NSW Planning Review

Submission from the Building Professionals Board

4 November 2011
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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

Building regulation and certification (referred to in this submission as the certification system) are an integral part of development and of the Environmental Planning and Assessment Act 1979 (the EP&A Act). Private and council accredited certifiers play a significant role in the Act’s administration when issuing certification of development under Part 4A of the Act.

Since the introduction of private certification of the built form in 1998, amendments to the EP&A Act have continuously expanded the private certification role. Private certifiers now determine $2.4 billion worth of complying development a year (2009/10 figures).

Prior to 1998, private practitioners were accredited by Engineers Australia, Planning Institute of Australia, Professional Surveyors’ Occupational Association and Building Surveyors and Allied Professions (BSAP) Accreditation Board Inc. The Department of Planning took over the administration of the BSAP scheme in May 2002.

Later that year, the Campbell Inquiry into the quality of buildings concluded that the building regulatory system in NSW was complex, poorly coordinated, poorly understood and lacking in professional rigour. The inquiry recommended increasing regulation of builders and other practitioners in the building industry, expanding the system of accreditation to include council building surveyors and introducing inspection regimes to ensure adequate installation of critical elements such as fire services, fire resisting construction and wet areas.

Work commenced in 2003 to establish the Building Professionals Board as an independent statutory body that could combine the functions of the four accreditation bodies, establish clear and consistent standards for all accredited certifiers and increase awareness of the certification of building and subdivision work in NSW.

The Building Professionals Act 2005 (BP Act) was passed in December 2005. In 2007, the Government appointed the first Board members, proclaimed the BP Act, formalised the BP Regulation and gazetted the Board’s Accreditation Scheme.

The Accreditation Scheme was expanded in 2010 to include council accredited certifiers. This established a single system of accreditation for all certifiers and aligned the NSW building certification system with other States.

The Board currently accredits 471 private certifiers, 860 council certifiers and two accredited bodies corporate who administer the certification functions of the EP&A Act across NSW.

The Board consults daily with the public and with certifiers working in different contexts, locations and organisational structures across NSW. Through the Board’s direct understanding of the day to day operations of the EP&A Act, it is acutely aware of the strengths and weaknesses of the development and building approvals system, particularly the relationship between approvals and construction.
The role of the Board

As a statutory body, the Board

- accredits certifiers to issue construction, occupation, subdivision, compliance and complying development certificates (CDCs) under the EP&A Act, and strata certificates under strata legislation
- promotes and maintains standards of building and subdivision certification in NSW
- improves professional practice by requiring certifier participation in education and training
- investigates complaints and audits accredited certifiers and councils in their certification role to improve the efficiency of the system and of certifiers’ processes
- informs the public about how projects are certified and where to find a certifier
- works with professional bodies and State agencies on policy development to help develop and refine best practice in the built environment
- advises the Department of Planning & Infrastructure (DP&I) and Minister on policy development and certification matters under the EP&A Act and the BP Act.

Objectives for the building regulation and certification system

A September 2011 workshop between the Board and DP&I identified a successful future building regulation and certification system as one with all components working logically, cohesively and efficiently towards:

- acceptable levels of health, safety, amenity and sustainability
- development that is consistent with planning expectations.

Further, the workshop identified the need for a robust approval system that:

- is fair and just
- has integrity
- provides for appropriate and consistent built outcomes
- integrates practically with the State’s planning controls
- provides a valuable support system that encourages growth in the building and construction industry.
Role of certification in NSW

Most building and subdivision in NSW involves certification. Certificates are approvals provided from either a council or an accredited certifier to confirm that proposed and completed development complies with relevant planning controls and national building standards.

The group of professionals who deliver this certification are accredited by the Building Professionals Board. It is up to the person who is building or developing to decide whether to use their council or an accredited certifier.

Construction certificates (CCs) and CDCs are approvals provided by certifying authorities (councils and accredited certifiers) to confirm that proposed work will be not inconsistent with planning controls and the Building Code of Australia (BCA) if built in accordance with the approved plans. Compliance certificates certify that a design or installation complies, and an occupation certificate (OC) certifies that the building is suitable for occupation and that certain required procedures have been followed.


A certifying authority with the appropriate accreditation can
- issue CDCs
- issue CCs
- issue compliance certificates
- issue strata certificates
- conduct inspections of building works during their construction
- be appointed as the principal certifying authority (PCA) to issue OCs for building work and subdivision certificates for subdivision work.

Private certification

Opening the certification system to competition in 1998 has improved application response times, holding costs and service levels. Other states - including Victoria, Queensland, South Australia and Tasmania – also accredit private building surveyors.

In 2009/10 private certifiers issued 58 per cent of CDCs, including 83.9 per cent of CDCs for community facilities in 2009/10, including school buildings funded by the Australian Government’s Nation Building Program.

Private certifiers issue a growing number of CCs, issuing 41 per cent in 2009-10 from 38 per cent in 2008-09 and 22 per cent in 2003-04.

As illustrated in Figure 1, the number of complaints against certifiers received between 2008/09 and 2009/10 dropped by 56 per cent.
Figure 1: Complaint investigations - 2002-03 to 2009-10

General issues to consider
The Board’s submission details a number of issues, discusses these issues and provides a recommendation for consideration by the Planning Review Panel.

Overall, it is the Board’s view that:

- Any review of the planning and certification systems must be complementary.
- Coordination is required between the planning system review and the BP Act review (which is currently taking place), it being noted that many of the requirements that impact the certification system are entwined in the EP&A Act, Environmental Planning & Assessment Regulation 2000 (EP&A Regulation), environmental planning instruments and that the remainder are in the BP Act and Building Professionals Regulation 2007 (BP Regulation).
- The certification system must respond to changes that occur in the planning system and the building industry over time and any new planning system needs to reflect the modern building process.
- The planning system must allow for efficient management of the volume of building and subdivision work in NSW.
- The review must address and reduce inefficiencies and differences between certifying authorities and consent authorities to ensure more consistency across jurisdictions.
- The review must consider how new planning and certification systems will require modifications to existing electronic systems and forms, and allow for a transition period.
- Consultation must take place on any proposed changes to legislation for the planning and certification systems.

Other jurisdictions
The Planning Review must also consider the requirements, practices and processes in other jurisdictions so as to ensure NSW maintains its competitive edge and continues to answer to its development needs. Many lessons can be learned from experience of other jurisdictions in administering their legislative requirements.
Further, the review must also consider how NSW will integrate into the national trade licensing system as agreed to by the Council of Australian Governments (COAG) in 2008. This system, designed to increase Australia's productivity and provide the environment for a seamless national economy, will identify and recognise the similar functions undertaken by private and council accredited certifiers across the country.

Snapshot of the NSW building industry
In 2010-11:
- $17.02b in building approvals ($10.65b residential/$6.3b non-residential building)
- 7.6% of the NSW economy growing to 8.4% by 2020.

In 2009-2010
- 69,617 DAs worth $15.66b approved
- 14,275 CDCs worth $2.98b approved
- 58,679 CCs
- 47,114 OCs
- 59% of CCs/OCs issued by council
- 41% of CCs/OCs issued by private accredited certifiers.
- 69.2% of DAs (49,566) residential development
- 12% (10,155) commercial/retail/office development
- 2.4% (1,714) industrial development.

Sources: Australian Bureau of Statistics, Summary of 2010-11 Building Approvals; NSW Department of Planning, Local development performance monitoring 2009-10
Regulation of the system

Regulation of building practitioners

Issue
The regulation of building practitioners in NSW is fragmented. It involves a number of government departments, is not integrated and does not comprehensively cover key professions, such as engineering and trades.

Discussion
In 2009-2010, 23% of all Australian building approvals ($18.64 billion worth of construction) was approved under the NSW local development approval system. However, no single body or authority is responsible for the regulation and control of people involved in the design, approval, construction and certification of this work:

- NSW Fair Trading licenses builders to carry out residential building work up to three storeys, and also licenses various tradespersons who carry out work such as carpentry, painting, bricklaying, fencing, flooring, structural landscaping, wall and floor tiling and waterproofing.
- The Building Professionals Board accredits building surveyors, engineers, land surveyors and hydraulics services consultants to issue a range of certificates under the EP&A Act and carry out periodic inspections of building work. Other government boards register architects and land surveyors.
- Other practitioners such as high-rise residential builders, building designers, many engineers, disability access consultants, fire protection services consultants and a range of sub-trades are not accredited or licensed by the government, but are self regulated by industry.

In other states, the regulation of building professionals is undertaken by one government agency. This provides a coordinated approach to monitoring the activities of the building profession, reporting on the status of the industry and providing a one-stop-shop for consumers in finding practitioners and seeking assistance.

The Board has already provided a paper on the benefits of establishing a building commission in NSW, based on the single agency model adopted in other States, to the Minister for Planning and Infrastructure. This is included at Appendix 1. The various professional bodies and agencies associated with the building industry support the concept of a building commission.

Through a building commission, an integrated regulated system would:
- provide consistent building controls and regulations
- improve building quality and industry outcomes
- inspire greater confidence in building and investing in NSW
- raise the profile of building and building regulation within the NSW planning system.

Recommendations
The Board recommends the Planning Review Panel:
- consider how a building commission model could benefit the NSW planning system.
Statutory regulation

Issue
The provisions within the EP&A Act and EP&A Regulation that relate to building control and certification are not consolidated, making it difficult to navigate, increasing the risk of misinterpretation and reducing the importance of building control and certification in the wider planning system.

Discussion
Table 1 sets out the main provisions that relate to building control and certification in the EP&A Act and EP&A Regulation.

Table 1

<table>
<thead>
<tr>
<th>EP&amp;A Act</th>
<th>EP&amp;A Regulation</th>
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<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>
<td>• Part 16 Registers and other records</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>
<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, it would have obvious benefits for the planning system.

The objectives of the building control and certification system are also 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
The Board recommends the Planning Review Panel:
- 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

(see also Relying on component certification)

Issue

Building defects impact the quality and liveability of buildings, affect property values and rental incomes, and can lead to ongoing damage to a building. Expanding the scope of the certification system could improve outcomes for all industry practitioners by improving the quality and standard of work.

Discussion

The Board is finalising a discussion paper to look at how the scope of the NSW certification system can be expanded to help reduce the impact and cost of building defects, improve building compliance and ensure accountability of building professionals for the work they do.

This discussion paper will be forwarded to the Planning Review Panel once it is placed on exhibition.

Studies, anecdotal reports and litigated building disputes demonstrate that significant defects continue to occur during construction. Defects commonly relate to water penetration, structural faults, fire safety and defective services. Defects may be attributed to:

- inadequate supervision and quality assurance in the construction process (as no one person may assume this role)
- inappropriate use of materials by contractors
- contractors who might not be competent
- disregard by some subcontractors for the effects of their actions on subsequent trades workmanship, materials or design faults. ¹

Factors further contributing to poor building quality include:

- the high percentage of building work carried out by unlicensed subcontractors
- building companies which are established only for the purpose of carrying out a particular building project before winding up at the end of the project to avoid liability for defective work
- the many critical building components not subject to mandatory licensing or certification for their design or construction
- the lack of compulsory insurance as protection for significant building work.

One of the emerging trends associated with defects in buildings is that some accredited certifiers, as the only holders of mandatory professional indemnity insurance, are reportedly being pursued in legal claims for building work.

These issues necessitate greater controls in the certification system. While not all of these matters may be rectified by making changes to the certification system, ensuring suitably qualified persons certify compliance of certain design and construction work against relevant building regulations, as well as expanded mandatory insurance requirements, will achieve a more consistent and rigorous system, improve building compliance and safety, improve accountability and stimulate greater competition.

Recommendations
The Board recommends the Planning Review Panel:

- 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

Issue
Criteria that identify complying development in environmental planning instruments and development control plans (DCPs) are fragmented, numerous, restrictive and can be difficult to interpret.

Discussion
Complying development simplifies the assessment process for small scale routine development and building work where the proposed building will comply with predetermined development standards. *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (the Codes SEPP) was introduced to further speed up and simplify the process for approving standard types of housing and, later, alterations and additions to certain commercial and industrial development.

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 2008*
- *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 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.

Recommendations
The Board recommends the Planning Review Panel:
- 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

Issue
The lodgement and determination of development applications can be delayed by the amount of information required to be submitted with the application.

Discussion
Development consent is intended to be a concept approval for development, including proposed building work. Ensuring that building work will comply 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.

Since the introduction of private certification, however, some councils in their role as the consent authority increasingly 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 delay the determination of the development application and could substantially increase costs.

This generally occurs where councils wish to consider the full implications of a development, or where the council perceives that the additional documentation is required to ensure that the proposal will comply, as this opportunity will pass once a private accredited certifier is engaged to issue the CC and/or act as the PCA. This may be based on the perception by some councils that private certifiers do not perform their functions adequately and with due regard to the public interest, and that certification functions should be returned to councils.

Recommendations
The Board recommends the Planning Review Panel:
- 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

(see also Certification of subdivision and strata and Role of occupation certificates)

Issue
Across NSW, the conditions of development consent imposed by consent authorities:
- vary in relation to the number of conditions imposed
- vary in relation to the matters required to be satisfied prior to the issue of a CC or OC
- vary in relation to whether restrictions on issuing an OC prior to certain matters being satisfied applies to the issue of any or all OCs or interim OCs
- vary in relation to the matters required to be satisfied prior to building or subdivision work proceeding
may be invalid where requiring compliance with the deemed to satisfy provisions in the BCA, as this prevents an accredited certifier from allowing an alternative solution that complies with the BCA
may be invalid where requiring that compliance certificates are issued for certain works even though the Board does not accredit any certifiers to issue the compliance certificates sought
may require that an existing building is upgraded to comply with the BCA even though it is not possible to comply fully with the BCA
may be unnecessary or imposed in error
may be unclear, ambiguous and/or uncertain
may impede other processes.

Discussion

Conditions of development consent address important local issues. Applicants and certifying authorities must ensure conditions of consent are complied with; if they believe the conditions cannot be complied with, they can apply to have the condition amended and/or removed or apply to the Land and Environment Court to declare the condition invalid (both of which can attract a fee).

There are several ways in which conditions can be imposed on a development consent under section 80A(1) of the EP&A Act, including if they:
- relate to matters under section 79C(1) of relevance to the development
- require the carrying out of works relating to matters under section 79C(1).

The EP&A Regulation prescribes a small number of conditions which relate to critical issues, such as ensuring compliance of building work with the BCA, requiring a home warranty insurance contract to be in force for residential building work, and protecting and supporting adjoining premises from possible damage from excavation.

Some councils impose conditions on consents that require council to be satisfied about a matter. For example, that an on-site detention of stormwater has been constructed in accordance with a required council policy.

An efficient building process will only be achieved if conditions of consent can be satisfied by an applicant without reference back to the council. In addition, clause 161 of the EP&A Regulation enables any requirement of the conditions of a development consent that a consent authority or council is to be satisfied as to a matter (in relation to such things as mechanical work, structural work, hydraulic work and road work) to be taken to have been complied with if a certifying authority is satisfied as to that matter.

Some councils 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 Regulation, the certifying authority must be satisfied the conditions of the development consent to be complied with prior to the CC being issued are complied with; however, the wording and intent of some of these conditions is unclear. Similarly, under the EP&A Act, an 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 is suitable for occupation) 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 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. The EP&A Act sets out that construction under a development consent cannot commence without a CC having been issued. It is not necessary or appropriate for development consents to specify whether a CC is required. The issue of a CC is also the responsibility of the certifying authority, not the responsibility of the consent authority.

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

Most councils have a set of standard conditions of consent they draw upon when issuing development consent. In many cases, the conditions may not be considered for suitability for the development and amended or deleted accordingly. For example:

- “Construction Traffic Management Plan from a Red Card RTA Accredited Traffic Controller, prior to the issue of the Construction Certificate”, imposed in relation to a development application for the addition of a bedroom to the back of a house.

**Recommendations**

The Board recommends the Planning Review Panel:

- 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**

**Issue**

Confusion arises from the application of section 96 to amend development consents. In addition, most councils require a section 96 application for any form of variation to a proposed development. This results in time delays and additional costs for matters that could be considered as being not inconsistent with the original development consent.
Discussion

To modify a development consent, an applicant must make an application to the consent authority (usually the council) under section 96 of the EP&A Act. This attracts a fee under the EP&A Regulation and consideration by the consent authority of the application. This raises several issues:

- there is no requirement under section 96 for a council to determine an application within a particular time, causing delays in the building process
- some councils require applications under section 96 to remove a condition of consent that was included in error by the council
- some councils require applications under section 96 to correct errors in the conditions of consent, even where the error is made by the council
- some councils require applications under section 96 for minor amendments to the internal or external configuration of a building, or other minor variations to the approved development.

As a result of the decision in *Windy Dropdown Pty Ltd v Warringah Council* [2000] NSWLEC 240 (17 November 2000) and similar cases, applicants can apply for a section 96 modification after work has occurred. An applicant can apply to modify a development consent years after the final OC or subdivision certificate was issued for the relevant development. There is no corresponding ability to apply for a CC retrospectively, as it is a prospective approval.

Recommendations

The Board recommends 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).
Building and subdivision work

Detail of work required before construction commences

Issue
Detailed design documentation for structural, electrical, mechanical and fire services is not required to be submitted prior to installation, as the legislation allows a certifying authority to rely on design certification for these elements from an appropriately qualified person when issuing a complying development or CC. A lack of detailed design documentation creates problems for the end users of the building. Further, a lack of a requirement for detailed design documentation to be prepared and certified by an accredited certifier has often resulted in designs that do not comply with the BCA.

Discussion
Under Schedule 3 Part 1 of the EP&A Regulation, plans and specifications for building work can be but are not required to be submitted to the certifying authority with the application for a complying development or CC.

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. Accredited certifiers, on the other hand, could not issue CCs subject to conditions, as it was considered that all details for the building work should be provided and ‘approved’ prior to the issue of the certificate.

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

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, would resolve the issue. Conditions could be limited to enabling the accredited certifier/PCA to require detail of nominated services immediately prior to their installation for the PCA to determine compliance and ‘endorse’ the plans, and would allow these plans to form part of the final documentation that is then available to the end user.

Recommendations
The Board recommends the Planning Review Panel:
- 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

(see also Role of occupation certificates)

Issue
Inconsistencies occur between the completed building or subdivision and the approved development consent/CC or CDC.

Discussion
There is no requirement under the EP&A Act and Regulation for a check to be made that completed building or subdivision work complies with the development consent and the approved plans and specifications, or with the complying development, or with the CC. As a result, there may be inconsistencies between the ‘approved development’ and the final building or subdivision.

In addition, some builders fail to adequately document full building services within a building and the builder can avoid responsibility for compliance of what is built.

Requiring that the builder certify the consistency of completed works against the development consent, CC, CDC and the associated plans and specifications could significantly enhance the compliance process, and would ensure that the built form is consistent with the approval.

Recommendation
The Board recommends the Planning Review Panel:
- 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

Issue
Difficulties arise when unauthorised building or subdivision work needs to be rectified.

Discussion
Building or subdivision work that occurs without being the subject of a valid development consent or a CC, or a CDC, can occur for a number of reasons. The applicant may fail to obtain the necessary approval before work commences, or design or other changes may occur during construction that are not the subject of a modification application under section 96 of the EP&A Act.

Following the decision of the Land and Environment Court in Marvan Properties Pty Ltd and Anor v Randwick City Council [2005] NSW LEC9, the EP&A Act was amended in 2006 to prevent a CC being issued retrospectively; that is, after building work has occurred. A CC is necessarily a prospective approval, certifying that work completed in accordance with specified plans and specifications will comply with the requirements of the EP&A Regulation.
On the other hand, it is not uncommon for large developers and builders to carry out work that is not the subject of a CC on the basis that the costs of any penalty will be insignificant against the potential costs lost to delays in seeking the appropriate approvals.

Where building or subdivision work that is subject to a CC or CDC deviates from the approved plans, the work cannot be 'approved' by the issue of a CC or CDC, as the work is not in accordance with the original certificate. Similarly, where work is carried out before a CC or CDC is issued, a certificate cannot be issued for that work.

Where building work or a building that is required to be subject to a CC or CDC is not the subject of a CC or CDC, an OC cannot be issued in relation to that work or building, as one of the tests for issuing an OC is that the required approvals are in force. An OC authorises the occupation and use of a new building, or a change of building use for an existing building.

The final payment under a building contract is often contingent upon the issue of an OC. In addition, property vendors are required to provide a copy of an OC for the relevant building during conveyancing transactions. The inability to issue an OC for a building, or part of a building, will delay final financing and conveyancing. Often, the only recourse is for the landowner to apply for a building certificate under the EP&A Act.

A building certificate does not authorise occupation of a building but prevents the council from issuing an order under the EP&A Act or the Local Government Act 1993 requiring the building to be repaired, demolished, altered, added to or rebuilt (except in relation to fire safety). Building certificates were not intended to authorise building work that has been deliberately carried out without the necessary approvals being in place.

Recommendations
The Board recommends the Planning Review Panel:
- 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

(see also Disparity between what is built and what was approved and Conditions of development consent)

Issue
The role of the OC is unclear, the use of the certificate can be manipulated, and consumers often incorrectly assume that a building subject to an OC complies with the relevant approvals and with the BCA.

Discussion

Legislative requirements
The EP&A Act allows two types of OC to be issued – an interim OC and a final OC. An OC can be issued for the whole or any part of a building, which includes any structure or part of a structure (including any temporary structure or part of a temporary structure).

A person cannot commence occupation or use of a building unless an OC has been issued for the relevant building or part of the building. However, this requirement does not apply after 12 months from the date on which the building was first occupied or used. This latter exemption was introduced to allow occupation of a building which has been occupied for 12 months without an OC.

Under the Act, an OC can only be issued when any preconditions to the issue of the certificate, as specified in the development consent or CDC as needing to be complied with before the certificate is issued, have been met. Some councils require work that does not relate to the health and safety of the building to be carried out as preconditions to the OC being issued, such as full landscaping.

What the OC is intended to achieve is not clear in the EP&A Act or Regulation. The Act provides that the PCA must not issue an OC unless the building is suitable for occupation or use in accordance with its classification under the BCA. This applies to all classes of buildings under the BCA, from residential development to large industrial development.

Multiple certificates
An OC is issued in relation to a particular development consent or CDC. However, if there is more than one development consent or CDC issued for a building, such as when fit outs of a shopping centre are undertaken, multiple PCAs can be appointed and multiple OCs can be issued for the one building. Monitoring of compliance, and in particular fire safety systems compliance, is made more difficult where there is not a single approval for building systems in a building that is modified as work is done and changes to use occur.

Other types of certificates
In other states, a final or completion certificate may be required instead of or in addition to an occupancy certificate. In Tasmania, a certificate of completion (building work) can be issued where an occupancy permit and a certificate of final inspection have been issued, and all conditions of the building permit have been met. In Victoria, a certificate of final inspection is issued for extensions or alterations to existing homes that do not require an occupancy permit. In Queensland, occupation of a single detached class 1a or 10 building, is permitted...
where the building certifier is satisfied, on an inspection carried out under best industry practice, that the work complies with the building development approval, and a final inspection certificate for the building work has been issued by the certifier. For other buildings, where the building certifier is satisfied the building has been substantially completed, they must issue a certificate of classification, which includes information about the type of building or use and any alternative solutions in the building, to enable occupation of the building.

*Failure to obtain an OC*

Often the final payment under a builder’s contract is not payable until an OC is issued. Similarly, purchasers of land will usually require an OC for new building work under a contract for sale of the land. Where an interim OC has been issued for part of a building, however, there is no requirement under the EP&A Act for a final OC to be issued.

If a CC is not issued in relation to a development and work is carried out, section 109F(1A) prevents a CC being issued retrospectively for the work already done. Any OC issued in relation to the development cannot include the work that is not the subject of a CC. In these circumstances, the only recourse is for the landowner to seek a building certificate from the local council.

A building certificate does not authorise occupation of a building but prevents the council from issuing an order under the EP&A Act or the *Local Government Act 1993* requiring the building to be repaired, demolished, altered, added to or rebuilt (except in relation to fire safety).

The Board has been consulting with industry to develop a model that enables CCs to be issued retrospectively in certain circumstances. The proposed model would enable an amended CC to be issued in relation to work where the relevant development consent, CC that relates to that development consent and a modification of the consent under section 96, have been issued, and the CC plans show works-as-executed and the prospective building complies with the BCA. Only the PCA would have power to issue the amended CC and issue the OC if the PCA is satisfied that the work complies with the BCA.

*Reliance on certification from the builder and other accredited certifiers*

A possible role for the OC could be to provide some certainty to the community and to the building owner that the development, including the building work, is consistent with the issued approvals. Certification could be required from the builder or an accredited certifier that certain critical elements in the building generally comply with the approval and with the BCA. Examples of critical elements could include structural, electrical, mechanical, fire services, and wet area flashing.

*Recommendations*

The Board recommends the Planning Review Panel:

- 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

Issue
Restrictions are placed on accredited certifiers issuing subdivision and strata certificates.

Discussion

Construction certificates for subdivision
Private accredited certifiers and councils can issue a CC for subdivision work under the EP&A Act. However, some councils issue development consents subject to a condition that prevents accredited certifiers issuing CCs for subdivision. Accredited certifiers could not issue the CC unless the development consent is modified under section 96, which attracts an application fee and delays the development.

Subdivision certificates
Subdivision certificates are issued under the EP&A Act to authorise the registration of plans of subdivision under the Conveyancing Act 1919. Further under the Act, unless an environmental planning instrument enables an accredited certifier to issue a subdivision certificate, only the council can issue the certificate. Only two councils in NSW enable private accredited certifiers to issue subdivision certificates under their local environmental plans or development control plans.

Councils are reluctant to enable certifiers to issue certificates in relation to subdivision infrastructure for which the council will become responsible for maintaining (for example, roads). However, private certifiers are also prevented from issuing subdivision certificates in relation to other subdivision work (for example, drainage on private land).

These practices delay the creation of new subdivisions, and the release of allotments of land for construction.

Delay in issue of subdivision and strata certificates
Strata certificates are issued under the Strata Schemes (Freehold Development) Act 1973 and Strata Schemes (Leasehold Development) Act 1986, by councils and appropriately accredited private certifiers. Strata certificates authorise the registration of a strata plan, strata plan of subdivision or notice of conversion.

Since the introduction of private certification, some councils impose conditions of development consent that prevent the issue of strata certificates until the OC has been issued.

These practices are motivated by councils’ concerns about the developer/builder disappearing once the plan of subdivision or strata subdivision is registered and the relevant units sold, leaving any outstanding conditions of consent to the landowner.
to satisfy. As a result, developers are prevented from registering the strata plan so as to sell the units in the building, which delays finalising the development and impacts on the cost of development.

Subdivision and strata certificates only have the function of enabling the plans of subdivision and strata, respectively, to be registered by Land and Property Information under the relevant legislation. Councils have orders powers under the EP&A Act to ensure compliance with the development consent. The release of the subdivision or strata plan should not be delayed until all conditions of development consent are satisfied.

Certification of subdivision work

Some councils impose conditions that prevent accredited certifiers carrying out inspections and certifying subdivision works by refusing to accept compliance certificates for completed subdivision work as evidence the work has been satisfactorily constructed. In a duplication of effort, the council also inspects the work.

Recommendations

The Board recommends the Planning Review Panel:

• 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

(see also Scope of the NSW building certification system)

Issue

The certifying authorities may be liable for relying on certification issued by unaccredited and unlicensed building practitioners where the certification is not in the form of a compliance certificate.

Discussion

Component certificates

A 2010 decision of the Administrative Decisions Tribunal determined that minimum professional standards of competence are not set by ‘industry practice’ in legislation applying to accredited certifiers (the Building Professionals Act 2005). “The benchmark in this
"legislation is the standard of competence, diligence and integrity a member of the public is entitled to expect of a reasonably competent accredited certifier."

The 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.

Certifying authorities must necessarily rely upon the certification of other building practitioners as they cannot be expert in all elements that form part of a building. However, reliance on certificates from unaccredited persons may result in liability ultimately being carried by the certifying authority or the PCA. In addition, the standards to which these certificates are issued and the information contained in the certificates vary significantly throughout industry, and certifying authorities and councils expend considerable resources to manage the deficiencies in certification documents.

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

Certifying authorities do not necessarily receive any protection from liability in relation to certification provided by tradespersons who may not be licensed or insured. Some 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.

**Compliance certificates**

In contrast to the above type of certification, accredited certifiers can issue compliance certificates under the EP&A Act 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.

The attraction of relying upon a compliance certificate from another accredited certifier is that the accredited certifier or PCA relying on that certificate is automatically not liable for any loss or damage arising from the work to which the certificate relates. A check of the competence of the accredited certifier who issued the compliance certificate or of quality of the work, is not required in order to obtain this protection from liability.

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. The limited number of persons accredited to issue engineering compliance certificates, the small number of accredited certifiers within the various disciplines, and their geographical location, are also reasons why compliance certificates for the engineering elements are not issued.

A report or certificate from a professional, accredited or otherwise, which is limited in scope and heavily qualified, on the other hand, would not necessarily limit the risks associated with the installation of critical building services.

**Recommendation**
The Board recommends the Planning Review Panel:
• 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

Issue
The general public is not aware of the role of the certifying authorities and has expectations about their role that do not reflect their functions.

Discussion
Roles of PCAs and accredited certifiers
Accredited certifiers have defined statutory functions under the EP&A Act and BP Act. For building work, they apply the legislation, the BCA, and Australian Standards to determine if construction can commence. During the construction phase, the PCA ensures the work proceeds in accordance with the relevant development consent or CDC and determines whether the completed building is fit for occupation.

The role and responsibilities of the accredited certifier and the PCA are not always clear to members the community. The public often mistakes the certifier as being someone who ensures the quality of building work and who supervises the work as it occurs. This misapprehension has arisen from the role councils traditionally undertook as the local authority, responsible for ensuring development proceeds as approved and engaging Clerks of Works to oversee the building process.

The issue is not confined to NSW. The Queensland Government’s *Improving building certification in Queensland* (August 2011), indicates that: ‘People often believe that because a building certifier approves building work, they are responsible for other matters that builders are actually responsible for.’ The Queensland Department of Local Government and Planning is considering changing the building legislation in that state to more clearly outline building certifiers’ roles and responsibilities by better defining the limits of their functions.

Under the EP&A Act, the PCA must be appointed by the person with the benefit of the development consent, which is usually the landowner. This provision was introduced to prevent the builder appointing the PCA and better ensure the landowner is aware of who the PCA is and their functions in relation to approving the development.

Under the *Home Building Act 1989*, all residential building work over $1,000 requires a written contract. Under the NSW Architects Code of Professional Conduct in the Architects Regulation 2004, architects should have a written architect-client agreement for all work undertaken. While the Board recommends PCAs enter into a contract for services with the landowner, it is unclear to what extent this occurs. A certifying authority could be engaged by a verbal agreement.

While the PCA’s role is not explicitly described in the EP&A Act, the Board’s consumer brochures explain their role and councils and certifiers have copies of the brochures available to provide to applicants.

Certifying authorities and principal certifying authorities
Another point of confusion is the distinction between the ‘certifying authority’ and the ‘principal certifying authority’ under the EP&A Act. It is often mistakenly assumed the PCA has the role of issuing the CC or CDC, that they are responsible for enforcing the conditions
of development consent, and that they are responsible for those functions that are actually the responsibility of the consent authority.

A certifying authority can issue complying development, construction and compliance certificates under the EP&A Act, and strata certificates under the Strata Schemes (Freehold Development) Act 1973 and the Strata Schemes (Leasehold Development) Act 1986. The PCA is a certifying authority who is appointed to carry out inspections and issue the subdivision and/or OC at the end of the development. Consumers have a choice between appointing the council (who must have a council accredited certifier to certify building work), and a private accredited certifier, to act as the certifying authority or PCA.

Accredited certifiers can only undertake certification work if their accreditation issued under the BP Act allows them to do so. Certifiers are accredited in different categories and can carry out different certification work for different classes of building depending on that accreditation.

**Recommendations**

The Board recommends the Planning Review Panel:
- 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**

**Issue**

There is no clear delineation of roles and responsibilities between councils and private accredited certifiers in managing issues that arise during the building process.

**Discussion**

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.

This often results in confusion for consumers, industry and local government as to the appropriate party to address issues, as well as failing to ensure effective and timely 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 EP&A 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.
Enforcement powers 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).

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
The Board recommends the Planning Review Panel:
- 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

Issue
There are few professional people entering the building surveying/certification profession at a young age and few practise in regional and rural areas of NSW.

Discussion
The majority of council and private accredited building surveyors are 41 to 60, although there is also a relatively high proportion of certifiers aged 31 to 40. While data reflects that certifiers necessarily tend to be experienced surveyors, it demonstrates the critical importance of recruiting younger certifiers as older professionals reach retirement age.
When the accreditation of council building surveyors commenced in 2010, it was clear that the same qualifications, skills and knowledge requirements could not be placed upon council officers working in regional and rural areas of NSW to gain accreditation as for their city counterparts. Similar to other professions, councils are not able to easily find building surveyors to live and work in areas away from large city centres.

There is no simple answer to attracting more people to the building surveying profession. The role of building surveyors is not well understood by the general community and, by extension, by students. As demand for qualifications and training in the area is not considerable, there is also a lack of available building surveying tertiary courses in NSW.

This issue is critical to the 32 Goals of NSW 2021, which include driving economic growth in regional NSW (targeting 40,000 new jobs regionally) and strengthening the NSW skill base. While the Board has worked closely with Newcastle and Bond Universities recently to have building surveying undergraduate and post-graduate courses recognised for accreditation in NSW, more flexible options are needed for entry level training with career trajectory which is supported by high quality vocational education training (VET) courses and continuing professional development.

The Queensland Government is considering strategies to increase the number of building certifiers in that state, including:\(^2\)

- working with educational institutions to provide accredited courses for building surveyors
- working with the Australian Government to simplify entry for overseas building certifiers into Australia, and develop specific bridging courses for overseas building certifiers

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• expanding its existing cadet partnership with the Queensland Building Services Authority, under which government agencies, local governments and private certification businesses would take on cadet building certifiers. Victoria currently runs a similar cadet program, which the Commonwealth Government partly funds.

Expanding the building certification system in NSW to include other professionals and make certification mandatory will raise the profile of the profession. However, additional marketing strategies need to be developed, in association with peak industry bodies.

Recommendations
The Board recommends the Planning Review Panel:
• 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

Issue
The capture of data on the certification of buildings and subdivision is insufficient.

Discussion

Capture of existing data
Data on building work and certification is currently collected by two means. Under the EP&A Regulation, applications for CDCs and CCs are required to include information on the number of storeys, the gross floor area of the building, the gross site area of the land, the number of dwellings to be included, the material to be used in the construction of the new building etc, which is forwarded to the Australian Bureau of Statistics for national statistical reporting on building activity.

Secondly, local councils are required to provide data to the Department of Planning and Infrastructure annually on, among other things:
• the number of construction, occupation, subdivision and strata certificates issued by council and private certifiers in their area
• the number of CDCs issued.

While accredited certifiers are obliged to forward copies of complying development and Part 4A certificates to the local council within two days of their issue, the Board’s complaints and audit investigations have found that many certifiers do not discharge this function either within time or at all. As a result, the certificate data provided to the Department is not comprehensive and does not paint a complete picture of the number of certificates being issued. The data is also limited to the number of certificates issued; it does not identify the type of development or class of building.

Reporting of existing data
The comparative information reported by the Department each year relates to the reporting period ending 30 June, however the report is not published until February the following year as the Department compiles the information as it become available from councils. As a result, the information in the report is not current on its release.
Under the BP Act, the Board has powers to require certifiers to provide copies of documents they have received, produced or relied on in carrying out their functions as certifying authorities. As a matter of course, the Board does not require certifiers to do so because of the resources required to establish an appropriate data capture, reporting and management system that is cost effective and simple for the Board and certifying authorities (councils and private accredited certifiers) to use. Most councils in NSW have established electronic systems to manage all of their local government functions and any further reporting requirements would need to be compatible with the existing systems.

The Board regularly reports to the Minister, the Department, other agencies, local government and industry on the state of the certification system so as to indicate where improvements can be gained and to identify where the system is working well.

In Victoria, the Building Commission collects information from building surveyors on the number, value and type of building permits issued each month, including for domestic houses, residential high rise, commercial, retail, industrial and hospital/healthcare development. The Commission’s monthly pulse provides qualitative and quantitative information on the building industry to measure industry’s performance. The website captures about 100 data measures on the Victorian building industry. The publication of comprehensive data is facilitated by the Commission’s role in licensing and regulating all building practitioners in Victoria.

Recommendations
The Board recommends the Planning Review Panel:
- 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

Issue
Difficulty in determining when home warranty insurance is required.

Discussion
Under the EP&A Regulation, for residential building work that requires home warranty insurance under the Home Building Act 1989, a contract of insurance must be in force before any building work can commence in accordance with a CDC or CC. While home warranty insurance must be obtained by the home building contractor, the PCA is required by the EP&A Regulation to determine whether the home warranty insurance is in place and to notify Council before work commences.

There appears to be difficulty in interpreting when home warranty insurance is required. Currently, the insurance is required for home building work with a contact price above $12,000. If the contract price is unknown, an alternative means of determining the requirement is the reasonable market cost of the labour and materials, which if above $12,000, will require insurance. Determining the reasonable market cost is not straightforward.

Recommendation
The Board recommends the Planning Review Panel:
- 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

Issue
The steps to be taken following a critical stage inspection are not clear.

Discussion
The EP&A Act provides that an occupation or subdivision certificate cannot be issued unless the PCA has carried out inspections required by the EP&A Regulation or by the PCA. The EP&A Regulation sets out the critical stage inspections, as summarised in table 2.

Table 2: critical stage inspections

<table>
<thead>
<tr>
<th>Class 1 or 10 building</th>
<th>Class 2, 3 or 4 building</th>
</tr>
</thead>
<tbody>
<tr>
<td>after excavation for, and prior to the placement of, any footings</td>
<td>prior to covering any stormwater drainage connections</td>
</tr>
<tr>
<td>prior to pouring any in-situ reinforced concrete building element</td>
<td>after the building work has been completed and prior an OC being issued</td>
</tr>
<tr>
<td>prior to covering of the framework for any floor, wall, roof or other building element</td>
<td>in the case of a swimming pool, as soon as practicable after a barrier (if required under the Swimming Pools Act 1992) has been erected.</td>
</tr>
<tr>
<td>prior to covering waterproofing in any wet areas</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>after the commencement of the excavation for, and before the placement of, the first footing</td>
<td>prior to covering of waterproofing in any wet areas, for a minimum of 10% of rooms with wet areas within a building</td>
</tr>
<tr>
<td>prior to covering stormwater drainage connections</td>
<td>after the building work has been completed and prior to an OC being issued</td>
</tr>
<tr>
<td></td>
<td>in the case of a swimming pool, as soon as practicable after the barrier (if required under the Swimming Pools Act 1992) has been erected.</td>
</tr>
</tbody>
</table>

Except for the final inspection, which the PCA must do, the critical stage inspections may be carried out by the PCA or, if the PCA agrees, by another certifying authority. While the principal contractor will usually request the PCA to attend for an inspection, it may not always be clear whether or not the inspection has occurred and the outcomes of the inspection. The outcomes should be notified to the principal contractor so it is apparent that the work can proceed.

For each critical stage and other inspection the PCA requires, the certifying authority must make a record of the inspection, which includes whether or not the inspection was satisfactory in the opinion of the certifying authority who carried it out. The Act and Regulation are silent on what is to occur where an inspection is not satisfactory. The PCA could be required to give the principal contractor notice that an inspection has occurred and whether or not it is satisfactory.

The Act could be amended to prevent the PCA issuing an OC where any matters identified during an inspection are unsatisfactory in the opinion of the certifying authority that carried out the inspection. The PCA should also take steps to require rectification of the outstanding matters.
Recommendations
The Board recommends the Planning Review Panel:

- 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

(see also Role of occupation certificates)

Issue
A missed critical stage inspection can result in an OC not being able to be issued.

Discussion
Critical stage inspections are mandatory under the EP&A Act and Regulation. The EP&A Regulation, however, enables an OC to be issued where a critical stage inspection is missed in circumstances that the PCA considers were unavoidable and where the PCA is satisfied the work that would have been the subject of the missed inspection was satisfactory. The record the certifying authority must make of a missed inspection under the EP&A Regulation is to include documentary evidence the PCA relied on to so satisfy themselves.

Where a critical stage inspection is missed and the circumstances were not unavoidable, an OC cannot be issued for the building, impacting on the completion of the work and future conveyances of the land/building.

Recommendations
The Board recommends the Planning Review Panel:

- 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.
Summary and conclusion

The recommendations included in this submission reflect the Board’s unique experience and knowledge of the EP&A Act and how it operates on building sites around NSW.

The 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 believes 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, all consent authorities, landowners and builders), then the planning system will not meet the Government's overall targets and vision for NSW.
Appendix 1: Towards a NSW Building Commission

Background
In 2002, the Joint Select Committee on the Quality of Buildings Inquiry (the Campbell Inquiry) recommended the establishment of a home building compliance commission to oversee home building regulation in NSW. The Government of the day decided not to establish a building commission and instead, in an attempt to improve communication between relevant government authorities involved in the regulation of the building industry, established the Building Industry Advisory Committee.

In 2007, the government inquiry into the operations of the Department of Fair Trading’s Home Building Service also recommended the establishment of an independent building commission to minimise fragmentation and duplication and to better coordinate the home building industry. This recommendation was not acted upon. A summary of these inquiries is at Attachment 1.

Victoria and Western Australia have established building commissions, whilst Queensland and Tasmania have centralised authorities responsible for regulating building construction and related practitioners. An outline of the functions and structure of each of those authorities is at Attachment 2.

The national occupational licensing system (NOLS) will commence from July 2012, which will grant building licences based on a single set of nationally agreed eligibility requirements. The NOLS will allow licence holders to work anywhere in the country without the need for further licence applications when moving across borders. A centralised building agency would be well placed to administer the implementation of the NOLS in NSW for building and building related occupations, which are expected to commence in the new system from July 2013.

Rationale for a NSW Building Commission
In 2009-2010, 23% of all Australian building approvals, $18.64 billion worth of construction, was approved under the NSW local development approval system. However, no single body or authority is responsible for the regulation and control of persons involved in the design, approval, construction and certification of this work.

The absence of a single regulatory body has attributed to ongoing problems in the industry, including:
- accountability and liability of builders and other building practitioners
- quality of building outcomes
- cost and efficacy of consumer protection measures
- confidence of investors and builders
- consistency of regulation

A building commission would allow the NSW government to deliver:
- a ‘one stop shop’ for consumers and industry
- a single integrated agency to oversee and lead the industry
- greater confidence in building and investing in NSW
- consistency in building control and regulation
- improved building quality and industry outcomes
- continued professional development and training
Regulation of the building industry in NSW

Currently the building industry in NSW is administered by various agencies including the Building Professionals Board, Home Building Service in Fair Trading NSW, Department of Planning and Infrastructure, Work Cover NSW, Building and Construction Long Service Levy Corporation and the Division of Local Government.

The table below identifies the authorities, relevant legislation, and Minister responsible for building functions in NSW. A summary of practitioners licensed and/or accredited by these authorities in NSW is provided at Attachment 3 whilst a summary of practitioner licensing in other states is provided at Attachment 4.

<table>
<thead>
<tr>
<th>Current Acts</th>
<th>Current Administration Agency</th>
<th>Current Responsible Minister</th>
</tr>
</thead>
<tbody>
<tr>
<td>Building Professionals Act 2005</td>
<td>Building Professionals Board</td>
<td>Minister for Planning and Infrastructure</td>
</tr>
<tr>
<td>Consumer, Trader &amp; Tenancy Tribunal Act 2001</td>
<td>Consumer, Trader and Tenancy Tribunal</td>
<td>Minister for Fair Trading</td>
</tr>
<tr>
<td>Environmental Planning and Assessment Act 1979</td>
<td>Building Professionals Board Building Systems Unit</td>
<td>Minister for Planning and Infrastructure</td>
</tr>
<tr>
<td>Fair Trading Act 1987</td>
<td>Fair Trading NSW</td>
<td>Minister for Fair Trading</td>
</tr>
<tr>
<td>Home Building Act 1989</td>
<td>Fair Trading NSW (Home Building Service)</td>
<td>Minister for Fair Trading</td>
</tr>
<tr>
<td>HomeFund Commissioner Act 1993</td>
<td>Fair Trading NSW</td>
<td>Minister for Fair Trading</td>
</tr>
<tr>
<td>Local Government Act 1993</td>
<td>Division of Local Government</td>
<td>Minister for Local Government</td>
</tr>
<tr>
<td>Occupational Health and Safety Act 2000</td>
<td>WorkCover NSW</td>
<td>Minister for Finance and Services</td>
</tr>
<tr>
<td>Swimming Pools Act 1992</td>
<td>Division of Local Government</td>
<td>Minister for Local Government</td>
</tr>
</tbody>
</table>

Consumer and industry issues

Currently, consumers and industry are required to be versed in and compliant with numerous pieces of legislation, relying on various agencies to provide information and interpretation.

Depending on the nature of their complaint, consumers may deal with the Board (disciplines accredited certifiers), the Home Building Service (disciplines builders), Treasury (administers home warranty insurance), WorkCover (monitors asbestos, demolition and site safety) local councils and/or the CTTT.

The example provided at Attachment 5 reflects the frustration commonly experienced by consumers and highlights the problems inherit within the current system. To obtain information and resolve a complaint, the consumer has sought assistance from the council, private accredited certifier, builder, Department of Fair Trading and Workcover.

The disparity between the regulatory environment and the outcomes experienced by consumers means that while property ownership remains the largest investment for many Australians, obtaining advice and resolving building disputes is often lengthy and cost prohibitive.

The Board’s experience is that complaints against accredited certifiers are often misdirected as responsibility rests with the builder, who is regulated by the Department of Fair Trading. Even when a complaint is proven against the accredited certifier, it can often require separate action to be taken against the builder to obtain a satisfactory resolution “on the ground”.

• a sustainable building industry.
Key building industry groups have also expressed frustration at the current fragmented system. An extract from the Master Builders Association’s “Key Policy Priorities” document of March 2011 expressing support for a Building Commission is at Attachment 6.

**A building commission model for NSW**

A NSW building commission would be responsible for all building sectors (residential and commercial) and would report to the Minister for Planning and Infrastructure.

The commission would bring together the building regulatory policy functions and work teams from Planning and Infrastructure, Finance and Services, Treasury, and Premier and Cabinet.

**Functions of a building commission**

A NSW building commission would:
- administer building legislation
- regulate building practices
- provide dispute resolution services for the building industry and consumers
- advise government on building policy
- inform consumers and industry on building matters
- administer the accreditation and licensing of building practitioners
- facilitate industry research and education
- promote improved building standards
- monitor activity in the building industry

**Funding a building commission**

Both the Victorian and West Australian building commissions are funded through a levy on building approvals in those states. A similar levy could be applied to the “construction certificate” process in NSW in addition to fees paid for building practitioner licensing and registration.
In Victoria, a levy of 0.128 cents in every dollar of the cost of building work applies to applications for building work. In 2009-2010 the Victorian Building Commission reported an income of $23 million from this levy. A levy applied at a similar rate in NSW would raise in the vicinity of $28 million, based on the $18.64 billion worth of development application and CDC approvals in NSW in 2009-2010.

For a $500,000 development such a levy would add $640 to the cost of the CC application. The Government may chose however not to fund a commission entirely from a levy, given that many of the functions the commission would take on are already funded through general revenue.

**Way forward**

Further work is required to determine an appropriate model for the establishment of a Building Commission in NSW. The Building Professionals Board is well placed to play a role in this work given the current statutory review of the Building Professionals Act 2005 being undertaken by the Board.

**Attachments**

- Attachment 1: Summary previous government inquiries
- Attachment 2: Summary - Victoria, Western Australia, Queensland, South Australia and Tasmania
- Attachment 3: Building Industry Licensing in NSW
- Attachment 4: Building Industry Licensing in other states
- Attachment 5: Typical example of a consumer’s experience
- Attachment 6: Extract Key policy priorities for the building and construction industry in NSW, MBA (March 2011)
Attachment 1: Previous NSW government inquiries

Joint Select Committee on the Quality of Buildings, Campbell Inquiry, (July 2002)

In 2002, the Joint Select Committee on the Quality of Buildings inquiry (the Campbell Inquiry) recommended the establishment of a home building compliance commission to oversee home building regulation in NSW.

The functions of this commission were to include:
- licensing, disciplining and auditing builders and other practitioners (including private certifier registration and auditing)
- licensing industry practitioners
- establishing and maintaining industry-wide registries
- establishing a front desk for consumer building complaints and disputes
- providing policy advice
- liaising with industry
- maintaining high level of practitioner skills and qualifications.

The Campbell Inquiry also recommended that a building commission provide a streamlined dispute management system for licence complaints and building disputes, eliminating duplication between NSW Fair Trading and the Consumer, Trader and Tenancy Tribunal (CTTT).

A building commission model as recommended by the Campbell Inquiry was not established. However the building industry has evolved since 2002, with key changes including:
- the establishment of the Home Building Service in February 2003 with responsibility for all building related functions of NSW Fair Trading including licensing, investigation of building complaints, dispute resolution and consumer advice and education
- the creation of the Building Professionals Board (Board) in 2007 in response to the Campbell Inquiry.

Inquiry into the operations of the Home Building Service (December 2007)

In 2007, the Inquiry into the operations of the Home Building Service considered it very important that the NSW Government work to minimise fragmentation ad duplication in the home building industry, and to deliver co-ordination.

The Inquiry recommended that the NSW Government examine ways to improve co-ordination in building industry regulation, including the establishment of an independent building commission. The Government at that time did not support this recommendation.
Attachment 2: Summary of other jurisdictions

Victorian Building Commission

- A statutory authority that oversees the building control system in Victoria.
- Established by the Building Act 1993 to administer Victoria's building legislation system.
- Oversees building legislation, regulates building practices, advises Government on building policy, and provides services to industry and consumers.
- Derives revenue from a levy on building permits. $28.6 million income (2009-2010).
- 115 employees (June 2010).
- Led by the Building Commissioner who reports to the Minister for Planning.
- Structured into 7 divisions including:
  - Practitioner services
  - Planning & corporate affairs
  - Policy services
  - Building quality
  - Compliance & conciliation
  - Financial & business services
  - Business development & consumer services
- Administers 4 statutory bodies being:
  - Building Advisory Council – the peak advisory council to the Minister for Planning
  - Building Appeals Board – determines appeals, disputes and assesses modification and compliance requests to building legislation
  - Building Practitioners Board – registers building practitioners and regulates their conduct and ability to practise
  - Building Regulations Advisory Committee (BRAC) – provides advice on building regulatory matters and accreditation of building products
- Together, the Commission and these 4 statutory bodies:
  - Regulate the Victorian building industry
  - Administer the registration of Victorian building practitioners and monitor their conduct (currently 23,334 practitioners in 2008-2009)
  - Advise the Minister for Planning and the Victorian Government on building policy
  - Administer building legislation, the Building Act 1993 and Building Regulations 2006 and advise the Minister for Planning and the Victorian Government on new building regulation development
  - Resolve residential building disputes as part of the Building Advice and Conciliation Victoria* service
  - Accredit building products, construction methods, designs, components and systems associated with building
  - Determine disputes and appeals arising from the Building Act 1993
  - Inform consumers about building and renovating
  - Communicate changes that occur in building legislation
  - Promote improved building standards in Victoria, nationally and internationally
  - Provide comprehensive information on building activity
  - Inform industry decision making through data and analysis
  - Facilitate industry research, development and education
  - Support the uptake of information technology and e-commerce
  - Encourage sustainable and accessible building design, construction and use.
* Building Advice and Conciliation Victoria is a partnership between the Building Commission and Consumer Affairs Victoria and is a 1 stop shop for consumers and builders providing free advice and assistance to resolve domestic building disputes.

**Western Australian Building Commission**

- Established as a division of the Department of Commerce in July 2009.
- Will be funded by a levy payable on the value of a building permit (contract value). Eg. 0.09% of the value of the works. The amount of the levy will be set out in the regulations prescribed under the Building Services (Complaint Resolution and Administration) Bill 2010.
- It is intended to apply the levy at double the rate for occupancy permits and building approval certificates used to retrospectively authorise building work, to act as a further disincentive to undertaking work without a building permit.
- WA Building regulation reform includes 3 bills:
  - The Building Services (Complaint Resolution and Administration) Bill 2010
  - The Building Services (Registration) Bill 2010
  - The Building Bill 2010
- These bills abolish the Builder’s Registration Board, Painters Registration Board, Building Surveyors Qualifications Committee and the Building Disputes Tribunal and replaces them with an integrated system under the Building Commission.
- Timeline – bills to be passed through WA Parliament in autumn 2011 and commenced May/June 2011.
- The Building Commission will include a single Building Services Board, which will be comprised of a chairperson, 2 consumer representatives and 2 representatives from each building service occupation. The Board’s primary responsibilities will be to:
  - make decisions on applications for registration as a building service provider, as well as the approval of owner-builders;
  - make decisions on whether to take disciplinary action before the State Administrative Tribunal against building service providers;
  - hold hearings into minor disciplinary matters; and
  - provide advice to the Building Commissioner.
- The Building Commission will provide services in the areas of:
  - Registration and licensing – includes making recommendations to the board, ensuring compliance with the conditions of registration and licensing, and prosecuting people and firms operating without licenses or registration. Will include builder registration, painter registration, plumber licensing, building surveyor accreditation, construction contracts adjudicator registration and owner builders.
  - Customer services – information, advice and dispute resolution for industry and consumers.
  - Technical service – input into the BCA and National Construction Code, development of WA plumbing and building standards, plumbing approvals and as-constructed drawings records.
  - Government service – advise government on building industry matters and options for greater efficiency and less red tape.
- The Commission will consider and resolve disputes on workmanship and contractual disputes. Where issues remain intractable, the State Administrative Tribunal will provide services in place of the Building Disputes Tribunal which currently manages consumer complaints and disputes.
- Accreditation of building surveyors still in its infancy in WA.
Queensland Building Services Authority (BSA)

- The Queensland Building Services Authority (BSA) is a statutory authority established under the Queensland Building Services Authority Act 1991 (the QBSA Act).
- The BSA is within the portfolio of the Queensland Minister for Public Works and Information and Communication Technology.
- The BSA’s charter is to regulate the building industry through the licensing of contractors; educating consumers about their rights and obligations; making contractors aware of their legal rights and responsibilities; handling disputes fairly and equitably; protecting consumers against loss through statutory insurance; implementing and enforcing legislative reforms; and where necessary prosecuting people not complying with the law.
- The BSA plays a role in preventing building disputes by educating licensees on technical issues and good business practices. BSA also assists consumers by offering advice on how to resolve disputes.
- BSA provides a dispute resolution service for defect-related disputes between licensees and consumers. If the contractor fails to comply with BSA’s directions to rectify defective work, BSA may take disciplinary action through the Queensland Civil and Administrative Tribunal (QCAT) and rectification may be arranged under the Queensland Home Warranty Scheme.
- The BSA’s role in relation to certification is legislated for in the Building Act 1975 not the QBSA Act 1991.
- The BSA is responsible for:
  - Certifier licensing, auditing and investigating complaints in relation to certifiers in Queensland
  - Administering a register of certifiers and recording any changes of certifier information
  - Investigating complaints made by others against a licensed certifier
  - Auditing certifier operations in relation to building practices and other requirements of the governing legislation (occur randomly approximately every three - four years)
  - Making decisions in relation to the cancellation of a certifier’s license, the application of a condition on a license or enforcing another form of penalty against a certifier.

South Australia: Building Rules Assessment Commission

- Following the adoption of the performance edition of the BCA in South Australia on 1 January 1998, the Development Assessment Commission established the Building Rules Assessment Commission as a sub-committee under Regulation 103(3) of the Development Regulations 2008.
- The Building Rules Assessment Commission is a peer referral group of persons appointed by the Minister for Urban Development & Planning for the purpose of ensuring national consistency and timely decision making on technical matters relating to compliance with the BCA.
- Section 36 of the Development Act 1993 establishes a procedure for Councils or private certifiers to seek an opinion from the Building Rules Assessment Commission on applications which need to be assessed against the performance requirements of the BCA. The council or private certifier is required to seek the concurrence of the Building Rules Assessment Commission before granting building rules consent to an application that is at variance with a BCA performance requirement.
- The functions of the Building Rules Assessment Commission are:
  - to consider matters referred to it under the Act; and
o to administer as appropriate any delegated functions of the Development Assessment Commission; and
o to report to the Development Assessment Commission on such matters determined by the Minister or referred by the Development Assessment Commission.

- The role of the Building Rules Assessment Commission is to provide concurrence on applications seeking to vary the performance requirements of the BCA; and also to assist councils and private certifiers (as relevant authorities) by providing an expert opinion on whether a building solution complies with the performance requirements of the BCA.

Private certifiers are registered by the Private Certifiers Registration Authority.

**Tasmania: Workplace Standards Tasmania**

- Workplace Standards Tasmania is a division of Tasmania Department of Justice.
- Workplace Standards Tasmania administers legislation which requires numerous trades people to be licensed.
- The Building Appeal Board is established under the Building Act 2000. The Board is a body of at least 7 persons appointed by the Minister for Justice under the Building Act 2000.
- The functions of the Appeal Board are:
  - Appeals and applications under the Act
  - Disputes relating to any matter in the Building Regulations 2004 or the Plumbing Regulations 2004.
- The Appeal Board consists of a Chairman and at least seven other members. Membership consists of persons with knowledge and expertise in building surveying, architecture, engineering, building, plumbing, local government, environmental and public health as well as access for people with disabilities.
- The Appeal Board hears and determines appeals and applications made under the Act and disputes relating to any matter in the Building Regulations or the Plumbing Regulations.
- Hearings are conducted with as little formality and technicality and as much expedition as the Board considers appropriate. The Board is not bound by the rules of evidence and hearings are not open to the public unless the Appeal Board determines otherwise.
- The Building Regulation Advisory Committee is established under the Building Act 2000.
- The Building Regulation Advisory Committee (BRAC) is a body of ten persons appointed by the Minister for Justice and Workplace Relations under the Building Act 2000.
- The BRAC functions are to:
  - Advise the Minister on the administration of the Act
  - Provide advice to the Minister regarding proposed regulations under the Act
  - To investigate and report to the Minister on matters relating to building and plumbing
  - Provide advice on the Building Administration Fund
  - Advise the Minister in relation to the Scheme for the accreditation of building practitioners.
- The Committee consists of a Chairman (who is also the Director of Building Control) and at least nine other members. Membership represents the building surveying, architectural, engineering, building and plumbing industries as well as local government, the fire services, the interests of the community and the environmental and public health services.
Attachment 3: Building industry licensing in NSW

The Board believes a NSW building commission can be a centralised agency with responsibility for leading the building industry, maximising consumer protection and building confidence for investors.

The existing system is significantly fragmented – for example, various agencies are involved in the licensing, accrediting and monitoring of building practitioners (see table below) and while some industry professionals are subject to licensing and monitoring by multiple agencies, others (such as building designers) are unregulated.

This fragmentation duplicates responsibilities and limits opportunities for coordinated investigations and prompt dispute resolution. A centralised agency can act on misconduct and reduce the likelihood of significant and repeat offences.

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Licensed / registered by:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engineers</td>
<td>In the absence of a mandatory national registration system for engineering practice, engineers in all jurisdictions other than Queensland operate under the self-regulatory system the National Professional Engineers Register (NPERS), operated by the National Engineering Registration Board (NERB) of Engineers Australia.</td>
</tr>
<tr>
<td>Accredited / Council certifiers</td>
<td>Building Professionals Board - responsible to the Minister for Planning</td>
</tr>
<tr>
<td>Builders / trade</td>
<td>NSW Fair Trading is responsible for licensing all builders and trades people that carry out residential building work in NSW. License classes include:</td>
</tr>
<tr>
<td></td>
<td>Bricklaying</td>
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<tr>
<td></td>
<td>Building</td>
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<td></td>
<td>Building consultancy</td>
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<tr>
<td></td>
<td>Carpentry</td>
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<tr>
<td></td>
<td>Decorating</td>
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<tr>
<td></td>
<td>Demolishing</td>
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<tr>
<td></td>
<td>Dry plastering</td>
</tr>
<tr>
<td></td>
<td>Erection of prefabricated metal-framed home additions and structures</td>
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<tr>
<td></td>
<td>Excavating</td>
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<td></td>
<td>Fencing</td>
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<tr>
<td></td>
<td>Flooring</td>
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<tr>
<td></td>
<td>General concreting</td>
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<tr>
<td></td>
<td>Glazing</td>
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<tr>
<td></td>
<td>Installation of security doors, grilles and equipment</td>
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<tr>
<td></td>
<td>Joinery</td>
</tr>
<tr>
<td></td>
<td>Bricklaying Kitchen, bathroom and laundry renovation</td>
</tr>
<tr>
<td></td>
<td>Building Mechanical services</td>
</tr>
<tr>
<td></td>
<td>Building consultancy Metal fabrication</td>
</tr>
<tr>
<td></td>
<td>Carpentry Minor maintenance/cleaning</td>
</tr>
<tr>
<td></td>
<td>Decorating Minor tradework</td>
</tr>
<tr>
<td></td>
<td>Demolishing Painting</td>
</tr>
<tr>
<td></td>
<td>Dry plastering Roof plumbing</td>
</tr>
<tr>
<td></td>
<td>Erection of prefabricated metal-framed home additions and structures Roof slating</td>
</tr>
<tr>
<td></td>
<td>Excavating Roof tiling</td>
</tr>
<tr>
<td></td>
<td>Fencing Structural landscaping</td>
</tr>
<tr>
<td></td>
<td>Flooring Swimming pool building</td>
</tr>
<tr>
<td></td>
<td>General concreting Underpinning/piering</td>
</tr>
<tr>
<td></td>
<td>Glazing Wall and floor tiling</td>
</tr>
<tr>
<td></td>
<td>Installation of security doors, grilles and equipment Waterproofing</td>
</tr>
<tr>
<td></td>
<td>Joinery Wet plastering</td>
</tr>
<tr>
<td>Specialist Trades:</td>
<td>NSW Fair Trading – a license is required before any plumbing, draining or gasfitting work can be undertaken in NSW, regardless of the cost of the work and regardless of whether the work is residential, commercial or industrial.</td>
</tr>
<tr>
<td>Air conditioning &amp; refrigeration</td>
<td></td>
</tr>
<tr>
<td>Electrical</td>
<td></td>
</tr>
<tr>
<td>Plumbing, drainage and gasfitting</td>
<td></td>
</tr>
<tr>
<td>Demolition, asbestos, site safety</td>
<td>WorkCover issue certificate of competency</td>
</tr>
<tr>
<td>Owner-Builder</td>
<td>NSW Fair Trading issue owner-builder permits</td>
</tr>
</tbody>
</table>
Attachment 4  Building industry licensing in other states

<table>
<thead>
<tr>
<th>Victorian Building Commission</th>
<th>Queensland Building Services Authority</th>
<th>Workplace Standards Tasmania</th>
<th>ACT Planning &amp; Land Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Builder – Demolition – Low Rise</td>
<td>Builder Low Rise</td>
<td>Building designers</td>
<td>Asbestos Assessors</td>
</tr>
<tr>
<td>Builder – Demolition – Med Rise</td>
<td>Builder Medium Rise</td>
<td>Engineers</td>
<td>Asbestos Removalist</td>
</tr>
<tr>
<td>Builder – Demolition – Unlimited</td>
<td>Builder Open</td>
<td>Building services designers</td>
<td>Builders (various classes)</td>
</tr>
<tr>
<td>Commercial Builder – Limited</td>
<td>Builder Project Management Services</td>
<td>Builders – low rise</td>
<td>Building assessors</td>
</tr>
<tr>
<td>Commercial Builder – Low Rise</td>
<td>Builder Restricted to Kitchen Bathroom and Laundry</td>
<td>Builders – medium rise</td>
<td>Certifiers</td>
</tr>
<tr>
<td>Commercial Builder – Unlimited</td>
<td>Builder Restricted to Shopfitting</td>
<td>Builders – open</td>
<td>Electricians</td>
</tr>
<tr>
<td>Domestic Builder – Limited</td>
<td>Builder Restricted to Structural Landscaping</td>
<td>Construction Managers</td>
<td>Energy assessors</td>
</tr>
<tr>
<td>Domestic Builder – Manager</td>
<td>Builder Restricted to Swimming Pool Construction</td>
<td>Fire Protection</td>
<td>Gas workers</td>
</tr>
<tr>
<td>Domestic Builder – Unlimited</td>
<td>Builder Restricted to Special Structures</td>
<td>Demolishers</td>
<td>Plumbers, gasfitters, drainers</td>
</tr>
<tr>
<td>Building Inspector – Limited</td>
<td>Building Design – Low Rise</td>
<td>Building Surveyors and Assistant Building Surveyors</td>
<td>Surveyors</td>
</tr>
<tr>
<td>Building Inspector – Unlimited</td>
<td>Building Design – Medium Rise</td>
<td></td>
<td>Work assessors</td>
</tr>
<tr>
<td>Building Surveyor – Limited</td>
<td>Building Design – Open</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Building Surveyor – Unlimited</td>
<td>Hydraulic Services Design</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Draftsperson Building Design (Architecture)</td>
<td>Completed Residential Building Inspection</td>
<td></td>
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<tr>
<td>Draftsperson Building Design (interior)</td>
<td>Building Surveyor</td>
<td></td>
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<tr>
<td>Draftsperson Building Design (Services)</td>
<td>Assistance Building Surveyor</td>
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<tr>
<td>Civil Engineer</td>
<td>Building Surveying Technician</td>
<td></td>
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<tr>
<td>Electrical Engineer</td>
<td>Trade contractors</td>
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<tr>
<td>Fire Safety Engineer</td>
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<tr>
<td>Mechanical Engineer</td>
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<tr>
<td>Quantity Surveyor</td>
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<tr>
<td>Supervisor – Temp Structure Class 1</td>
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<tr>
<td>Supervisor – Tem Structure Class 2</td>
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</tbody>
</table>
Attachment 5: Typical example of a consumer’s experience

From: [email]  
Sent: Tuesday, 19 April 2011 10:11 AM  
To: Department of Premier and Cabinet (Local Government)  
Subject: Developments: Private Certifiers

Dear Minister,

Eight months ago a building adjacent to my property was demolished and a four storey block of units with shop was put on the block. During the demolition and construction damage was done to my property.

I emailed my local council for advice and assistance. No assistance was given but I was advised to contact the private certifier as it was not up to Council to intervene. Not getting satisfaction from the builders I contacted Department of Fair Trading who visited my place and the building site. A Rectification Order was issued which by the end date was not fully complied with.

As I did not have a contract with the builder the Department of Fair Trading does not seek compensation on my behalf. Work Cover could not help and the Council wiped their hands of my problem. Where do I go from here?

At the moment my only recourse is to have a lawyer seek damages through the Small Claims Court, which will be an expensive exercise for me.

I feel it is absolutely shocking that builders can come onto a site, damage neighbouring property and just walk away. Majority of builders are very considerate and ensure minimum damage is caused to neighbouring properties. Then there are other builders who just don’t care and carry on as though all they have to do is put up a building.

My experience has been with the latter, their policy being that any damage done to neighbouring properties will be fixed whenever and however that is acceptable to them, the property owner doesn’t count.

Could you please advise the responsibilities of Councils towards ratepayers when a builder chooses to have a Private Certifier. What are the regulations, if any, Councils are to follow when a Private Certifier is engaged? Surely a home owner has some rights, as it stands at the moment the home owner is at the mercy of the builder.

Your advice will be greatly appreciated.

[Signature]
Attachment 6: Extract “Key policy priorities for the building and construction industry in NSW”, MBA (March 2011)

* ESTABLISHMENT OF A BUILDING COMMISSION *

**Background**

In 2002 an enquiry into the Quality of Buildings in NSW (Campbell report) reported that there were a number of structural problems within the home building process, including the fragmentation of the regulatory regime. An example was provided whereby contractors and building practitioners are regulated by different government agencies. The key recommendation of the Campbell Report was for the establishment of a Home Building Commissioner, independent of the Department of Fair Trading.

Master Builders supported the recommendation, however sought as a policy position that a Building Commission should hold an overarching responsibility for all sectors of the NSW building and construction industry and not just the residential sector.

In response to the Campbell Report’s key recommendation, the government established the Home Building Service as an agency within the Office of Fair Trading. The Home Building Service took responsibility for builders and trade licensing and compliance.

More recently, the Home Building Service has taken responsibility for the regulation of specialist trades areas of plumbing, gas and electrical.

In 2008 the NSW Government established the “super department” within the Department of Commerce, which was subsequently renamed the Department of Services, Technology & Administration (DSTA). DSTA has an overarching responsibility for the divisions of:

- NSW Fair Trading
- NSW Procurement
- Government Chief Information Service
- NSW Public Works
- Industrial Relations
- Government Advertising and Strategic Communication

In addition, the Government established the Building Professionals Board (BPB), which is responsible for accreditation and compliance of building contractors, including local government (lga) contractors. The BPB is within the NSW Planning structure and is independent of the Minister for Planning.

The Government also formed the Construction Consultative Committee (CCQ) made up of various NSW Government departmental representatives such as Sydney Water, RailCorp and Corrective Services. The Construction Consultative Committee meets, however industry is uninsured of its work and outcomes.

The Government also established the NSW Home Warranty Insurance Fund (HWIF), following the withdrawal of private home warranty insurance providers. The HWIF is located within the NSW Self Insurance Corporation, which is part of NSW Treasury.

Further, NSW Planning incorporates the Building Systems Unit, responsible for NSW’s contribution to the development and reform of the Building Code of Australia and the Building Sustainability Index (NSWBA).

The departments and agencies mentioned above are not exhaustive.

For example, Housing NSW, Building and Construction Industry Long Service Leave Corporation and WorkCover — all regulatory authorities influencing the NSW building and construction industry — operate independently and add to the fragmentation of the industry.

**Master Builders Policy**

Master Builders believes the Home Building Service’s role and functions are in conflict with NSW Fair Trading’s principal charter of consumer protection and consequently the Home Building Service should be consolidated into the BPS. Further, due to the complexities of the industry, the impact of the industry on the Government’s fiscal position, the growing issues in shortage of supply and ongoing affordability, it is clear that the industry requires a more independent and focused direction.

There is a direct nexus between builder licensing and home warranty insurance, and consequently future harmonisation would reduce duplication and cost, which currently results in significant cost to industry.

The pre-qualification process for contractors bidding on government projects and project housing projects is also open to consolidation, drawing together repetitive but different qualification requirements such as financial and business elements required for licensing and home warranty insurance eligibility.

Master Builders policy position is to further consolidate of government departments, agencies and their functions. Furthermore, in recognition of the importance of the building and construction industry, a specific ministerial portfolio for the industry needs to be created.

**Recommendation**

Master Builders advocates that an independent Building Commission is a deserving response to the industry’s contribution to the state economy. This Commission will draw together the current fragmented approach of various departments and government agencies to deliver efficiencies and eliminate duplication.