Issues Paper of the NSW Planning System Review

Submission from the Building Professionals Board

2 March 2012
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Acronyms

BCA Building Code of Australia
BP Act Building Professionals Act 2005
BP Regulation Building Professionals Regulation 2007
CC Construction certificate
CDC Complying development certificate
DP&I Department of Planning & Infrastructure
EP&A Act Environmental Planning & Assessment Act 1979
EP&A Regulation Environmental Planning & Assessment Regulation 2000
OC Occupation certificate
PCA Principal Certifying Authority
Introduction

This submission is provided in response to the request of the NSW Planning Review Panel for stakeholder and community feedback, suggestions and ideas about the questions raised in the Issues Paper of the NSW Planning System Review (December 2011).

The recommendations included in this submission reflect the submission provided in November 2011 to the NSW Planning Review Panel during the scoping phase. All recommendations from the earlier submission are included in Appendix A; additional recommendations directly relating to the issues identified in the Issues Paper of the NSW Planning System Review are identified throughout the body of this document.

These recommendations reflect Board’s unique experience and knowledge of the Environmental Planning and Assessment Act 1979 (EP&A Act) and how it operates on building sites around NSW. The Board’s recommendations are driven by a desire for a new legislative structure that provides:

- clear requirements
- a clear structure
- development that delivers planning expectations
- accountability for work done
- clear enforcement obligations
- compliant and safe buildings.

The Board considers the legislative structure should allow for applications for proposals for development that:

- eliminate unnecessary delays
- provide clear and consistent requirements for paperwork
- provide consistent and clear requirements to be met
- provide for consistent decision making.

The certification system, while just one element of the NSW planning system, is a vital element – if the legislative structure does not allow for a certification system that can reflect the right planning outcomes, ensure the quality of buildings and safety of occupants, and ensure a fair, equitable and sustainable playing ground for all participants (private certifiers, council certifiers, consent authorities, landowners, builders and others), then the planning system will not meet the Government’s overall targets and vision for NSW.

Ongoing consultation with stakeholders

The Board is holding consultation sessions across NSW on the further development of the building certification system. These sessions, which commenced in Ballina in mid-February, will end on 7 March. The Board will provide a further submission on the outcomes of that consultation to the Panel in time for inclusion in the Green Paper expected in April 2012.

Structure of the submission

Questions from the Issues Paper relating to certification and accreditation issues are dealt with in this submission, as relevant to the Board’s functions.
A new planning system: What should the underlying principles be?

Building certification

A16. What changes should be made to the private certification system?

A17. How can private certifiers be made more accountable?

Comment
The Building Professionals Board accredits over 460 private certifiers and over 850 council building certifiers.

Accredited certifiers play a critical role in the construction process, issuing complying development, construction, compliance, occupation, subdivision and strata certificates and also carrying out inspections of building work under construction.

In 2010/11, private certifiers determined $1.5 billion in complying development certificates, equating to 7.1 per cent of total development in NSW or 66 per cent of complying development certificates (up from 58 per cent in 2009/10 and 44 per cent in 2008/09). Private certifier determinations were significant in commercial / retail / office; residential alterations and additions; residential-other; and community facilities.

In 2010/11, private certifiers determined 12 per cent of all determinations (development applications and complying development certificates), up from 9.7 per cent in 2009/10 and 5 per cent in 2008/09. Private certifiers also issued a growing number of construction certificates, issuing 45 per cent in 2010/11 (up from 41 per cent in 2009/10 and 38 per cent in 2008/09), and issued 46 per cent of occupation certificates in 2010/11. In 2010/11 and 2009/10, 25 per cent of strata certificates were issued by private certifiers and 22 per cent in 2008/09.1

To be accredited, certifiers must demonstrate, on an annual basis, a minimum level of competence, have professional indemnity insurance and undertake continuing professional development.

The Board has significant powers to discipline accredited certifiers through its complaint management process and ongoing auditing program. The Board can impose fines of up to $110,000 on private certifiers, suspend and cancel accreditation and deal with most disciplinary matters without reference to the NSW Administrative Decisions Tribunal.

The powers of the Board ensure a robust building certification system and provide consumers with confidence that building work accords with legislated standards.

In 2010/11, the Board received 97 complaints in relation to the conduct of 57 accredited certifiers and one accredited body corporate, and determined 94 complaints.

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1 Figures from Department of Planning and Infrastructure, *Local development performance monitoring 2010-11*, February 2012.
Seventy two per cent of the 94 complaints determined were withdrawn, dismissed or halted with no further action. Less than 0.1 per cent warranted an action more serious than a reprimand and fine. The decisions that resulted in disciplinary action related to the conduct of only one per cent of all accredited certifiers. The complaints determined were received from neighbours (40 per cent), councils (31 per cent), owners (26 per cent) and others (three per cent) (clients, owners, corporations and strata committees).

During 2010/11, the Board conducted 48 audits of accredited private certifiers and 20 audits of councils (mostly in country areas).

A change required to the certification system to ensure better consumer protection and accountability for decision making is requiring others, whose work is critical to the building process but who are not accredited, to be accountable for their work and insured. The Board is working to identify who should be accredited through its current consultation process. Comment on this work is expanded below under D117.
Key elements, structure and objectives of a new planning system

Objectives of new planning legislation

B1. What should be included in the objectives of new planning legislation?

Comment

The objectives of the building control and certification system are not recognised in the objects of the EP&A Act. The introduction of a health, safety and amenity objective into the EP&A Act will achieve greater recognition in NSW of the significance of regulating the standards that apply to the building process.

An increased focus within the legislation on building regulation will help to clarify the importance of the role in achieving desired planning outcomes.

Recommendations

In relation to this question, the Board recommends the Planning Review Panel:

- introduce a health, safety and amenity object into the EP&A Act in relation to the built environment.

The structure of a new planning legislation – a single instrument

B10. Should there be one act or separate acts for different elements of the planning system?

Comment

Table 1 sets out the main provisions that relate to building control and certification in the EP&A Act and Environmental Planning and Assessment Regulation 2000 (EP&A Regulation).

Table 1

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<thead>
<tr>
<th>EP&amp;A Act</th>
<th>EP&amp;A Regulation</th>
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<tbody>
<tr>
<td>• Part 4 Division 3 Special procedure for complying development</td>
<td>• Part 7 Procedures relating to complying development procedures</td>
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<td>• Part 4A Certification of development</td>
<td>• Part 8 Certification of development</td>
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<td>• Part 4C Liability and insurance</td>
<td>• Part 9 Fire safety and matters concerning the BCA</td>
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<td>• Part 6 Division 2A Orders</td>
<td>• Part 12 Accreditation of building products and systems</td>
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<td>• Part 6 Division 4 Offences, including penalty notice offences</td>
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<td>• Part 8 Miscellaneous – section 149A-G Building certificates</td>
<td>• Part 17 Miscellaneous – clauses 280 and 281 building certificates, clause 284 penalty notice offences, clause 291 savings and transitional provisions</td>
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<td>• Schedule 1 Forms</td>
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<td>• Schedule 5 Penalty notice offences</td>
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Building regulation and certification provisions have traditionally been contained in the *Local Government Act 1919* and *Local Government Act 1993* and, more recently, the EP&A Act, even though none of these Acts explicitly deal with building control.

It is difficult to easily locate relevant requirements that apply to development in both instruments. Further, since 1998, numerous amendments and provisions have been included as issues have been identified or new processes have been introduced. A review of the drafting of the provisions would simplify and clarify the requirements, make the legislation easier to navigate for practitioners and save time, money and potential risks.

Most other states and territories have a dedicated building Act that comprehensively covers residential, commercial and industrial building regulation and certification requirements, separating building and certification provisions from strategic planning and the development assessment process.

A similar outcome in NSW would require consolidating building regulation and certification provisions currently within the EP&A Act and the *Home Building Act 1989*. This would simplify and amalgamate building requirements, and while it goes beyond the current scope of the planning review, would have obvious benefits for the planning system.

**Recommendations**

In relation to this question, the Board recommends the Planning Review Panel:

- consolidate building control and certification provisions within the EP&A Act into the one chapter.
Development proposals and assessment

Exempt and complying development

D4. What development should be exempt from approval and what development should be able to be certified as complying?

D5. How should councils be allowed local expansions to any list of exempt and complying development?

Comment

The Board previously recommended to the Planning Review Panel that the legislation for exempt and complying development could be expanded to permit more building types as exempt and complying development so as to ensure a faster approval process for routine development.

A related significant issue the Board has identified with complying development is in its operation.

Complying development is currently permitted through a number of State and Council policies, including:

- Council environmental planning instruments
- State Environmental Planning Policy No 4-Development Without Consent and Miscellaneous Exempt and Complying Development
- State Environmental Planning Policy No 60-Exempt and Complying Development
- State Environmental Planning Policy (Exempt and Complying Development Codes) 2008
- State Environmental Planning Policy (Temporary Structures) 2007

To take advantage of the 10-day approval period for complying development certificates (CDCs), an applicant must read, understand and meet the numerous development standards in the relevant planning instrument.

Likewise, before issuing a CDC, a certifying authority is required to ensure the development standards do not exclude the development as complying development. The information available to determine whether a development standard has been met is usually held by Council.

An accredited certifier may face disciplinary or legal action for not ensuring the building work complies with all the relevant requirements.

While the principle and objectives of complying development are sound, the length and complexity of the standards, the number of applicable policies, and the ability for certifying authorities to determine compliance with those standards, must be improved to give greater certainty to certifying authorities and applicants and to increase the amount of complying development.

This will also ensure complying development works more efficiently. It will improve consistency of standards and make it easier to identify relevant standards. Standards will be easy to read and documents referenced in the standards will be readily available to the community and accredited certifiers.
Recommendations
In relation to these questions, the Board recommends the Planning Review Panel:

- expand the legislation for exempt and complying development to allow more building types to be permitted as exempt and complying development where the buildings comply with predetermined development standards
- determine these development and building types in consultation with industry and local government
- place all complying development requirements in the one planning instrument for application across the state
- determine options for identifying development as complying development, such as by reviewing approaches in other jurisdictions
- recommend the Department of Planning and Infrastructure provide training to certifying authorities on interpreting complying development requirements
- require consent authorities to provide access to certifying authorities to the documents referenced in the relevant planning instrument

Approving unauthorised structures

D18. Should there be a single application to the council to obtain permission to use an unauthorised structure?

An application for development consent or to modify development consent to use an unauthorised structure is usually required by councils to ensure planning issues are addressed.

However, building certificates are not mandatory, being applied for at the discretion of a landowner. Once approved, a building certificate guarantees the council will not issue certain orders under the EP&A Act for a period of seven years. As these certificates of “non action” focus on building matters, it is considered the approvals should not be combined. A “cumbersome and expensive” process for obtaining a building certificate is a deterrent to unauthorised works.

Enabling a single application to be made would also detract from the role the occupation certificate plays in the building process. The principal certifying authority (PCA) ensures a building is fit for occupation in accordance with its classification under the Building Code of Australia (BCA) by undertaking inspections and obtaining certification of critical building elements as construction occurs. A building certificate lies outside this process, to somewhat ‘regularise’ unauthorised work, but does not take the place of the occupation certificate. Not all work can be satisfactorily inspected once a building has been completed.

Recommendations
In relation to this question, the Board recommends the Planning Review Panel:

- retain the current regime of requiring development consent or a modified consent for unauthorised works, and a separate building certificate application process at the discretion of the land owner.
A quicker process

D29. If an application partially satisfies the requirements for complying development, should it be assessed only on those matters that are non-complying?

Comment
Assessment of only those matters that are outside the criteria for complying development by council would confine their consideration to relevant matters during the development application (DA) process.

Due to complexity and little impact on processing times, the Board does not support a part CDC/DA process involving private certifiers and the council.

It is not clear who would be undertaking the assessment of the matters that lie outside the criteria for complying development, nor the process that would be adopted for the assessment. A determination as to compliance of the complying parts would need to be made. Liability for the different aspects of the assessment would also need to be clear.

Recommendations
In relation to this question, the Board recommends the Planning Review Panel:

- allow councils to make merit assessment of DAs only in relation to parts of a development application that fall outside complying development rules.

Standard conditions of consent

D86. Should there be a range of standard conditions of consent to be incorporated in development approvals?

Comment
The Board addressed this issue in detail in its submission to the Panel dated 4 November 2011.

Developing standard conditions of consent would contribute to the efficiency of the planning and development control system. The Board receives many complaints involving unclear or ambiguous conditions of consent that confuse landowners, builders and certifying authorities. Every NSW council imposes individual conditions of consent, usually drawing on standard conditions developed by the council.

Standard conditions of consent, however, are not well utilised. For example:

- councils may not check whether a standard condition is applicable to the development before including it in the consent, necessitating a modification application under section 96 of the EP&A Act
- councils may impose conditions on consents that require council to be satisfied about a matter, such as requiring an on-site detention of stormwater to be constructed in accordance with a required council policy
- councils may use conditions to require detailed work for the building or subdivision work where the council is unlikely to be engaged as the certifying authority to issue the CC and/or act as the PCA.

Under the EP&A Act, an occupation certificate (OC) can only be issued if any preconditions to the issue of the certificate – as specified in the development consent or CDC - have been met. Some councils rely on these ‘prior to the issue of an occupation certificate ….’
conditions to prevent the issue of the OC until matters unrelated to the OC test (i.e. whether the building suitable for occupation or use in accordance with its BCA classification) have been complied with. Examples include requiring that:

- all landscaping is finalised
- all operational conditions have been complied with (for example, hours of business operations)
- all hoardings are removed
- all engineering works are complete and executed plans are lodged
- all fees are paid

even though these conditions are not critical to whether a building is fit for occupation or use before occupation commences.

Some conditions of consent require the issue of a construction certificate (CC). Once development consent is obtained, it is the applicant’s decision whether or not to act on that consent and obtain a CC to commence construction.

Further, some councils impose conditions that prevent the issue of a subdivision or strata certificate until the OC has been issued.

Standard conditions that consent authorities are required or expected to apply, would address many of these issues.

**Recommendations**

The Board recommends that the Planning Review Panel

- develop a range of standard conditions of consent in consultation with local government, agencies and the building and certification industries.

**Performance bonds or financial sureties**

**D91.** Should new planning legislation make it possible to impose performance bonds or sureties unrelated to the protection of public assets?

**D92.** If so, should there be any restrictions on the reasons for which such bonds or sureties could be required?

**Comment**

The *Environmental Planning and Assessment Amendment Act 2008* contains provisions that allow for an enforcement bond to be imposed as a condition of development consent. This ensures compliance with the terms of the development consent during the carrying out of any building work or subdivision work (section 80A(6)(c)). This provision was intended to enable councils to improve compliance with conditions of consent.

The provision has not been commenced as, during consultation on complementary regulation provisions, stakeholders were concerned the provision would be abused and agreement could not be reached on the operation of the provision.

In lieu of these provisions, amendments were commenced to allow councils to issue compliance cost notices under the EP&A Act and Regulation to recover the costs of enforcing orders issued under the Act. The notices have a direct link with enabling councils to ensure compliance with the Act and development consents.

Enforcement bonds would, nevertheless, facilitate the role of the PCA as the developer would have a financial stake in ensuring compliance of the development with the Act and the development consent.
Recommendations
In relation to these questions, the Board recommends the Planning Review Panel:

- consider enabling councils’ enforcement powers to be supported through ‘enforcement bonds’ paid with the development application, similar to bonds for footpath/driveway damage
- consider, alternatively, a set fee being established for council’s development monitoring role.

Putting conditions on construction plans

D94. If there is to be a more concept based development application process, should councils have the power to impose conditions on construction approvals?

Comment
When private certification was introduced in 1998, most discretionary decisions on development proposals were left with councils, including the ability to issue conditions on development consents. Certifying authorities could not issue CCs subject to conditions, as it was considered that all details for the building work should be provided and ‘approved’ at the time of issue of the CC.

Many accredited certifiers require comprehensive design documentation for structural, electrical, mechanical and fire services to be lodged prior to their installation. However, there is no formal mechanism in the legislation to facilitate this practice.

Some councils, when acting as the consent authority, require the submission of detailed plans, specifications and reports relating to building and other matters at the development application stage, even though such matters do not need to be addressed until CC stage. These requirements go beyond the matters for consideration a council needs to address to provide consent (identified in section 79C of the EP&A Act), unnecessarily delaying the determination of the development application and substantially increasing costs.

This generally occurs where councils wish to consider the full implications of a development, or where the council perceives that the additional documentation will ensure compliance, as this opportunity will pass once a private accredited certifier is engaged to issue the CC and/or act as the PCA.

Development consent is intended to be a concept approval for development, including proposed building work. Ensuring building work complies with the BCA, the development consent plans and certain conditions of development consent is intended to be addressed prior to the issue of a CC.

A power to “stage” development consents already exists under the EP&A Act yet is rarely used by councils. The Board does not support empowering the council, where it is not the certifying authority for the CC to add conditions at the CC stage as this would unnecessarily delay approvals and decrease competition in the provision of certification services. It would also result in duplication of conditions contained in the development consent.

Enabling conditions to be imposed on CCs to the effect that design details for certain structural, electrical, mechanical and fire services prepared by an accredited certifier must be submitted and ‘endorsed’ by the accredited certifier/PCA prior to installation can resolve the issue. Conditions could be limited to enabling the accredited certifier/PCA to require the detail of nominated services immediately prior to their installation. This will allow the PCA to determine compliance and ‘endorse’ the plans, and would allow these plans to form part of the final documentation available to the end user.
The Board supports allowing the certifying authority to add BCA-related conditions to a CC or CDC to ensure detailed design requirements are met prior to the construction or installation of key building elements and systems.

Recommendations
In relation to this question, the Board recommends the Planning Review Panel:
- not enable councils to attach conditions on CCs for which they are not the certifying authority
- enable certifying authorities to impose conditions on CCs in relation to detailed drawings and specifications for matters required under the BCA, but not in relation to matters required by the development consent
- limit the information councils can require to be submitted with a development application to the information necessary to allow adequate consideration of the matters for consideration pursuant to section 79C of the EP&A Act.

Modifications application – general

D107. What should be the permitted scope of modification applications?

D108. Should there be a limit to the number of modifications applications permitted to be made?

Comment
Section 96 allows modifications of developments the subject of a development consent provided the proposed changes result in “substantially the same development”.

Provided councils undertake appropriate public consultation with respect to proposed modifications, the Board considers the current process remains appropriate. This is a matter for each council and will vary from development to development. The Board considers that provided the development remains substantially the same development there should be no limitation to the number of modifications permitted to be made.

Minor variations to a development often occur during construction. Many of these changes will not require a section 96 application as the work will be “not inconsistent with” the development consent. However, on many occasions a section 96 application will be required.

Limiting the number of modification applications may encourage changes being made to a development without the necessary merit consideration being undertaken.

More importantly, councils should provide clarity as to when an application is required to modify a consent. Currently, it is not clear when an application is required and landowners, builders and accredited certifiers must seek advice from the relevant council - all councils differ in their practices.

However, some councils do not readily provide this advice where a private PCA is engaged, or may not require a formal section 96 application where council is the PCA, thus exercising a discretion that is not available to private PCAs.

Recommendations
In relation to these questions, The Board recommends that the Planning Review Panel:
- clarify the circumstances in which an application under section 96 is required, as well as the types of applications that should be made under section 96
• expedite the resulting section 96 application process by identifying design changes an accredited planner can certify as part of the modification to eliminate the need for councils to consider all of these applications
• consider the need to accredit planners who work on section 96 and other matters
• consider introducing a time limit on the determination by a consent authority of an application under section 96
• prevent a section 96 modification being submitted where a final OC has been issued (resulting in the need to submit a new development application or CDC application for proposed changes after completion).

Modification application – retrospective approval

D109. Should any modification be able to be approved retrospectively after the work has been done?

D110. If so, should retrospective approval be confined only to minor changes and not more substantial ones? Should this be the case even if major changes leave the development substantially the same development as the one originally approved?

Comment

Construction certificates cannot be issued retrospectively under the EP&A Act. They are intended to be a prospective approval, enabling development to commence once proposed work has been certified to comply with the requirements of the regulations if completed in accordance with the specified plans and specifications.

Legal decisions that have allowed the modification of DAs retrospectively have detracted from the objective of CCs. In practice, the DA for a development can be amended retrospectively, whereas the CC for the development cannot. In addition, an OC cannot be issued for development that is approved under a retrospective DA.

The Board supports the continued ability to grant section 96 approvals retrospectively. However, it is also recommended that the EP&A Regulation be amended in relation to the issue of CCs for such development. The Board has previously submitted that changes could be made to enable retrospective CCs to be issued in circumstances where the development consent, a CC and a modification application under section 96 have been issued; works-as-executed plans have been prepared; and the prospective building complies with the BCA (so as to enable an OC to be issued).

The questions above do not propose an alternative process for dealing with “unauthorised” building work. A process for retrospective approvals will continue to be required under legislation. A DA or building certificate process as an alternative will not provide an improved pathway for retrospective approvals.

As discussed above, section 96 should be limited to applications for development that remains ‘substantially the same’ development, even if such changes are considered “major”, however that is defined.

Recommendations

In relation to these questions, the Board recommends that the Planning Review Panel:

• confirm the importance of modifications being approved prospectively under the Act
• enable modifications being approved retrospectively only where the development remains substantially the same development as the development originally approved
• enable retrospective CCs to be issued where the development consent, a CC and a modification application under section 96 have been issued, works-as-executed
plans have been prepared and the prospective building complies with the BCA (so as to enable an OC to be issued).

Private certification

D117. Should private certifiers have their role expanded and, if so, into what areas?

The Board’s current consultation with local government, industry and agencies is focusing on expanding the NSW building certification system. Identifying critical building elements to be certified by accredited persons (e.g. building designers, engineers) will reduce construction defects, increase compliance of work with the BCA and Australian Standards, reduce building disputes and increase the satisfaction of consumers with the certification process. Expanding the system will also ensure greater accountability of building practitioners for the work they undertake and ensure more practitioners hold insurance; both of which are important public safety measures.

The outcomes of this consultation will be provided to the Planning Review Panel for consideration in the Green Paper.

Recommendations

In relation to this question, the Board recommends that the Planning Review Panel:

• note the Board will provide a detailed submission on this issue at the completion of consultation being undertaken on the further development of the building certification system.

D118. Should private certifiers be permitted, in effect, to delegate certification powers to other specialist service providers and be entitled to rely, in turn, on certificates to the certifier from such specialist professions?

Comment

Certifying authorities must necessarily rely on the certification of other building practitioners - they cannot be expert in all elements that form part of a building. Under the EP&A Act, certifying authorities can rely on “compliance” certificates to specify that:

• building or subdivision work has been completed and complies with specified plans and specifications, or
• that a condition of consent has been complied with, or
• that a specified aspect of development complies with specified standards, or
• that a component complies with the BCA.

Relying on a compliance certificate from another accredited certifier removes liability for loss or damage arising from the work to which the certificate relates for the accredited certifier or PCA relying on that certificate. A check of the competence of the accredited certifier who issued the compliance certificate or of quality of the work is not required.

The practical use of compliance certificates is limited, however, as they are not mandatory and are infrequently issued by accredited certifiers. Many structural engineers who are accredited certifiers (engineering) consider the requirement for a compliance certificate to certify ‘compliance with’ specific aspects is absolute, potentially imposing liability on the accredited engineer. Compliance certificates for engineering disciplines are also not issued because of the limited number of persons accredited to issue engineering compliance certificates and the small number of accredited certifiers within the various disciplines and their geographical location.

Certifying authorities, therefore, also have to rely on other forms of certification, often taking the form of certificates from unaccredited, unlicensed and uninsured building practitioners.
These certificates (also known as component certificates) and the information contained in the certificates vary throughout industry; certifying authorities and councils expend considerable resources to manage the deficiencies in certification documents. Liability in relying on these certificates may ultimately be carried by the certifying authority.

A 2010 decision of the Administrative Decisions Tribunal determined that a certifier should not rely, blindly, on the word of an installer without having formed an independent view of what standards should be referenced, making enquiries if the applicable standards were not referenced, and, wherever practical, performing simple, independent checks (for example, visual inspection of items externally exposed) to corroborate the sign-off provided. It is not acceptable practice for a certifier to sign off without ever having undertaken a careful site inspection of the finished works.

The Board is developing a handbook to assist industry in determining the factors to consider in accepting certificates from unaccredited, unlicensed or unregistered persons and to provide recommended template certificates.

Certifying authorities do not receive automatic protection from liability in relation to certification provided by tradespersons who may not be licensed or insured. Other states provide statutory protection to building certifiers who rely in good faith upon certification from persons they have determined are suitably qualified or competent.

The Board’s consultation on the building certification system is also considering whether to enable certifiers to rely on other practitioners while providing appropriate protection to the community for the building work they certify.

Recommendation
In relation to this question, the Board recommends the Planning Review Panel:
- note the Board will provide a detailed submission on this issue at the completion of consultation being undertaken on the further development of the building certification system.

D119. Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?

Comment
This is an existing requirement under the EP&A Regulation 2000. Clause 142(2) requires accredited certifiers to provide a consent authority and council with a copy, among other things, of plans and specifications in relation to the issue of a construction certificate within two days of its determination. This requirement facilitates the role of the council as the keeper of the public record in relation to development occurring in its local area.

D120. Should there be a requirement for rectification works to remove unacceptably impacting non-compliances when these are actually built rather than leaving an assessment of such non-compliances to either a modification application assessment or to the Court on an appeal against any order to demolish?

Comment
It is not clear from the Issues Paper how such a proposal might operate, what ‘unacceptably impacting non-compliances’ might include and who would make that determination. Giving councils the power of a court to order the removal of non-compliant work is not considered appropriate. Where significant impacts are occurring, councils already have powers to seek immediate orders from the court for relief.
Councils also have significant orders powers under section 121 of the EP&A Act, including orders to demolish, stop work or force compliance with a development consent. As noted previously, the biggest impediment to council using these powers is the cost of enforcement through the courts. This could be resolved through an “enforcement” bond or additional fee at the DA stage. Non compliances with the BCA should be followed up and action taken by the consent authority or PCA as they are identified. Leaving rectification to the end of a project would be likely to result in compliance with the BCA not being achieved, particularly when defective work is cumulative.

**D121.** What statutory compensation rights, if any, should neighbours have against a certifier who approves unauthorised works that have a material adverse impact on a neighbouring property?

**Comment**

Claims for compensation against private certifiers are currently provided under existing legislation (the *Building Professionals Act 2005* (BP Act) and Administrative Decisions Tribunal (ADT) Rules). Under the BP Act, an accredited certifier can be ordered to pay up to $20,000 compensation for damage arising from the certifier’s unsatisfactory professional conduct or professional misconduct arising from a complaint or audit investigation. The Board or the ADT considers the impacts of the certifier’s conduct on the neighbour and their property before issuing an order for compensation.

The circumstances in which any proposal to provide additional or alternative statutory compensation rights would need to be determined, including the definition of ‘material adverse impact’, who would determine ‘material adverse impact’ and the stage at which claims for compensation may be invoked.

The Board’s experience is that the majority of “unauthorised” works are undertaken by builders and land owners without the authorisation of certifying authorities. The work is frequently undertaken between prescribed inspections by the certifying authority. Increasing statutory penalties for unauthorised work, in addition to ‘enforcement’ bonds or fees, may also assist in reducing this problem.

**Recommendation**

In relation to this question, the Board recommends the NSW Planning Review Panel:

- confirm the existing statutory compensation rights for complainants as sufficient, subject to review of the amount of available compensation, as appropriate.

**Changes to development approval plans**

**D122.** Should construction plans be required to be completely the same as the development approval and not permitted to be varied by a private certifier for construction purposes?

**Comment**

The Board does not consider a proposal of this nature could work in practice. Requiring CC drawings to be exactly the same as development consent plans would result in an exponential increase in applications to councils to modify development consents, taking up significant council resources and unnecessarily slowing the approval and construction process. DA plans are concept plans only, while construction plans deal with detailed BCA requirements. Some variations will occur from the DA plans before the certifying authority, as the BCA expert, approves the detailed plans. This provides some measure of flexibility to allow minor changes to be accommodated.
Under the EP&A Regulation, a certifying authority must not issue a CC for building work unless, among other things, the design and construction of the building as depicted in the plans and specifications and other documents are ‘not inconsistent’ with the development consent. This test requires the certifying authority to be satisfied that the construction plans and specifications are not substantially different to the DA plans.

There is no evidence that inconsistencies between the development consent and the CC is a significant issue. In 2010/11, private certifiers issued over 25,000 CCs. In the same period the Board received 97 complaints in total. A small proportion of these complaints related to the issue of CCs inconsistent with the development consent. Also, councils do not appear to issue a significant number of notices on landowners or developers so as to achieve compliance with the development consent.

In the Board’s experience, requiring a level of consistency of the final building with the development consent is a greater issue so as to achieve community expectations with the development process. Currently, an OC can be issued at the end of construction work to enable the occupation of a building where the PCA is satisfied the building is suitable for occupation or use in accordance with its classification under the BCA. There is no requirement for the building to be consistent with, not inconsistent with, or generally consistent with the approved plans and specifications.

Recommendation
In relation to this question, the Board recommends the NSW Planning Review Panel:

- confirm the ability of the certifying authority to issue CC plans that are not inconsistent with the approved development consent plans
- requiring the “principal contractor” (builder) and the certifying authority to certify that completed building work is not inconsistent with the approved plans and specifications prior to the issue of any OC for the work
- clearly define the role of the OC in the Act.

Choosing a certifier

D123. Should developers be permitted to choose their own certifier?

Comment
Under the EP&A Act, only landowners can choose the council or an accredited certifier as their certifying authority. A developer or builder may only appoint a certifying authority where they are also the land owner.

The private certification system has been criticised for the perceived conflict of interest in having the certifying authority being paid directly by the developer, builder or other applicant. Certifiers have reported being threatened with non-payment of certification fees unless they issue a particular certificate.

There is no specific evidence to suggest that private certification results in poorer outcomes in terms of compliance with the BCA or development consent requirements. In fact there is anecdotal evidence that there has been a de-skilling of local council certifiers and an increase in the professionalism of certification in the private sector.

Over time, the controls on certifiers have been increased to counteract these claims and to ensure certifiers act independently by applying statutory requirements. These controls include requiring the certifying authority to be appointed by the landowner; subjecting certifiers to ongoing education, stringent conflict of interest provisions and a code of conduct; annual accreditation; a complaints process; and auditing at least a third of accredited
certifiers annually. This year the Board will also commence “close relationship” audits, involving audits of certifiers who undertake a significant amount of work for particular developers or land owners, to determine whether the outcomes of certification are any different in these circumstances.

Difficulties would arise in implementing a cab rank system for the appointment of a certifying authority. This would reduce competition, require standard certification fees, restrict the capacity of private certifiers to manage risks associated with their practices, and require administrative arrangements by the Board or each council. It would, in effect eradicate private certification.

Recommendation
In relation to this question, the Board recommends that the Planning Review Panel consider:

- requiring a written contract between the owner and the certifying authority
- requiring the payment of certification fees to be made up-front to the certifying authority (thereby reducing the potential for conflict resulting from the certifying authority being threatened with non-payment)
- clarifying responsibilities of private certifiers to report unauthorised building work to councils and providing assistance to councils with respect to any investigation
- increasing resources for auditing of accredited certifiers (noting the recommendations of the Victorian Auditor General’s report, Compliance with Building Permits, December 2011 in this regard)
- establishing a Building Commission to enable centralised monitoring of all building practitioners
- establishing a state-wide database on planning and building approvals to support effective audit and review processes, as well as education and training.

Occupation certificates

D125. Should interim occupation certificates have a maximum time specified and, if so, how much time should this be?

Comment
Under the EP&A Act, a development must be substantially commenced within five years of the development consent being granted or the consent lapses. While councils can issue orders to complete a project, these powers are seldom used. It is difficult to establish whether a significant issue exists with respect to incomplete work and any consequent impacts.

In Victoria, a building permit is required to be renewed after a set period of time, whether or not the work has been substantially commenced. This allows the certifying authority to review the work and determine whether action should be taken to force completion. It is understood that such renewals are virtually automatic, adding little value to the process.

There is no obligation under the EP&A Act or Regulation for a final OC to be issued following the issue of an interim OC.

The tests for the issue of an OC should be reviewed and more clarity provided. The term “interim occupation certificate” is misleading and should be reviewed.

The work outstanding when an interim occupation certificate is issued should be identified on the certificate. In this regard, the Environmental Planning and Assessment Amendment Act 2008 provides for a certifying authority who issues an interim OC where the design and construction of the building are not consistent with the development consent or CDC to
record the nature and extent of the inconsistency on the certificate. This provision has not been commenced.

Recommendation
In relation to this question, the Board recommends that the Planning Review Panel consider:

- requiring outstanding work to be noted on an interim OC
- introducing a requirement for the certifying authority to review the work outstanding on the issue of an interim OC within 12 months of the issue of the certificate

D126. Should a certifier issuing a final occupation certificate be required to certify that the completed development has been carried out in accordance with the development consent?

Comment
Further to the discussion above under question D122, if enacted clause 154D of the Environmental Planning and Assessment Amendment Act 2008 would amend the EP&A Regulation to prevent a certifying authority issuing a final OC for a building or part of a building unless the design and construction of the building or part are consistent with the relevant development consent or CDC.

A provision of this nature would ensure consistency between the development approved by the consent authority and the final building. The provision has not been commenced as consultation with stakeholders concluded that requiring ‘consistency’, instead of the less stringent ‘not inconsistent with’, which is the test for the issue of a CC, would be a difficult test to satisfy and a suitable definition could not be determined.

Recommendation
In relation to this question, the Board recommends that the Planning Review Panel consider:

- requiring the “principal contractor” (builder) and the certifying authority to certify that completed building work is not inconsistent with the approved plans and specifications prior to the issue of any OC for the work
- requiring the builder to be accredited for the purpose of providing this certification.
Appeals and reviews; enforcement and compliance

Orders

E13. What new orders should there be or what changes are needed to the present orders?

Comment
The Board considers councils have sufficiently wide-ranging powers to issue orders under the EP&A Act. The key issue for councils is funding the enforcement process. This is discussed above in the Board’s comments in D91 and D92.

Recommendation
In relation to this question, the Board recommends the Planning Review Panel:
• consider funding options for council enforcement processes.

Improving enforcement

E14. How can enforcement be made easier and cheaper for consent authorities?

E15. Should councils have a costs or other remedy against private certifiers in certain circumstances?

Comment
Enforcement powers currently available to councils include:
• issuing orders under the EP&A Act requiring compliance with the development consent and/or cessation of building or subdivision work.
• issuing a compliance cost notice to recover the costs of ensuring compliance with an order
• imposing an on-the-spot fine by issuing a penalty infringement notice for failure to comply with an order
• using clean-up, prevention and noise control notice powers under the Protection of the Environment Operations Act 1997 to ensure compliance with conditions of consent, for example sediment control or hours of work.
• bringing proceedings under the EP&A Act in the Land and Environment Court for an order to remedy or restrain a breach of the Act.

By comparison, private PCAs can only issue a notice of an intention to issue an order under the EP&A Act (as well as initiating proceedings in the Court, which would be an extraordinary occurrence).

The EP&A Act and EP&A Regulation do not describe the role and responsibilities of councils and private certifiers (when appointed as the PCA) in managing issues that arise on development sites and ensuring compliance with relevant requirements.

This often causes confusion for consumers, industry and local government complicates the resolution of compliance problems. It also feeds into the continuing tensions between councils and the private certification industry regarding the extent of responsibilities and potential liabilities of both parties in connection with a development proposal.
When a PCA is appointed from the private sector, the council's approval role in relation to the development ceases, although its enforcement role continues. Councils have a greater range of enforcement powers under the Act and other legislation than private PCAs. As a result, it is the Board’s view that councils should consider whether they are the appropriate authority to resolve issues on development sites. Matters that may warrant action by councils include urgent matters, such as involving a danger to the public or a significant breach of the development consent or legislation, and matters that are not preconditions to the issue of the occupation/subdivision certificate, such as sediment control or traffic management.

Where a private certifier has certified unauthorised work the council can lodge a complaint with the Board. The Board has powers to issue compensation where unsatisfactory professional conduct has occurred and costs established.

The certifying authority has no power to enforce remedial works or demolition works on the landowner so no useful purpose would be served in enabling councils to issue such orders on the certifier. In addition, the Board’s experience is that the certifier is often unaware of unauthorised building works and is not at fault when these works occur.

Where a council exercises an enforcement power, the private PCA needs to be informed of the action taken. Where a council decides not to exercise its enforcement power, such as determining not to issue an order, the PCA also needs to be informed. The action the PCA should then take is not always clear. Currently, the PCA cannot issue an OC if a matter cannot be certified by a CC or a CDC, or unauthorised work is ‘authorised’ only by a building certificate.

Recommendations

In relation to these questions, the Board recommends the Planning Review Panel:

- statutorily define the role and responsibilities between a private certifier, when appointed as the PCA, and the local council (consent authority) in addressing issues and complaints about development sites
- review the extent of the enforcement powers of PCAs
- require the council to send to the PCA a copy of any order issued
- consider requiring the PCA to issue a notice that sets out the outstanding conditions of consent when issuing an OC
- consider enabling Councils’ enforcement powers to be supported through ‘enforcement bonds’ paid with the development application, similar to bonds for footpath/driveway damage
- consider whether penalty infringement notices should be cumulative, that is the amount of a notice being increased for ongoing periods of non-compliance with conditions of development consent.

Private certification and third parties

E17. Should there be an appeal right for third parties in proceedings against private certifiers?

Comment

Third party appeal rights are designed to protect private interests. Disciplinary proceedings against accredited certifiers involve the interests of the certifier and his/her responding to the Board or the Administrative Decisions Tribunal as to his or her standard of professional conduct.

It is not necessary to provide third party appeal rights in relation to disciplinary matters against accredited certifiers.
Appendix A: Recommendations from November 2011 submission

Regulation of the system

Regulation of building practitioners
- consider how a building commission model could benefit the NSW planning system.

Statutory regulation
- consolidate building control and certification provisions within the EP&A Act into the one chapter
- introduce a health, safety and amenity object into the EP&A Act in relation to the built environment.

Scope of the NSW certification system
- consider requiring development application, CC and CDC plans for specified buildings or building work over a certain amount be prepared by either a registered architect or accredited building designer
- support the accreditation of building practitioners to provide certification for the design and installation of specialist building systems including fire services, structure and wet area flashing
- investigate options for requiring the accreditation of high-rise, commercial and industrial builders
- review the definition of compliance certificates under the EP&A Act to enable accredited certifiers involved in the design or installation of the building work to issue them
- consider requiring an accredited certifier to rely on a compliance certificate issued under the EP&A Act for the design and installation of the specialist building systems referred to above
- review options for insurance requirements for accredited certifiers, including introducing home warranty-style insurance for certifiers as an alternative to professional indemnity insurance
- investigate introducing required home warranty insurance for all multi residential style development, including developments greater than three storeys
- consider aligning the period of liability for building actions for accredited certifiers with that for builders under the statutory warranty liability period in the Home Building Act 1989.

Complying development standards
- place all complying development requirements in the one planning instrument for application across the state
- determine options for identifying development as complying development, such as by reviewing approaches in other jurisdictions
- recommend DP&I provide training to certifying authorities on interpreting complying development requirements
- expand the legislation for complying development to allow more building types to be permitted as complying development where the buildings comply with predetermined development standards.
Development consent

Information required to consider development applications
- clarify the objective of development applications in the legislation
- limit the information councils can require to be submitted with a development application to the information necessary to allow adequate consideration of the matters for consideration pursuant to section 79C of the EP&A Act
- amend section 79C of the EP&A Act to limit the matters for consideration for simple developments to matters contained in the applicable planning instruments.

Conditions of development consent
- determine and legislate for the matters that need to be addressed prior to the issue of any CC or OC
- remove the ability for councils to restrict the issue of a CC or OC prior to compliance with conditions of development consent that do not relate to the tests for issuing these certificates
- develop standard conditions of development consent for recommended use by councils
- base these standard conditions on existing council standard conditions and develop them following consultation with local government
- remove the ability for councils to impose requirements that council is to be satisfied about a matter through conditions of development consent
- remove the ability for councils to require CCs as a condition of development consent.

Scope of section 96 modifications of development consent
- clarify the circumstances in which an application under section 96 is required, as well as the types of applications that should be made under section 96
- expedite the resulting section 96 application process by identifying design changes an accredited planner can certify as part of the modification to eliminate the need for councils to consider all of these applications
- consider the need to accredit planners who work on section 96 and other matters
- consider introducing a time limit on the determination by a consent authority of an application under section 96
- prevent a section 96 modification being submitted where a final OC has been issued (resulting in the need to submit a new development application or CDC application for proposed changes after completion).

Building and subdivision work

Detail of work required before construction commences
- enable certifying authorities to impose conditions on CCs in relation to detailed drawings and specifications for matters required under the BCA, but not in relation to matters required by the development consent
- consider requiring that design details for certain structural, electrical, mechanical and fire services must be prepared by an accredited certifier
- consider requiring that the design details prepared by an accredited certifier must be submitted and ‘endorsed’ by the accredited certifier/PCA prior to installation.

Disparity between what is built and what was approved
- define what should be certified at the end of the building work by clearly defining the role of the OC
- introduce a consistency test ('not inconsistent with' or 'generally consistent with') to ensure consistency between the final development and the approved plans and specifications
- require the builder to certify consistency of completed work against the approvals, including the approved plans and specifications, prior to the issue of any OC.

Unauthorised building or subdivision work
- ensure a clear process exists in the EP&A Act for CCs and CDCs to be modified
- enable retrospective CCs to be issued where the development consent, CC and section 96 have been issued, works-as-executed plans have been prepared and the prospective building complies with the BCA (so as to enable an OC to be issued)
- review the enforcement powers for councils and private PCAs to ensure roles are clear and authorities are appropriately compensated for undertaking this function
- review the objectives and role of building certificates to ensure they are not used as de facto OCs in circumstances where it would not be appropriate to issue an OC.

Certifying development

Role of occupation certificates
- clearly define what an OC is intended to achieve
- review the use and need for interim OCs
- identify what conditions of development consent (as part of developing standard conditions of development consent) must be complied with prior to the issue of an interim and final OC, and prevent councils from imposing conditions of development consent that require additional conditions to be complied with prior to the issue of the OC
- amend the EP&A Act to:
  - enable an amended CC to be issued for completed work where an original development consent and CC, and a section 96 if required, have been issued; works-as-executed have been prepared; and the completed building complies with the BCA
  - enable an amended CC for completed work to be issued in relation to minor building variations that are not inconsistent with the development consent
  - enable the PCA to issue the OC if satisfied the completed work complies with the BCA
  - prevent persons occupying non-residential development without an OC.

Certification of subdivision and strata
- enable private certifiers to be appointed as the PCA for subdivision work and to issue subdivision certificates in relation to subdivision infrastructure for which councils will not become responsible (for example, drainage on private land)
- prevent councils issuing development consent conditions that preclude accredited certifiers issuing CCs for subdivision work and develop standard conditions of consent across the state
- enable private certifiers to issue subdivision and strata certificates once the relevant subdivision and strata plans have been prepared, irrespective of when the OC is issued (that is, conditions of consent that prevent the issue of a subdivision or strata certificate before the issue of the OC for the building, should have no effect)
- clarify that an applicant may choose to obtain a CC for subdivision work from either a council or a private accredited certifier and that the council cannot require the applicant to obtain the CC from the council
- clarify that where a compliance certificate is issued by a private accredited certifier in relation to subdivision work, the council is not to inspect the work.
• specify strata subdivision as complying development across the state.

Relying on component certification
• consider whether to mandate a form for certification (possibly called a component, as opposed to a compliance, certificate) from suitably qualified persons, and whether these suitably qualified persons should be accredited certifiers as recognised by the accreditation scheme
• require the PCA to undertake appropriate checks during critical stage inspections of the work the subject of a component certificate
• provide protection from liability for an accredited certifier/PCA in relying in good faith on a component certificate from a suitably qualified person. For that purpose, define good faith to include a range of checks required to be undertaken of such competent persons and the certificates they issue
• amend the definition of compliance certificate in the EP&A Act to allow accredited certifiers involved in the design or installation of the building work to be able to issue them.

Certifying authorities

Uncertainty over the role of PCAs
• clearly specify the role of the PCA in the Act and determine whether there should continue to be a separate definition of ‘Principal Certifying Authority’
• ensure the Act formally requires PCAs to enter into a written contract with the landowner, which includes the payment of fees
• require consent authorities to attach copies of Board-approved brochures to development consents and CDCs detailing the building certification process and the role of the PCA.

Enforcement powers
• through the EP&A Act, define the role and responsibilities between a private certifier, when appointed as the PCA, and the local council (consent authority) in addressing issues and complaints about development sites
• review the extent of the enforcement powers of PCAs
• require the council to send to the PCA a copy of any order issued
• consider requiring the PCA to issue a notice that sets out the outstanding conditions of consent when issuing an OC
• consider enabling Councils’ enforcement powers to be supported through ‘enforcement bonds’ paid with the development application, similar to bonds for footpath/driveway damage
• consider whether penalty infringement notices should be cumulative, that is the amount of a notice being increased for ongoing periods of non-compliance with conditions of development consent.

Sustainability of the building surveying/certification profession
• support the development of strategies to market the professions associated with the certification system and the role of these professionals in the building process
• support the development of incentives to encourage accredited certifiers to work in country areas
• support government funding to Councils and private accredited certifiers to employ or sponsor cadets aspiring to be accredited certifiers so that they can gain experience.
Data collection
- support funding for the Board to develop and implement an online data collection and management system for certifying authorities to provide data on a monthly or quarterly basis.

Requirement of the PCA to check home warranty insurance is in place
- amend the EP&A Regulation so that it is no longer the responsibility of the PCA to ensure home warranty insurance is in place before work commences
- alternatively, where the contract price for residential building work is unknown, determine that a certificate is to be obtained from a quantity surveyor specifying the reasonable market cost of the labour and materials before work commences.

Results of critical stage inspections
- require the PCA to give notice to the principal contractor that an inspection has occurred and whether or not it was satisfactory, within 24 hours.
- prevent the PCA issuing an OC unless any matters identified during a critical stage inspection as unsatisfactory have been rectified.
- enable the PCA to rely on a certificate or report from a suitably qualified person that an outstanding matter arising from a critical stage inspection has been rectified.

Missed critical stage inspections
- enable the PCA to issue an OC where a critical stage inspection is ‘avoidably’ missed subject to the PCA being satisfied the work the subject of a missed inspection was satisfactory, collection of documentary evidence the PCA relied on to satisfy themselves the work was satisfactory, and noting on the OC the matter/s that was not inspected. The mandatory nature of critical stage inspections, however, must continue to be reinforced.