: none"> <li>Reorient the complaints investigation process to become first a problem identification and solving process, undertaken in a timely manner, and only subsequent a disciplinary process</li> <li>Develop a program of proactive investigations and audits</li> <li>Expand the range of disciplinary measures, including a demerits point system</li> </ul>
5. improve the quality and safety of all building work.	<p>There is no data collected on which an assessment can be made of the success against this objective. This points to the need to prioritise the obtaining of such information on an ongoing basis.</p> <p>In this regard certifiers are in a privileged position to obtain record and transmit information on building quality and safety and this should be investigated as a priority.</p>	<ul style="list-style-type: none"> <li>Utilise online technology and the role of certifiers to create a comprehensive data base on the quality of building work and areas of defects</li> <li>Improved performance of certification process and linkage between the oversight of certifiers and building practitioners should improve the performance of the building function</li> <li>Target CPD requirements for builders to address areas of high defects (for example, waterproofing)</li> </ul>
6. promote public confidence in the certification system.	<p>From the two surveys that were undertaken as part of the review, as well as feedback provided in submissions and at public meetings, there does not appear to be a high level either of knowledge of or confidence in the certification system.</p> <p>Consumers do not appear to understand the certification system, the role of the certifier and the respective roles of builder and certifier. This is an area that requires public education, directed at people that are undertaking building projects, particularly in the residential building area.</p>	<ul style="list-style-type: none"> <li>Create an online community notice board for all developments in each local government area, with details on how to get additional information or lodge complaints</li> <li>Create an improved working relation between councils and certifiers with clarity with respect to the compliance and enforcement function</li> <li>Public education on the role and responsibility of certifiers</li> </ul>

## The way forward

15. There is a strong case for reform of the building regulation and certification system based on actions in 10 priority areas:
  - Creation of a sound, easily comprehended legislative framework involving the rewrite of building legislation as a principles based, non-prescriptive framework, with the detail set out in supporting documentation such as regulations and practice codes, with complementary changes to the Building Professionals Act.
  - Restructure of the administration of building regulation based on the principles of good administration, including the consolidation of like functions, creating an Office of Building Regulation that while having linkages to planning and Fair Trading is independent of both.
  - Development and implementation of an information systems strategy directed at generating data on the performance and outcomes achieved, involving standardisation and digitalisation of all building regulation instruments, greater access to and transparency of information and more efficient processing of building approvals
  - Enhance the accountability of certifiers to act in the public interest
  - Establish a partnership model between the State and local government, with full consultation and involvement with industry, to oversight an effective working relationship on between councils and certifiers on building regulation.
  - Establish a best practice building regulation and certification system
  - Progress the professionalization of certifiers through improvements in the processes for accrediting, educating and training, supporting and ensuring accountability of certifiers
  - Refocus the complaints handling system for certifiers on identifying and addressing the underlying consumer and community concerns as the first priority, then dealing with any consequent disciplining matter
  - Enhance the coverage and sustainability of the professional indemnity insurance scheme for certifiers
  - Adequately resource and appropriately fund the State's building regulation and certification system, including a revised model for funding the building compliance function of councils.
16. The implementation of the reforms is a major exercise whose success is dependent on a number of critical success factors:
  - Reform champion at both the ministerial level and the organisational level capable of driving the reform and with full understanding of the outcomes to be achieved
  - Clear understanding of building regulation from both a policy and operations perspective and of the linkages to planning
  - Achieving full stakeholder engagement and support

There will be a need for a fully resourced and dedicated project team to be established to drive the reforms, with the reforms to be staged but with a clear commitment and understanding of the ultimate objectives and outcomes.

## 17.2 Recommendations

First, in regard to the specific matters that the terms of reference sought recommendations on, namely:

**Terms of reference 3b:** The reviewer's recommendations as to new or additional policy objectives which should be pursued or adopted

**Terms of reference 3c:** The reviewer's recommendations as the nature of legislative amendments or provisions which may be required to implement and recommended new or additional policy

It is noted that the terms of reference allowed for the review to consider matters beyond the policy objectives of the BP Act and may include recommendations relating to building regulation generally. The following recommendations relate both specifically to BPB and its policy objectives as well as building regulation more generally. It is considered that it is more informative for the reader if these recommendations are presented under 10 priority actions areas as set out below.

It is recommended that the following actions and reforms be endorsed:

### A. Reforms

#### 1. Create a principles based legislative framework for building regulation

1.1 The Government makes an upfront public commitment to achieving and maintaining best practice building regulation and certification in NSW to improve the safety, health, amenity and sustainability of the design and performance of buildings and to this end engage the community and industry in consultation on the basis of the reforms.

1.2 Establishment of a revised legislative basis for building regulation and certification in a separate Building Act, incorporating relevant provisions of the Home Building Act and the building regulation provisions of the EP&A Act in a principles based, plain English form with a clear statement of objectives and with the details to be incorporated in more flexible instruments including regulations and codes.

1.3 In the event that it is decided not to create a separate Building Act, that the current building regulation provisions in the EP&A Act are consolidated in one part of the Act and rewritten in a principles based form, with supporting regulations and codes.

1.4 Rewrite the Complying Development SEPPs in close consultation with the building regulator and industry in a form comprehensible to the industry and for all future changes to or extensions of Complying Development policy to be fully coordinated between DPE and the proposed Office of Building Regulation, and with full consultation with BRAC.

1.5 Maintaining the Building Professionals Act as a separate Act, amended to incorporate a statement of objectives and provide greater flexibility in terms of the changes set out in Table 11.2 of this report, including the handling of licensing and accreditation in the one organisation for the entire building sector

## **2. Strengthen the administration of building regulation and certification**

2.1 Consolidation of the responsibility for the licensing of building practitioners and the accreditation of certifiers in a single statutory authority, with a suitably representative board in order to create an integrated approach to licensing and accreditation in the building sector, while recognising the regulatory role of certifiers and hence the need for additional requirements for accreditation and support.

2.2 Consolidate in an Office of Building Regulation the building regulation and certification functions currently undertaken separately within DPE (namely BPU, BASIX and the administration of complying development policy); the non-licensing policy and regulatory functions, excluding consumer protection, in Home Building Services; and any policy functions currently within BPB.

2.3 Location of the Office of Building Regulation and BPB in one portfolio, either the Finance, Services and Innovation portfolio or the Planning portfolio, reporting to a Minister for Building Regulation, with suitable mechanisms established for a close working relation with local government, Fair Trading and DPE.

2.4 The Minister for Building Regulation appoints the Building Regulations Advisory Council which includes representatives from all the key industry bodies to advise the government on improving building regulation and the quality of the building product.

## **3. Implement an information systems strategy for the building regulation and certification system**

3.1 A commitment be made to developing and implementing an e-Building strategy as a joint project involving the Office of Building Regulation, BPB and local government, with full consultation with the building industry and the e Building Branch of DPE, seeking to achieve digitalised and standardised building information that is accessible and transparent and capable of generating performance and outcomes information.

## **4. Enhance the accountability and clarify the role of certifiers**

4.1 Enhance the accountability of certifiers to act in the public interest by:

- establishing and maintaining a practice guide to create a benchmark for the process that should be followed by certifiers, with the guide given legal effect
- creating a program of proactive investigations and audits of certifiers and certification as practiced in the building sector, linked to the education and training program
- providing greater clarity to the community about the role and responsibility of certifiers, to reduce or eliminate misconceptions about the role of the certifier, including each building contract provided to an owner being accompanied by a leaflet which sets out the role and responsibilities of a building certifier and compares and contrasts this with the roles and responsibilities of a builder
- utilising the partnership arrangement between councils, certifiers and the State to assess and monitor the working relation between private certifiers and councils
- restructure the written contract between certifiers and the beneficiaries of developments as a letter of engagement between the certifier and the beneficiary of the development making clear the regulatory role and

responsibility of the certifier and the obligations of the owner/developer, with execution of the letter of engagement to be enforced

4.2 As an initial stage in the reform process, and subject to Government approval of the legislative and regulatory changes contemplated, the practice guide for certifiers developed by the BPB Reference Group together with the proposed protocol governing the relationship between certifiers and councils being subject to industry consultation and early implementation and subsequently updated as additional building regulation and certification reforms are adopted.

## **5. Establish a partnership model between the State and Local Government in respect to building regulation and certification**

5.1 Establishment of a partnership agreement involving local government, the Office of Building Regulation and the BPB, with consultation with AAC and AIBS, to establish and oversight the operation of a protocol for the respective roles, responsibilities and relationships between private certifiers and councils as building consent and compliance authorities.

5.2 The first priority to be addressed under the partnership model is to be the development of the building information system, as well as oversight of the operation of the protocol for the roles and responsibilities for councils relative to private certifiers in respect to compliance and enforcement.

## **6. Achieve and maintain a best practice building regulation and certification system**

6.1 Proceeding on the basis of an integrated and holistic approach to building regulation and certification covering the design and approval, building construction, completion and maintenance stages, with the proposals set out in Chapter 14 to of this report, augmented as appropriate, to form the basis for public consultation with the release of a discussion paper, before a final approval by government.

6.2 The key elements of a reform package for building regulation and certification would include the following:

<b>Reform element</b>	<b>Specific initiatives</b>
<b>Improved planning and approval process</b>	<ul style="list-style-type: none"> <li>• certification of building plans for Class 2 to 9 buildings by an accredited person</li> <li>• certification of the design of critical building elements and systems by an accredited person</li> <li>• standard information requirements for DAs and conditions for DAs</li> <li>• require an independent assessment for any proposal by councils to impose standards in excess of the BCA for a class or classes of buildings</li> </ul>
<b>Certification to allow commencement of building work</b>	<ul style="list-style-type: none"> <li>• active role for BPB in the selection and monitoring of PCAs for strata and community title developments</li> <li>• establish a robust process for assessing alternative solutions, such as a Peer Review Panel, and capture information on all alternative solutions</li> <li>• establish a “consistent” test, with supporting guidelines</li> <li>• allow prescribed conditions for CCs and CDCs</li> </ul>

Reform element	Specific initiatives
<b>Building construction stage</b>	<ul style="list-style-type: none"> <li>mandate pre-commencement inspection, a risk assessment of what additional critical stage inspections should be undertaken and remove the ability to have missed inspections</li> <li>the installation, commissioning, maintenance and certification of critical building elements and systems to be undertaken by accredited persons</li> </ul>
<b>Occupation stage</b>	<ul style="list-style-type: none"> <li>redesign the occupation certificate/completion certificate and limit the ability of councils to issue building certificates</li> <li>require all buildings, including those with unauthorised work or missed mandatory inspections to obtain an occupation/development completion certificate, with substantial economic penalties for unauthorised work</li> </ul>
<b>Building maintenance</b>	<ul style="list-style-type: none"> <li>require building manuals are established and maintained online for all Class 2 to 9 buildings</li> <li>establish accreditation for persons providing annual certification of fire safety systems.</li> </ul>
<b>General</b>	<ul style="list-style-type: none"> <li>reform the fire safety review process, including accreditation for the design, installation, commissioning, maintenance and certification of fire safety systems; provision of information to FRNSW on all alternative solutions for fire safety systems; remove the requirement for FRNSW to produce fire safety reports; and provide FRNSW with the power to issue penalty infringement notices for non-compliant fire safety systems</li> <li>remove restrictions on participation by accredited private certifiers in subdivision certification and require council subdivision certifiers to be accredited.</li> </ul>

6.3 The certification of fire safety systems and waterproofing be accorded a high priority and act as a demonstration case owing to the issues of public safety in respect to fire safety and the level of complaint and concern regarding waterproofing.

6.4 Reform of the regulation of the fire safety systems for commercial buildings to involve the following approach:

- Accreditation of suitably qualified and experienced persons for the design of fire safety systems, their installation, commissioning and maintenance and that these same professionals be required to certify their work, preferably drawing upon the existing accreditation schemes developed by the relevant professional associations.
- Replace fire safety schedules with a building safety schedule with a broader, revised approach to documenting safety systems in buildings involving:
  - o having a broader scope to cover all important safety features of the building, including but not limited to fire safety systems
  - o initial preparation of the building safety schedule at the time of the issue of the CC or CDC but for the schedule to be updated as the project progresses and finalised at the end of the project, being consolidated into a single building safety schedule where there are multiple CCs/CDCs

- o the final building safety schedule being incorporated into and maintained in the Building Manual.
- Incorporate the *International Fire Engineering Guidelines* or an alternative equivalent requirement as a mandatory referenced document for the purposes of pursuing an alternative solution for fire safety systems and for the certifier to declare that this document has been followed, or to detail in what aspects it has been deviated from and for what reason.
- Provide FRNSW with access through the local government portal, with transitional access arrangements to be provided in the mean time for all Fire Engineering Briefs and Fire Engineering Reports of alternative fire safety solutions that affect a performance standard related to fire and, in particular, where fire brigade intervention is explicitly mentioned.
- Amend the EP&A Regulation to remove the requirement for FRNSW to produce an initial (Clause 144) and final (Clause 152) fire safety report, with the prime reliance placed on the accreditation requirements for fire safety certification.
- Provide FRNSW with the power to issue penalty infringement notices for non-compliant fire safety systems.

6.5 A commitment be made for NSW to work with the Commonwealth to seek to integrate BASIX with the sustainability requirements in the NCC, thus achieving a consistent national approach to building sustainability across all categories of buildings.

6.6 The NSW Government raise with the Building Ministers' Forum the desirability of achieving a nationally consistent approach to clarification of matters relating to the interpretation of the Australian Standards and the NCC.

6.7 The NSW Government formally raise with the Commonwealth Government the proposal of Australian Standards making its information on Standards available free of charge to industry in general.

6.8 The Office of Building Regulation work with ABCB to develop a Standard for engineering design requirements for subdivisions as part of the NCC.

## **7. Enhance the professionalization of certifiers through accreditation, education, training and support for certifiers**

7.1 Improve the certifier accreditation scheme by:

- Extending the range of professional and academic qualifications that can be considered for building certifiers by identifying what professional qualifications have a reasonable mapping with the knowledge required of certifiers, what the gaps in knowledge are and what training programs would be required to bridge the gaps.
- Expanding the accreditation scheme to recognise nationally recognised training organisations and universities.
- Working with relevant tertiary institutions to develop an assessment tool that can assess the knowledge of certifiers in each category against what is required for that category, as well as identifying the gaps that need to be addressed to move to a higher category and using this tool as an objective means to assessing the knowledge of certifiers.

- Extending the current annual accreditation system from an annual scheme to allow for accreditation for period of three to five years for certifiers with a satisfactory history, with provision to continue with annual accreditation where a certifier has a less satisfactory record, until such time as there is evidence of an improvement in performance.
- Replacing the current manual accreditation system with a fully online system which consolidates, in one database, information on certifiers including qualifications, accreditation history, history of continuing professional development, complaints lodged and outcomes.

7.2 Consideration be given to the creation of a building certifier classification A1R, that is A1 Regional that would provide sufficient capability for a certifier with suitable experience to certify for the typical range of building work undertaken in regional NSW.

7.3 Expand the education and training role of BPB by:

- BPB taking primary responsibility for the design and content of the continuing professional development (CPD) program for each category of certifier, in concert with the relevant professional associations, including standards to be met by training providers
- Developing a continuous process of establishing education and training needs for certifiers based on evidence such as data from investigations and advice from certifiers and their professional associations
- Establishing and actively maintaining a panel of suitable training course designers and providers who will work closely with BPB to address any gaps in training needs of certifiers.
- Monitoring of training and education including CPD to ensure relevance, currency and achieving expected learning outcomes, with audits to focus on content and quality of learning material and suitability of lecturers/trainers/educators
- Establish an online system for management of CPD, including a list of CPD training approved by the Board for certifiers to choose from and an online diary system for certifiers to record their training in real time.
- Establish criteria and a process for the assessment and recognition of qualifications.
- Develop and provide an online Accreditation Exam which can be used to allow both self-assessment and BPB assessment of the knowledge of certifiers in various categories.
- Broaden the scope of accreditation to include accreditation with respect to town planning, building design and the design, installation and commissioning of critical building systems and elements, including fire safety systems and waterproofing, with BPB to assess what other areas would benefit from accreditation.



#### 7.4 Expand the support provided to certifiers by:

- Establishing, maintaining and publicising a single dedicated hot line for all building regulation and certification inquiries, consolidating the advice function currently provided separately by BPB, BPU, e-Business Branch in respect to BASIX and the Codes Unit.
  - Establishing in conjunction with the Certifier Associations a both an Advisory Panel of experienced certifiers who can provide more in depth guidance to certifiers, particularly on complex buildings and alternative solutions as well as a Reference Panel for mandatory review of certain designated complex matters.
- 7.5 BPB develop with universities, certifiers, councils and private certifiers a program for providing work experience for students, traineeships and facilitating a career path for each category of certifier.

7.5 Remove the current restrictions on the participation of accredited private certifiers as PCA in subdivision work and require council subdivision certifiers to be accredited with BPB.

7.6 BPB to establish for guidance of certifiers and potential customers, an indicative fee schedule for each class of building work, based on undertaking the work set out in the practice guide.

7.7 Councils and private certifiers to publish their fee structure, including any variable fees for handling non-compliance and for there to be audit of fees charged.

### 8. Refocus of the complaints handling process

8.1 Refocus the approach to the investigation of complaints concerning certifiers to assess and act on the underlying development issue raised by the complainant in a timely manner before addressing possible professional misconduct or unsatisfactory professional conduct by certifiers

8.2 More timely and effective handling of complaints, through both the application of more resources, more effective management of complaints and clear advice to the community about the process and potential outcomes.

8.3 Establish a less prescriptive approach in the legislation to the handling of complaints to facilitate a more streamlined administrative approach.

8.4 Establish a complaints lodgement and management system, which should also include creating an integrated database of all the information on accredited certifiers, including complaints and disciplinary actions, and this information, should be accessible to potential clients.

8.5 Broaden the range of penalties that can be imposed, covering not just certifiers but all building professionals, to include:

- making greater use of an existing system of penalty infringement notices to address detected administrative and procedural errors
- introducing a demerits point system, noting a demerit system is in place in Queensland and has the benefit that it takes account of an individual action that of itself may not justify a fine or suspension of accreditation, but may justify more serious action if it becomes part of a pattern.

## **9. Enhance the sustainability of Personal Indemnity Insurance**

9.1 BPB in conjunction with the certifier association(s) introducing an industry scheme to cover run offs and any other gaps in cover, with the scheme open to all certifiers and with cost reflective insurance pricing at the individual certifier level.

9.2 BPB and the certifier associations to undertake an active role in establishing a panel of approved insurers with agreed conditions and, exclusions; an active program of risk management, identifying and addressing areas generating claims; and establishing a review process for all material claims before submitting the claim to the insurer.

9.3 Consideration be given to changing the maximum liability period for building professionals, including certifiers, under the EP&A Act in the event it is found not possible to obtain run off professional indemnity insurance for the full 10 year period

## **10. Appropriate resourcing and funding**

10.1 Provide the means for councils to fund building compliance function by the State setting an upper limit on a levy for DAs and CDCs and allowing individual councils, within that limit to determine the appropriate mix of funding sources between rate payer funding the levy and PINs for building compliance activity.

10.2 The Office of Building Regulation and BPB to work with the Treasury to identify the incremental level of resources required to undertake the role set out in this report and the mix of budget and industry funding to be applied.

## **B Implementation**

### **11. A resourced, committed and accountable implementation approach**

11.1 The Minister for Building Regulation be given ministerial responsibility and authority to drive the reforms

11.2 A reform task force be established that is suitably resourced with experienced personnel, headed by a person with the experience, capability and commitment to manage the implementation of the reforms and guided by the outline implementation plan set out in Chapter 18.

11.3 The implementation of the reforms fully involve the key stakeholders

## **17.3 Targeted outcomes**

Any regulatory system and associated reform program needs to be evidence based and produce quality, accessible and timely information both on the performance of the system and whether and to what degree it is delivering on agreed objectives and outcomes. Set out below is information on four of the targeted outcomes, followed by a summary of all of the outcomes that are proposed to be tracked as part of the reform program.

## **Evidence based approach**

An integral part of the proposed reforms is to create and maintain a data base that provides the evidence against which to assess the performance of building regulation and guide adjustments of the approach to ensure that a best practice approach is attained and maintained. The data base will track activity in the building sector and how building applications are being processed and how projects are progressing but it does more than that. The key target outcomes to be achieved should be measured and tracked over time.

## **Improved quality, safety and amenity of buildings**

The improved certification process and the increased accountability of certifiers for acting in the public interest will improve the quality of the building product, to the benefit of the community and economy in general.

Key initiatives to drive this improvement include the requirement for building plans for Class 2 to 9 buildings to be prepared and certified by accredited persons; the requirement for the design, installation, commissioning and maintenance of critical building systems and elements to be undertaken and certified by suitably accredited persons; a completely revised approach to the design, installation, commissioning certification and maintenance of fire safety systems in complex buildings, giving greater confidence in the integrity and effectiveness of fire safety systems; greater accountability, support and consistency in the undertaking of the certification process for all buildings; and Peer Review Panels to review higher risk building systems and elements.

In the area of strata and community title developments, where there is evidence of a higher than acceptable level of building defects, it is proposed that BPB has a more active role in the appointment of certifiers and in auditing the certification process followed, seeking to identify and address problems as early as possible, rather than waiting to the stage of consumer complaints and defect rectification.

## **Providing a robust foundation for the expansion of complying developments**

The Government has a commitment to expand the range and level of developments that can be handled as Complying Development. The objective is to reduce the costs and delays in proceeding with developments, while ensuring conformity with planning and building requirements. However, the effectiveness of this initiative is vitally dependent on the effectiveness and integrity of the certification process leading to the issue of CDCs. The evidence is that the system is not as effective and thorough as needed to have confidence in the outcomes generated through the Complying Development process.

A precondition to expanding the Complying Development program and having confidence in the quality of the developments that are undertaken through this process is to both rewrite the Complying Development SEPPs so that there is full clarity by builders and certifiers about what is required and, second, to have a strong certification process that is focussed on the public interest. The reforms proposed in this report will achieve these aims and hence facilitate the Government's objective of increasing the range and proportion of developments handled as Complying Development.

## **Achieving both greater confidence in and greater take up of alternative building solutions**

As noted in Chapter 4, the NCC is performance based with the opportunity to develop and implement alternative solutions for developments as an alternative to conformity with the “deemed to satisfy” building standards. The alternative solution both encourages innovation in building design and approach and potentially improves productivity and lowers building costs.

However, there is a higher risk attached to alternative solutions and a higher technical requirement to evaluate them. Under the current approach there is no full confidence that alternative solutions are being properly evaluated and installed and there is a lack of information on what alternative solutions have been installed and what their maintenance requirements are. The proposed reforms to address these deficiencies include creating a Peer Review Panel approach to assess complex and higher risk alternative solutions; expanding the range of certifiers with the appropriate expertise to support building certifiers in assessing certification of critical building elements and systems; including in the building manual, which is proposed to be established for all complex buildings, information on alternative solutions; and greater dissemination of information on alternative solutions that have been reviewed and found to be effective.

The reforms will provide a more robust review process for alternative solutions, giving greater confidence in the effectiveness of those solutions; provide readily accessible documentation on the alternative solutions in buildings; and disseminate information more widely on alternative solutions, so encouraging their take up.

### **A more informed community**

At present there is a lack of understanding, confusion and a level of frustration in the community about developments and the role of builders versus certifiers. In addition, where private certifiers are involved in developments, many councils, at least in the major metropolitan areas tend to avoid getting involved in compliance and enforcement activities. Members of the community are not aware of who is the responsible party for a development and how to seek additional information and to whom to complain, be it to the builder, the certifiers, the BPB, Fair Trading or the council.

The reforms include a protocol to be agreed between councils and certifiers as to the responsibility for enforcement where there are non-compliant matters regarding developments. In addition, it is proposed that there will be an online community notice board that provides information on all developments in the community, the details of the development, the builder and certifier and contact details; the contact persons for more information or for lodging complaints. Allied to these reforms will be a simplified and accelerated complaints handling process.

Set out in Table 17.1 are the outcomes that are proposed to be targeted by the building regulation and certification reforms, divided between process outcomes, that is intermediate outcomes that improve the building and certification process and societal outcomes, the benefits that are delivered to society in general.

Table 17.1 Targeted outcomes from the building regulation and certification reforms

Outcome	How achieved
<b>Process outcomes</b>	
1. Improved regulatory practice and performance	<ul style="list-style-type: none"> <li>Principles based, non- prescriptive legislation combined with more flexible codes and regulation</li> <li>Feedback loop from operating experience to the design of and approach to building regulation</li> <li>Regular contact and feedback from building regulators in other jurisdictions</li> </ul>
2. Establish and maintain a comprehensive building data base, including information on building safety, alternative solutions and critical building elements	<ul style="list-style-type: none"> <li>Digital data base of development approvals and certificates issued for buildings</li> <li>Online building manual for all complex buildings that is maintained and updated</li> <li>Establish data base on building quality and common defect areas and use this to target rectification strategies</li> </ul>
3. Effective real time monitoring of the performance and activity of the building system	<ul style="list-style-type: none"> <li>Digital data base for all developments</li> <li>Development of and reporting on outcome measures</li> </ul>
4. Improved accountability and professionalism of certifiers	<ul style="list-style-type: none"> <li>Certifiers assessed against the practice guide</li> <li>Proactive, risk based audits of certifiers</li> <li>Expanded education, training and certifier support program</li> <li>Strengthened and more flexible disciplinary measures</li> </ul>
5. Track and assess trends in alternative solutions, that is innovative approaches to building solutions	<ul style="list-style-type: none"> <li>Information of alternative solutions, which is at present not available, will be captured by councils and available to agencies through a portal</li> </ul>
6. Greater certainty and consistency of both development consents and certification	<ul style="list-style-type: none"> <li>Practice guide close monitoring and training and education</li> <li>Access to online data to better monitor building development</li> </ul>
<b>Societal Outcomes</b>	
1. Early identification of building and certification complaints to the satisfaction of consumers	<ul style="list-style-type: none"> <li>Integration of the licensing of builders and trades with a holistic and timely approach to investigating complaints, directed at resolving the any onsite problem</li> </ul>
2. Improved quality of the certification process and more professional and independent certifiers	<ul style="list-style-type: none"> <li>Use of the practice guide to create a good practice approach to certification</li> <li>Education of the community on the role of certifiers and the certification system</li> <li>More extensive monitoring of the work of certifiers</li> </ul>
3. Improved quality, safety and amenity of new buildings	<ul style="list-style-type: none"> <li>Requirement for plans to be prepared and certified by accredited parties</li> <li>Requirement for certification of the design, installation and commissioning of critical building systems and elements for complex buildings, including fire safety systems and waterproofing</li> <li>More robust and accountable certification process</li> </ul>

Outcome	How achieved
4. Greater investment confidence in the NSW building industry	<ul style="list-style-type: none"> <li>Greater certainty and consistency of both development consents and certification</li> </ul>
5. Increase in the uptake of complying developments, with reduced delay and cost in obtaining certification	<ul style="list-style-type: none"> <li>Rewrite of the Complying Development SEPPs to improve clarity to the building industry</li> <li>Training and support for certifiers in assessing complying developments</li> </ul>
6. Greater confidence in the review of Alternative Solutions, leading potentially to better designed and documented alternative solutions, lower building cost and greater innovation	<ul style="list-style-type: none"> <li>Requirement for full documentation and review of Alternative Solutions</li> <li>Peer panel review of complex alternative solutions to assist certifiers</li> <li>Ability to draw upon accredited specialists to help with performance assessment</li> <li>Online data collection to inform alternative solution development and access to alternative solutions</li> </ul>
7. More informed community about developments in their area and knowledge of how to obtain more information or lodge a complaint	<ul style="list-style-type: none"> <li>Online community board of all developments in each council area, with information on the nature of the development, the builder, the certifier and how to obtain additional information or lodge complaints</li> </ul>

## 18 Implementation plan

Set out in this final chapter is an outline of an implementation plan for progressing the recommendations set out in this report. More detailed work planning will be required if the recommendations in this report are endorsed. The actions have been grouped by indicative timeframe assessed for implementation, being:

- Shorter term: 0 to 12 months
- Medium term: greater than 12 months to two years
- Longer term: greater than two years

In view of the history of reviews that have been undertaken of building regulation and certification without any subsequent significant reforms and having regard to the broad industry consensus on the need for such reform and the nature of the reform that should be pursued, it is proposed that the government make a public statement at the outset about its commitment to reform in this area and for full consultation regarding the reform program.

The shorter term priorities are considered to be the following:

- government public statement as noted above
- establishment of new Office of Building Regulation and assessment of resource requirements and funding sources
- appointment of a Minister for Building Regulation and determination of which portfolio area it will be located in
- industry consultation on the initial draft practice guide and the protocol for the relation between councils and certifiers, noting that the practice guide is preliminary and does not reflect the full scope of the reforms which will be subject to a more extensive consultation program
- release of a discussion paper and the undertaking of a broad consultation program on the reform of the building regulation and certification process
- priority implementation of revised approach to the review and certification of fire safety systems and waterproofing.

In addition to ordering the actions by timeframe, the required prior actions necessary as a precondition to undertaking a particular action are identified. The timeframe relates to the delivery of the required outcomes of each action, not to when the action commences.

Table 18.1: Proposed Implementation Plan

Indicative timeframe	Action	Relevant recommendation number	Prior required actions
<b>Short-term</b>			
	1. Announcement by the government of its intention to proceed with building regulation and certification reforms, including fire safety regulatory reform, subject to full public consultation	1.1	Cabinet approval
	2. Resource assessment and interim funding of the Office of Building Regulation	10.1,10.2	1.
	3. Establish Office of Building Regulation and designate Minister for Building Regulation	2.1,2.2,2.3	1
	4. Consolidate in a statutory authority, most likely BPB, the responsibilities for licensing and accrediting building professionals	2.1	1
	5. Public and industry consultation on proposed reforms of the building regulation and certification process	6.1	1.
	6. In principle government approval of the preliminary legislative and regulatory changes contemplated in the draft practice guide and industry consultation on the practice guide followed by adoption, with subsequent updating as additional changes to the building regulation and certification system are adopted.	4.2	
	7. Establishment of partnership agreement between Office of Building Regulation, BPB and local government and preparation of protocol in consultation with the certifier associations	4.1(iv),5.1	1.
	8. Establish the e-Building Project	3.1	
	9. Establish maximum levy for councils for funding building compliance activity and commence requirement for councils and certifiers to publish their schedule of fees	10.1,7.8	
	10. Establish task force to fast track fire safety regulatory reform, and waterproofing certifier reform	5.2,6.3,6.4	
	11. Remove restrictions on private certifiers participating in subdivision certification	7.6	



Indicative timeframe	Action	Relevant recommendation number	Prior required actions
	12. Establish enhanced certifier support arrangements	7.4	
	13. Reconstitute BRAC	2.4	
	14. Undertake consultation on interim practice guide and the protocol between councils and certifiers	4.1	Approval by relevant Ministers of proposed policy changes
	15. Raise the proposal for nationally consistent interpretation of the NCC and for free access to Australian standards at the Building Ministers Forum	6.6, 6.7	
<b>Medium term</b>			
	16. Develop and implement a communication program to inform building consumers of the role and responsibilities of certifiers	13 (iii)	
	17. Legislate the Building Act with corresponding amendments to Home Building Act and EP&A Act	1.2, 1.3, 6.1, 6.2	1, 5
	18. Legislate the changes to the BP Act	1.5	
	19. Redraft the complying development SEPPs in consultation with the Office of Building Regulation combined with a public consultation process	1.4	
	20. Extend certification to include fire safety and waterproofing as a first priority	6.3, 6.4	10
	21. Implement revised approach to fire safety regulation	6.4	
	22. BPB to introduce a revised accreditation scheme for certifiers	7.1	
	23. BPB to establish a proactive audit program	4(ii)	2
	24. BPB to re-engineer the complaints and disciplining system	8.1, 8.2, 8.3, 8.4	2
	25. BPB to introduce an expanded education and training role and put in place support mechanisms for certifiers	7.3, 7.4	2
	26. Introduction of an improved trainee and career path opportunities	7.5	

Indicative timeframe	Action	Relevant recommendation number	Prior required actions
	27. Introduce a revised industry based PII scheme	7.2, 9.1, 9.2	
	28. Introduce an indicative fee scale for certifiers and commence publication of schedule of fees by councils and private certifiers	7.7	
<b>Longer term</b>			
	29. Office of Building Regulation to work with ABCB to address any gaps between BASIX and the sustainability code, leading to the replacement of BASIX with reference to the national code	6.5	
	30. Office of Building Regulation to work with ABCB to develop a standard for engineering design requirements for subdivisions	6.8	
	31. Introduction of e-Building information scheme	3.1	9

## Appendix 1: Terms of reference for the review

### The review

The Hon Robert Stokes MP, the Assistant Minister for Planning (Minister), requests Mr Michael Lambert (the Reviewer) to:

- undertake a review of the *Building Professionals Act 2005* (Act) under Section 97 of that Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives
- examine the Independent Pricing and Regulatory Tribunal reviews into *Licence Rationale and Design* and *Local Government Compliance and Enforcement* (IPART reviews) and identify any implications or outcomes from those reviews which relate to building regulation reform
- review any other report produced since the Act was assented to which relates to building regulation reform or the certification of building work.

The Minister requests that the review of the Act be undertaken on his behalf in accordance with these Terms of Reference (Terms).

This review presents an opportunity to deal with the broader issues relating to building regulation reform discussed in the IPART reviews and in other reports or enquiries.

The review will include the actions, consultation and considerations set out in these Terms.

#### 1. Policy Objectives

The Reviewer is to confirm the policy objectives of the Act.

In order to understand the policy objectives, the Reviewer is to have regard to (but is not limited to):

- the Act as made and legislation that has amended the Act
- Parliamentary Second Reading Speeches in relation to the Act and amending legislation
- the 2002 report by the Joint Select Committee on the Quality of Buildings
- such other policy documents as may be provided to the Reviewer by the Department of Planning and Environment (Department) or the Building Professionals Board (BPB).

#### 2. Validity of Policy Objectives

The Reviewer is to consider whether the policy objectives of the Act are still valid and whether there are new policy objectives that should be pursued.

The Reviewer is also to consider whether there are other policy objectives relating to building regulation generally that should be pursued.

The Reviewer must have regard to (but is not limited to) the reports and reviews listed in Annexure A.

To assist the Reviewer in undertaking the review and to undertake stakeholder consultation, the Department will:

- make arrangements for the Reviewer to confer in private sessions and/or group sessions (as determined to be appropriate by the Reviewer) with:
  - the stakeholder groups listed in Part 1, Annexure B
  - the BPB personnel listed in Part 2, Annexure B
  - the personnel of the Department listed in Part 3, Annexure B
  - such other persons or organisations as required by the Reviewer
- arrange for notices to be published in newspapers in the locations listed in Annexure C advising that the review is being conducted, and inviting written public submissions and/or attendance at public forums to be held in those locations
- arrange for public forums to be conducted, at which the Reviewer will be the Convenor, in the locations listed in Annexure C
- provide such administrative or other support as the Reviewer may require.

### **3. Draft Report**

The Reviewer is to prepare a draft report which sets out:

- the Reviewer's conclusions as to:
  - which of the policy objectives of the Act continue to be valid
  - which of the policy objectives are no longer valid
  - whether the current provisions of the Act are appropriate for securing those policy objectives which remain valid
- the Reviewer's recommendations as to new or additional policy objectives which should be pursued or adopted. In this regard, the recommendations that may be made are not to be limited to policy objectives for the Act, and may include recommendations relating to building regulation generally
- the Reviewer's recommendations as to the nature of legislative amendments or provisions which may be required to implement any recommended new or additional policy. In this regard the recommendations that may be made are not limited to the Act, and may include recommendations for the amendment of other legislation or the introduction of new legislation. In making any such recommendation the Reviewer should seek the assistance and input of the personnel of the BPB and Department listed in Part 4, Annexure B.

### **4. Public Exhibition**

The Reviewer will provide the draft report to the Department, which will publish it on the website of the BPB and the Department, and invite final written public comment for a period of 28 days.

### **5. Final Report**

The Reviewer will consider all written public submissions received and prepare a final report for the information of the Minister.

For the purpose of preparing the final report, the Reviewer will identify viable options for reforms to the Act and/or building regulation generally.

The Department will assist the Reviewer to obtain the services of an appropriately qualified person to conduct a cost-benefit study of the options.

The Reviewer will have regard to the cost-benefit studies when preparing the final report.

The final report will include indicate the Reviewer's preferred option for reform.

## **6. Governance**

The Reviewer will commence the review by October 2014.

The Reviewer will provide monthly progress updates to the Secretary of the Department (Secretary).

The draft report is to be provided to the Secretary by 31 July 2015.

The final report is to be provided to the Secretary by 31 October 2015.

## ANNEXURE A

- *Building Certification and Regulation - Serving a New Planning System for NSW* by George Maltabarow.
- Independent Pricing and Regulatory Tribunal draft reports titled *Licence Rationale and Design* and *Local Government Compliance and Enforcement*.
- Draft Home Building Regulation 2014 and associated Regulatory Impact Statement.

## ANNEXURE B

### Part 1

Association of Accredited Certifiers

Australian Institute of Building Surveyors

Office of Local Government

Development and Environmental Professionals' Association

Australian Institute of Building

Urban Development Institute of Australia

Property Council of Australia

University of Technology, Sydney

University of Western Sydney

University of Newcastle

TAFE NSW

Engineers Australia

Planning Institute of Australia

Australian Institute of Architects (NSW)

Building Designers Association of Australia

The Institution of Surveyors NSW

Australian Building Codes Board

Business Council of Australia

Fire Protection Association Australia

Insurance Council of Australia

Local Government NSW

National Fire Industry Association

Strata Community Association NSW

Owners Corporation Network

Fire and Rescue NSW

NSW Fair Trading

Swimming Pool and Spa Association

Master Builders Association  
Housing Industry Association

## **Part 2**

Members of the Board  
Manager  
Team leaders

## **Part 3**

The Secretary  
Deputy Secretary, People and Business  
Executive Director, Corporate and Executive Services  
Director, Legal Services  
Director, Building Systems Unit  
Team Leader, Building Systems Unit  
Director, Local Plans Codes and Development Guides  
Manager, Codes and Complying Development

## **Part 4**

### BPB Personnel

BPB President  
BPB Manager

### Department Personnel

The Secretary  
Deputy Secretary, People and Business  
Executive Director, Corporate and Executive Services  
Director, Legal Services

## **ANNEXURE C**

Sydney  
Newcastle  
Wollongong  
Ballina  
Batemans Bay  
Wagga Wagga  
Dubbo  
Tamworth

## **Appendix 2: Key stakeholder meetings and consultation events**

### **KEY STAKEHOLDER MEETINGS**

Meetings were conducted with the following individuals, position holders, agencies and other bodies.

#### **NSW Government Ministers**

NSW Minister for Planning, the Hon. Rob Stokes, and in his former role as Assistant Minister for Planning

NSW Minister for Innovation and Better Regulation, the Hon. Victor Dominello

NSW Minister for Local Government, the Hon. Paul Toole, and Chief of Staff, Darren Bark

The Hon. Pru Goward, in her former role as the Minister for Planning

The Hon. Matthew Mason-Cox, in his former role as NSW Minister for Fair Trading

#### **Other government agency representatives**

John Tansey, NSW Fair Trading

Richard Potts, NSW Fair Trading

Greg Buckley, Fire and Rescue NSW

David Boverman, NSW Rural Fire Service

#### **Building Professionals Board**

President, George Maltabarow

Board members: George Maltabarow, Malcolm Ryan, Sarah Hill, Robert Marinelli, Peter Meredith, Karen Stiles, Susan Bailey and Sean O'Toole

BPB Manager, Dr Gabrielle Wallace

BPB personnel

#### **Department of Planning and Environment Personnel**

Secretary, Carolyn McNally

Deputy Secretary, Policy and Strategy, Alison Frame

Executive Director, Resources and Industry Policy, Alex O'Mara

Manager, Codes and Complying Development, Lynne Sheridan

Director, Legal Services, Eloise Murphy

Team Leader, Building Policy, Stephen Durnford

Senior Building Policy Officer (and the planning white paper building regulation program manager), Building Policy, Alan Host

Director, Building Regulation, Alison Geddes

Former Director, Building Systems, Neil Cocks

Chief Economist, John Stephens



Executive Director, Regions, Tim Hurst

Director, e-Planning, John Hudson

Policy and Legal Manager, e-Planning, Peter Holt

Acting Director, Planning Frameworks, Josephine Wing

### **Building Professionals Board**

Accreditation Team Leader, Jonathan Lynch

Investigations Team Leader, Vas Kumar

Principal Legal Officer, Tony Grey

### **Building Regulations Advisory Council (BRAC)**

Stephen Durnford, Alison Geddes, Michael Said, Alan Host, Michael Marks, Stephanie Wake and Helen Ting from the Department of Planning and Environment

Gabrielle Wallace, Manager, Building Professionals Board

Peter Conroy, City of Sydney Council

Benjamin Cohen, Ministry of Health

Greg Buckley, Fire and Rescue NSW

Upali Mallawaarachy, Land and Housing Corporation

Peter Sarlos, Australian Institute of Architects

Brian Seidler, Master Builders Association

Paul Murtough, Department of Finance and Services

Trevor Beardsmore, Property Council of Australia

David Lawrence, Housing Industry Association

Russel Grove, Australian Institute of Building Surveyors

David Boverman, NSW Rural Fire Service

### **Industry**

David Blackett, Association of Accredited Certifiers

Craig Hardy, Association of Accredited Certifiers

Neil Savery, Australian Building Codes Board

Russell Grove, Australian Institute of Building Surveyors

David Alessi, Australian Institute of Building

Bob Whittaker, Australian Institute of Building

Glenn Barker, Barker Ryan Stewart Pty Ltd

Allan Harriman, BCA Logic

Ian Bassett, Building Designers Association of Australia

Melanie Symington, Building Designers Association of Australia

Ian Robertson, Development and Environmental Professionals' Association

Jamie Loader, Development and Environmental Professionals' Association

Brian Malouf, Development and Environmental Professionals' Association

Steve Finlay, Engineers Australia

Robert Hart, Engineers Australia

Charles Rickard, Engineers Australia

Matthew Wright, Fire Protection Association of Australia

David Laurence, Housing Industry Association

Michael Buckley, Housing Industry Association

Peter Vandergraaf, Institute of Surveyors

Peter Backe-Hansen, Insurance Council of Australia

Kelvin Bannan, Insurance Council of Australia

Mark Coss, Insurance Council of Australia

John Jousif, Insurance Council of Australia

Donna Rygate, Local Government NSW

Noel Baum, Local Government NSW

Jane Partridge, Local Government NSW

Dr Amer Magrabi, Lote Consulting

Suzie Broome, Makinson d'Apice Lawyers

Peter Meredith, Master Builders Association

Carmel Coate, National Fire Industry Association

Maurene Horder, Planning Institute of Australia

Tony McNamara, Planning Institute of Australia

Evelyn Subagio, Property Council of Australia

Spiros Dassakis, Swimming Pool and Spa Association

Justin Drew, Urban Development Institute of Australia

### **Strata bodies**

Greg Harwood, Strata Community Association

Chris Mo'ane, Owners Corporation Network

Karen Stiles, Owners Corporation Network

Suzie Broom, Owners Corporation Network

Stephen Goddard, Owners Corporation Network

### **Councils**

Sue Robinson, City of Sydney Council

John Riley, City of Sydney Council

Trevor Taylor, Blacktown City Council

Marise van der Walt, North Sydney Council

Long Huynh, North Sydney Council

Gordon Dryburgh, Lake Macquarie Council

Michael Keys, Albury Council

Steven Campbell, Parkes Council

Michelle Bicket, Parkes Council

Howard Orr, Parkes Council

Roman Wereszinski, Randwick Council

### **Academics and training organisations**

David Russell-Jones, TAFE NSW

Kim Maund, University of Newcastle

Geraldine O'Connor, University of Technology, Sydney

## **CONSULTATION EVENTS**

Almost 300 people attended public forums and council sessions at nine locations around NSW as part of the Building Professionals Act Review.

The largest attendance numbers were recorded in Sydney (29 council attendees and 43 at the public forum) and Penrith (30 at the council session and 49 at the public forum).

Council consultation sessions were held to specifically examine review-related topics of importance to councils.

Public and council events were combined and session times extended at Dubbo, Batemans Bay and Tamworth to enable all topics to be discussed.

Details of forum dates, venues and times are listed in the following tables.

**Public hearings**

Date	Place	Venue	Time
12 May 15	Dubbo	Dubbo Regional Centre	12 - 1.30 pm
14 May 15	Batemans Bay	Hanging Rock Sports Centre	12 - 1.30 pm
15 May 15	Tamworth	Tamworth Community Centre	12 - 1.30 pm
20 May 15	Ballina	Ballina Surf Club	12 - 1.30 pm
21 May 15	Sydney	MLC Centre	5 - 6.30 pm
27 May 15	Wagga Wagga	Mercure Hotel	12 - 1.30 pm
1 Jun 15	Wollongong	Wollongong Town Hall	5 - 6.30 pm
2 Jun 15	Newcastle	Entertainment Centre	5 - 6.30 pm
5 Jun 15	Penrith	Penrith Panthers	12 - 1.30 pm

**Council consultation events**

Date	Place	Venue	Time
20 May 15	Ballina	Ballina Surf Club	2 - 3 pm
21 May 15	Sydney	MLC Centre / Trade and Investment	3 - 4 pm
27 May 15	Wagga Wagga	Mercure Hotel	2 - 3 pm
1 Jun 15	Wollongong	Wollongong Town Hall	3 - 4 pm
2 Jun 15	Newcastle	Entertainment Centre	3 - 4 pm
5 Jun 15	Penrith	Penrith Panthers	2.30 - 3.30 pm

## Appendix 3: Newspaper advertising

Notices were published in newspapers in the locations listed in Annexure C to the Review's terms of reference. The advertisements advised the public that the review was being conducted and invited them to attend public forums or make written public submissions.

Publication date	Forum location	Newspapers
6 May 15	Dubbo	Bathurst Western Advocate, Dubbo Daily Liberal and Orange Central West Daily
7 May 15	Tamworth	Tamworth Northern Daily Leader
8 May 15	Batemans Bay	Batemans Bay Post
13 May 15	Sydney and Penrith	Sydney Morning Herald and Daily Telegraph
14 May 15	Ballina	Lismore Northern Star
15 May 15	Wagga Wagga	Daily Advertiser
21 May 15	Wagga Wagga	The Rural
18 and 25 May 15	Newcastle	Newcastle Herald
19 and 25 May 15	Wollongong	Illawarra Mercury

## Appendix 4: Survey of certifiers

Open from 4 May to 15 June, this online survey asked certifiers and other practitioners about the type and volume of their work.

Accredited certifiers and peak bodies were notified by email about the survey.

A total of 306 people responded to the survey, including 259 accredited certifiers (18 per cent of all accredited certifiers). Of those respondents, 235 worked mostly as A1, A2, A3 or A4 category certifiers (including 22 A4 category certifiers whose accreditation authorises them to carry out inspections but not issue certificates), and 24 worked mostly as B, C, D or E category certifiers.

The remaining 47 respondents to this survey were builders, architects, building designers, consultant building surveyors, tradespeople, and others.

### Key findings

The majority of certifiers reported they were confident or very confident when carrying out their work (i.e. assessing development compliance against the prescribed standards, the BCA and other legislative requirements). This result was supported by other questions in which certifiers reported many years of experience in the profession and a high level of formal education.

Legislative complexity was viewed as the biggest impediment to working as a certifier, while accreditation standards were the biggest impediment to becoming a certifier.

There were mixed views about the level of job satisfaction. Most certifiers were satisfied or very satisfied with their work. Half of them reported a decrease in job satisfaction in the past three years, 15 per cent reported an increase, and the remaining 35 per cent said their level of job satisfaction had stayed the same.

Legal liability and the cost of professional indemnity insurance was viewed as a barrier to attracting new certifiers, and rising premiums affected some certifiers' choices about the type of work they carried out.

## Appendix 5: General survey

Open from 4 May to 15 June, this survey based on questions in the discussion paper attracted 490 responses.

Not all questions were mandatory, and the response rate for each question varied.

Most proposals in the discussion paper received general support, and all significant issues were considered to have been included.

The responses indicated general support for proposals to:

- consolidate all building legislation (including the Home Building Act) in its own Act or in one part of the EP&A Act
- consolidate building regulation administration in either a single body to licence all building professionals or a separate independent building commission
- adopt standard forms for DAs, CCs, CDCs and OCs
- adopt standard DA conditions or independent assessment if a council imposes standards above the BCA
- issue improved community information on local development
- limit DAs to concept approval
- standardise information requirements for CCs/CDCs
- standardise the report for alternative solutions, with content confirmed by a certifier
- replace the 'not inconsistent test' with a consistency test for CCs, OCs and CDCs
- address current problems with the regulatory approach to the construction stage by:
  - ensuring the builder receives certified plans and CC/CDC
  - documenting and requiring adherence to good certifier practice
  - additional inspections based on risk assessment
  - replacing interim/final OCs with OC and DCC
  - requiring an OC for projects with missed inspections and unauthorised work
  - imposing effective financial sanctions for unauthorised work
- improve certifier supply and make certification a more attractive career by:
  - accrediting building designers and designers of critical elements
  - widening education on how a certifier's role differs from that of a builder, and
  - increasing support through advisory panels and a practice guide
- improve certifier accountability through a practice guide, proactive investigations and audits, and increased awareness of a certifier's role
- reform the regulation of building fire safety by:
  - accrediting fire safety designers, installers and/or technicians
  - replacing the fire safety schedule with a compliance schedule
  - incorporating international guidelines in alternative solutions
  - widening the range of alternative solutions notified to Fire and Rescue NSW
  - giving Fire and Rescue NSW the discretion to prepare reports and focus on higher risks

- giving Fire and Rescue NSW a five day window of opportunity to inspect before OC issue, and
- allowing Fire and Rescue NSW to issue fines.



## Appendix 6: Submissions received

### CERTIFIERS – INDIVIDUALS

Bruce Gaal, Accredited Building Surveyor, Willoughby City Council  
 Mark Dodgson, E1 Certifier, Inspections NSW  
 Stephen Murray, AcroCert Pty Ltd  
 Andrew Clift, ABSA Sustainability Assessor  
 Greg Patten, Building Surveyor, Local Government  
 Steve Johnson, Director/Accredited Certifier, Land Development Certificates  
 Nathan O’Connell, Building Surveyor, Berrigan Shire Council  
 Peter Conroy, Accredited Certifier, Local Government  
 Glenn Barker, Accredited Certifier (Subdivisions), Barker Ryan Stewart Pty Ltd  
 Emma Strickland, Senior Building Surveyor, Hawkesbury City Council  
 Robert Bennett, Building Surveyor, Local Government  
 Peter Durisic, Registered Architect and Accredited Building Certifier  
 Greg Miles, Building Co-ordinator, Hawkesbury City Council  
 Stephen Johnson, Accredited Certifier, and Andrew Symonds, Accredited Certifier, Land Development Certificates

### DEVELOPMENT INDUSTRY AND PROFESSIONAL BODIES

Joe Pastrovic, Yallah Project Homes Pty Ltd  
 Spiros Dassakis, CEO, Swimming Pool and Spa Association  
 Karen Stiles, Executive Officer, Owners Corporation Network  
 Damian O’Shannassy, NSW/ACT Chapter President, Australian Institute of Building Surveyors  
 Peter Gardner, Manager, Fire Engineering Consultancy, NSW Fire Engineering Group  
 James Cameron, Policy and Advocacy Manager, Australian Institute of Building  
 Kristin Brookfield, Senior Executive Director, Housing Industry Association Ltd  
 Robert Welch, Secretary/Life Member, Association of Hydraulic Services Consultants Australia (NSW) Inc  
 Matthew Wright, Chief Technical Officer/Deputy CEO, Fire Protection Association Australia  
 Brian Seidler, Executive Director, Master Builders Association  
 John Hatch, Principal Building Designer, Building Designers Australia  
 Jason Jeffress, Director, Defire  
 Clinton Cole, Director, CplusC Architectural Workshop  
 Stephanie Wake, Business Development Manager, CplusC Architectural Workshop  
 Peter Boyce, North Western Certifiers Forum

Trevor Beardsmore, Chair, BRAC sub-committee

Robyn Hobbs OAM, Small Business Commissioner

Glenn Byres, NSW Executive Director and Evelyn Subagio, NSW Policy Advisor, Property Council of Australia

Jim Smith AFSM, Acting Commissioner, Fire and Rescue NSW

Illana Halliday, Chief Executive Officer, Aged and Community Services

Rachel Lynn, General Manager, Strata Community Australia

David Bannerman, Bannermans Lawyers

Chris Johnson AM, Chief Executive Officer, Urban Taskforce Australia

Jill Brookfield, Executive Officer, Association of Accredited Certifiers

## **COUNCILS**

Robert Greenwood, General Manager, Blue Mountains City Council

Carey McIntyre, Director, City Outcomes, Shellharbour City Council

Stephen Krimmer, Supervisor Certification, Penrith City Council

Noel Baum, Director, Policy, Local Government NSW

David Whitwell, Building and Plumbing Coordinator, Wagga Wagga City Council

Dominic Johnson, Group Manager, Environment and Planning, City of Ryde Council

Timothy Tuxford, Manager Compliance, Woollahra Municipal Council

Greg Raft, Director, Environmental and Planning Services Department, Holroyd City Council

John McKee, General Manager, Ku-ring-gai Council

Kevin Mack, Mayor, Albury City Council

Roman Wereszczynski, Manager, Health Building and Regulatory Services, Randwick City Council

Melissa Watkins, Director, Environmental Services, Dubbo City Council

Helen Sloan, Program Manager, Southern Sydney Regional Organisation of Councils (SSROC)

Eddie Love, Planning and Building Services Manager, Muswellbrook Shire Council

Peter Jeuken, Manager, Development and Compliance, Lismore City Council

Geoffrey Douglass, Senior Development Officer (Projects), City Of Newcastle

Andrew Carfield, Director, Planning and Environment, Wollongong City Council

Andrew Henry, Coordinator, Health and Building, Singleton Council

Mark Dicker, Director, Planning and Environmental Services, Blayney Shire Council

Simone Plummer, Manager, Certification and Development Assessment, Sutherland Shire Council

Ben Taylor, Executive Director, Shore Regional Organisation of Councils

Jackie Kruger, Director, Planning and Community Services, Tamworth Regional Council  
Brendan Leo, Acting Manager, Development Services, Campbelltown City Council  
Paul Vogt, Manager, Regulatory Services, Rockdale City Council  
Michael Mason, Executive Manager, Environmental Services, Lane Cove Council  
Scott Pedder, Director, City Planning and Environment, Bankstown City Council  
Graham Jahn, Director, City Planning, Development, Transport, City of Sydney

## **OTHER GROUPS OF INDIVIDUALS**

Hylda Rolfe  
David McLaughlin, Licensed Builder  
Peter Edwards, Architect  
Robert Hart  
John McCormack  
Michiel Dolk, Sturt Street Residents  
Mark Dodgson, Property Owners Association  
Name withheld, home owner  
Dr Amer Magrabi, Director, Lote Consulting  
Peter Johnson FTSE ARUP, retired C10 certifier  
Paula Doherty, Greater Taree City Council  
Jane Coates, Randwick Council  
Scott McGufficke, AcroCert Pty Ltd  
Name withheld, community group

## Appendix 7: Chronology of significant developments in the NSW building regulation and certification system

Date	Event
1992-93	The Building Code of Australia commenced in NSW
1993	<i>The Local Government Act 1993</i> allowed councils to place greater reliance on the certification of the design and installation of building works
1997 (1 July)	A performance-based version of the Building Code of Australia (alternative solutions) was introduced in NSW
1997	The Home Warranty Insurance Scheme was established under the <i>Home Building Act 1989</i>
1998 (Commenced on 1 July)	Changes to the EP&A Act transferred building related functions from the <i>Local Government Act</i> to the EP&A Act. It also introduced private or council certifying authorities
1998 (November and December)	Two accreditation bodies were approved to accredit private certifiers in accordance with their accreditation schemes. The first private certifiers were accredited and private certification became part of the development assessment process
2002 (February)	The Consumer, Trader and Tenancy Tribunal was established, replacing the Fair Trading Tribunal and the Residential Tribunal
2002 (March)	The NSW and Victorian governments changed their home warranty insurance schemes to protect future viability following concerns raised by insurers
2002 (May)	The then Department of Planning took over the administration of the Building Surveyors and Allied Professions Accreditation Scheme
2002 (July)	<i>The Joint Select Committee on the Quality of Buildings</i> published the <i>Report upon the Quality of Buildings</i> (the 'Campbell Report')
2002 (July)	The <i>Home Building Amendment (Insurance) Act 2002</i> came into effect in response to concerns about the viability of the Home Warranty Insurance Scheme. It placed various limitations and restrictions on the scheme and converted it to a last resort policy

Date	Event
2002	The <i>Building Legislation Amendment (Quality of Construction) Act 2002</i> was passed. It amended the EP&A Act and the <i>Home Building Act</i> , introduced a dispute resolution service for consumers and licensed builders/trades, a financial soundness test for new licensees, and certain mandatory conditions for building contracts
2003 (October)	The final report of the NSW Home Warranty Insurance Inquiry (the 'Grellman Inquiry') recommended further changes to the Home Warranty Insurance Scheme
2004	The Building Professionals Branch was established in the Department of Planning, partly in response to the Campbell Report, which recommended increased government involvement in the regulation of building professionals and an expanded accreditation scheme including council certifiers
2005 (September)	<i>Home Building Amendment Act 2004</i> came into effect to enable implementation of the reforms recommended by the Grellman Inquiry
2005 (December)	The <i>Building Professionals Act</i> was passed by Parliament
2006	The draft regulations and accreditation scheme for the <i>Building Professionals Act</i> were exhibited
2007 (January-February)	The <i>Building Professionals Act 2005</i> was proclaimed, the Board was appointed and the Accreditation Scheme was gazetted
2007 (March)	The Building Professionals Board became operational and the four former accreditation bodies were no longer authorised to accredit private certifiers
2007 (November)	The discussion paper <i>Improving the NSW Planning System</i> was released for public consultation
2008 (July)	The Council of Australian Governments (COAG) agreed to establish a National Occupational Licensing System for building and building-related occupations, and other property-related trades and professions.
2008 (July)	The <i>EP&amp;A Amendment Act 2008</i> introduced reforms including: <ul style="list-style-type: none"> <li>increased local council investigatory and enforcement powers</li> <li>provision for the issue of compliance cost notices by councils</li> </ul>

Date	Event
2008 (October)	The Building Professionals Board started accrediting bodies corporate under the <i>Building Professionals Act</i>
2009 (February)	The <i>State Environmental Planning Policy (Exempt and Complying Development Codes) 2008</i> commenced
2009 (November)	Major changes were made to the Home Warranty Insurance Scheme, with application from 1 July 2010
2010 (February)	A review of the <i>Home Building Act 1989</i> commenced
2010 (1 March)	Amendments to the BP Act, BP Regulation and the Accreditation Scheme commenced to allow the Board to accredit council accredited certifiers
2010 (July)	Reforms to the Home Warranty Insurance Scheme commenced and the NSW Self Insurance Corporation became the sole home warranty insurer in NSW
2010 (September)	Amendments to the BP Act required council officers to be accredited in categories A1, A2, A3 and A4.
2010 (October)	The Fire Protection Systems Working Party produced its final report: <i>Design, Approval, Installation, Certification and Maintenance of Fire Protection Systems</i>
2010 (October)	The Electronic Housing Code – an online system for the electronic lodgement of complying development applications – was launched in NSW
2011 (October)	<i>Home Building Amendment Act 2011</i> was assented
2011 (December)	A review of the EP&A Act commenced with the release of a discussion paper, <i>The Way Ahead for Planning in NSW?</i>
2011 (December)	Consultation commenced on the review of the NSW strata and community title legislation
2012 (May)	The National Construction Code was implemented through NSW legislation
2012 (July)	NSW Fair Trading started consulting on <i>Home Building Act</i> reform
2012 (July)	The NSW Government released the <i>Green Paper: A New Planning System for New South Wales</i> , which proposed major reforms to planning and building regulation in NSW.
2012 (November)	<i>The Final Report of the Independent Inquiry into Construction Industry Insolvency in NSW</i> (the ‘Collins

Date	Event
	Report') was released
2013 (January)	The <i>NSW Building Regulation Working Party Report</i> was released
2013 (March)	Council accreditation applications could no longer be made. Council officers seeking to be accredited from 1 March 2013 had to satisfy the same accreditation criteria as private certifiers
2013 (April)	The NSW Government released the Planning <i>White Paper: A New Planning System For NSW</i> , which included a chapter on building regulation and certification, and two exposure Bills
2013 (May)	<i>The 'Maltabarow Report' on Building Certification and Regulation - Serving a New Planning System for NSW</i> was released
2013 (November)	The planning reforms failed to be passed in the Legislative Council
2013 (November)	NSW Fair Trading released the <i>Strata and Community Title Law Reform Position Paper</i>
2013 (December)	COAG decided not to pursue the National Occupational Licensing Scheme
2014 (May)	The Independent Pricing and Regulatory Tribunal released the draft report, <i>Reforming Licensing in NSW-Licence Rationale and Design</i>
2014 (May)	The Independent Pricing and Regulatory Tribunal released the draft report, <i>Local Government Compliance and Enforcement</i>
2014 (September)	NSW Fair Trading released the <i>Community Schemes Law Reform Position Paper</i>
2015 (February)	The NCC became available online, free of charge
2015 (August)	The Independent Pricing and Regulatory Tribunal released the final report, <i>Reforming Licensing in NSW-Review of Licence Rationale and Design</i>

## Appendix 8: References

- Australian Government, 2011, *Australian Consumer Survey*
- Building Professionals Board, 2012, 'Better Buildings Model: Background paper for stakeholder forum'
- Building Professionals Board, 2012, 'Issues paper of the NSW Planning System Review: Submission from the Building Professionals Board'
- Building Professionals Board, 'An Introduction to the Building Professionals Act 2005 and the Building Professionals Board'
- Building Professionals Board, *Accreditation Scheme for Certifiers*
- The Centre for International Economics, 2012, *Benefits of building regulation reform: From fragmentation to harmonisation, Final Report*
- City Futures Research Centre, University of NSW, 2012, *Governing the compact city: The role and effectiveness of strata management, Final report*
- Collins, B, *Final Report of the Independent Inquiry into Construction Industry Insolvency in NSW*, 2012
- Council of Australian Governments, 2007, *Best Practice Regulation: A function for Ministerial Councils and National Standard Setting Bodies*
- Department of Planning and Environment, 2014, 'Changes to NSW building and subdivision regulation and certification': draft discussion paper
- Engineers Australia Multi-Disciplinary Committee, 2015, *Defects Free Construction in NSW: How it can be achieved*
- Finity Consulting Pty Limited, 2012 and 2013, 'Insurance Options for Private Building Certifiers', Department of Planning and Infrastructure
- Fire Protection Systems Working Party, 2010, *Design, Approval, Installation, Certification and Maintenance of Fire Protection Systems, Final Report*
- Home Building Regulation 2014 and associated Regulatory Impact Statement
- Independent Pricing and Regulatory Tribunal, 2012, *Reforming Licensing in NSW, Regulatory Review Issues Paper*
- Independent Pricing and Regulatory Tribunal, May 2014, 'Local Government Compliance and Enforcement': draft report'
- Independent Pricing and Regulatory Tribunal, August 2015, 'Reforming Licensing in NSW-Review of Licence Rational and Design, Final Report '
- Lovegrove, K, 'Is the Era of Private Certification Nearly Over?', 2015, Sourceable Industry News and Analysis
- Maltabarow, G, 2013, Building Certification and Regulation: *Serving a New Planning System for NSW*
- NSW Building Regulation Working Party, 2013, *Report of the NSW Building Regulation Working Party*



- NSW Department of Premier and Cabinet, 2009, *Guide to Better Regulation*
- NSW Government, 2013, *White Paper - A new planning system for NSW* - 'Chapter 8, Building regulation and certification'
- NSW Government, 2013, *Strata and Community Title Law Reform Position Paper*
- NSW Home Warranty Insurance Inquiry, 2003, Final Report, (the Grellman Report)
- NSW Joint Select Committee on the Quality of Buildings 2002, *Report Upon the Quality of Buildings* (the 'Campbell' report)
- Montoya, D, NSW Parliamentary Research Service 2013, *NSW planning reforms: building regulation and certification* Briefing Paper, No. 9/2013
- NSW Parliamentary Library Research Service, 2010, NSW Planning Framework: History of Reform, e-brief, 10/2010
- New Zealand Treasury, 2015, *Best Practice Regulation: Principles and Assessment*
- Organisation for Economic Cooperation and Development (OECD) 2012, *Recommendations of the Council on Regulatory Policy and Governance*
- Organisation for Economic Cooperation and Development (OECD) 2012, *Best Practice Principles for Improving Regulatory Enforcement and Inspection*
- PRC Bouwcentrum International, 2011, *The Lead Initiative (LMI) and sustainable construction: screening of national building regulation, Final Report*
- Productivity Commission, 2004, *Research Report: Reform of Building Regulation*
- Queensland Government, 2011, *Discussion paper: Improving building certification in Queensland*
- Queensland Parliamentary Transport, Housing and Local Government Committee, 2012, *Inquiry into the Operation and Performance of the Queensland Building Service Authority, Report No.14*
- Stokes, R.G, *Challenges in an age of consent: Post decision monitoring of planning conditions in New South Wales*, 2007, Local Government Law Journal, Volume 12, Part 3
- Victorian Auditor General, 2015, *Victoria's Consumer Protection Framework for Building Construction*
- Victorian Auditor General, 2011, *Compliance with Building Permits*
- Victorian Ombudsman, 2012, *Own motion investigation into the governance and administration of the Victorian Building Commission: report no. 15/12*
- Wallace, A, 2014: *Review of the Building Act 1975 and building certification in Queensland, Final report of discussion paper*

Walmsley, S, 2014, 'Review of the Complaints, Investigation and Disciplinary Functions of the Building Professionals Board'

