

**Submission
No 56**

**INQUIRY INTO REGULATION OF BUILDING
STANDARDS, BUILDING QUALITY AND BUILDING
DISPUTES**

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SUBMISSION TO THE

Legislative Council Public Accountability
Committee Inquiry into the Regulation of Building
Standards, Building Quality and Building Disputes



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Submission to the Legislative Council Public Accountability Committee

1. Introduction

This submission responds to the invitation by the Legislative Council Public Accountability Committee to provide submissions on its inquiry into the regulation of building standards, building quality and building disputes.

I am the author, commissioned by the NSW Government, to undertake an independent review of the Building Professionals Act 2005, released in November 2015, which had a broad terms of reference and hence involved a full review of building regulation in NSW.

In providing this submission I am drawing on the findings and recommendations from my report as well as the more recent report commissioned by the Building Ministers' Forum, , Building Confidence: effectiveness of compliance and enforcement systems for the building and construction industry across Australia by Peter Shergold and Bronwyn Weir (Shergold Weir) and the extensive consultation and discussions I have had with members of the building industry on building regulation reform over the last five years. I note that of the 24 recommendations in the Shergold Weir report, which takes a national perspective, all but one are also addressed in my report which demonstrates a consistency of views between the two reports. I fully agree with and support the findings and recommendations of the Shergold Weir report but note that my report obviously goes into greater detail about the NSW situation. While the core problems identified in the Shergold Weir report are fully relevant to regulation of building in NSW, there are additional issues that exacerbate the situation in NSW. I would argue that building regulation and building outcomes in NSW are poorer than in any other major Australian State and requires reforms in addition to those recommended in the Shergold Weir report.

It should be noted that this submission is in substantially the same form as a submission I have made to the NSW Government in response to the Building Stronger Foundations Discussion Paper which was said to be the NSW Government's response to implementing the Shergold Weir report. I have not restricted myself in this submission or in the submission to the NSW Government to the proposals set out in their discussion paper but rather have taken a holistic approach to what are the problems in building regulation in NSW and Australia and how these problems can be effectively addressed.

This submission is divided into the following sections:

- Section 2 sets out the key messages and advice based on my experience in reviewing the NSW building regulation system
- Section 3 provides an overview of what are the problems with the building industry and in particular with the approach to regulating the building industry and the necessary solutions to address these problems
- Section 4 summarises what actions have been undertaken to date in NSW since the release of my report and assesses these actions
- Section 5 addresses the four proposals contained in the NSW Government Discussion Paper and explains why they are necessary but quite insufficient to reform building regulation in NSW.
- Section 6 sets out what additional reforms are required to address the parlous state of building regulation and building industry performance in NSW and Australia.

At the time I wrote my report I identified and reviewed previous reports which had addressed aspect of NSW building regulation. I identified sixteen such reports in the previous twenty years, with my report and the Shergold Weir report making that now eighteen reports urging NSW building industry reforms (though the Shergold Weir report has a national perspective). The time is well and truly past when piecemeal tinkering with the system can suffice. A comprehensive, integrated set of reforms are required, that are nationally consistent, given that the building industry is a national industry.

As a matter of terminology, in this submission I refer to those appointed to the role of issuing the Construction Certificates and comply development certificates, carrying out certain critical stage inspections followed by the Occupation Certificate as building certifiers (private or Council). In NSW their official title in carrying out inspections and issuing occupation certificates is Principal Certifying Authorities while in the Shergold Weir report they are referred to as building surveyors. Building practitioners are those professions and trades involved in the design, construction and maintenance of buildings including but not limited to builders, site or project managers, building designers, engineers, plumbers and fire safety practitioners.

2. Key Messages

The key messages of this submission are as follows:

- The problem afflicting the NSW building industry at present and the industry in other jurisdictions is inadequate and ineffective regulation of the building industry and in particular not holding building practitioners to account for their performance.
- The nature of the building industry, with complex, highly technical and differentiated products, safety and environmental impacts and a lack of consumer knowledge and expertise requires an effective regulatory arrangement which is not present in NSW.
- The current high-profile building problems exposed in Sydney are having a significant adverse impact on the industry and on consumer confidence in the industry and building industry leaders are calling for government action to address the problems.
- The problems and the solutions have been well documented over a number of years, most recently in NSW in my 2015 report and more recently nationally in the Shergold Weir report. The findings and recommendations in these reports are consistent.
- An independent cost benefit analysis of the reforms set out in my report estimated that the implementation of the reforms would generate benefits to the NSW economy in net present value terms of over \$12billion with benefits exceeding costs by 6.4 to 1.
- To date regulatory reforms in NSW have been piecemeal and partial and have not addressed the major problems afflicting the industry. The proposals contained in the Discussion Paper continue that practice.
- All Australian Governments have endorsed the reforms set out in the Shergold Weir report which recommends that they be undertaken as a package and are implemented in a nationally consistent way. This is fully supported. However, NSW significantly lags behind major States such as Victoria and Queensland in this area and needs to implement additional reforms.
- It is essential that the proposed NSW Building Commissioner is suitably resourced and tasked with responsibility for establishing an implementation program to progress the reforms as an integrated package, undertaken in a consistent manner with other jurisdictions and that the implementation program is made publicly available to ensure full accountability to the community.

3. What Is the Problem and the Solution?

Put simply the major problem in the building industry in NSW and to a lesser extent in other States and Territories is inadequate building regulation and building practitioner accountability to ensure buildings are built in accordance with approved plans and comply with the National Construction Code (NCC) and are safe and of appropriate quality and amenity.

Buildings are a high cost, technically complex with highly differentiated, designed products with, in the residential area, a major gap in understanding and knowledge between the builder and the consumer. There are also major safety and environmental considerations involved which impact on the community in general. These factors dictate the need for effective regulation to ensure safety, amenity, consistency with approved building plans, and compliance with the NCC.

Traditionally quality control of buildings was undertaken by the architect who appointed chartered engineers to assist, together with a clerk of works who carried out regular inspections of building work to ensure compliance with the building regulations, and coordinated the building process. That approach was supplanted in the 1980s by the design and construct (D&C) model with the builder taking the lead role and employing the various trades and professions to undertake the work under contract with the owner/developer. This was followed by the establishment of private building certifiers, in addition to council employed building certifiers, who have a regulatory role which includes inspecting buildings at critical stages to ensure they are built in accordance with approved plans. The reality is that the NSW legislation is vague on the role of the critical stage inspections and whether a building certifier is certifying that a building is built in accordance with the approved plans or complies with the NCC when issuing an occupation certificate. The occupation certificate test is that the built form is not inconsistent with the plans and that the building is 'suitable for occupation'. There should be an explicit requirement for conformity with the NCC.

There has not been adequate development and implementation of an effective building regulation function in the light of these industry changes to ensure that buildings are built in conformity with the NCC and the approved plan. My report concluded that NSW had the most poorly developed regulatory approach of the major states.

Despite the large number of reports urging regulatory reform over the last 20 years and the more recent, excellent national report commissioned by the Building Ministers' Forum, Building Confidence Report by Peter Shergold and Bronwyn Weir (Shergold Weir), there has been very little in the way of reform in NSW to date. What changes that have been made are marginal and not part of a comprehensive package of reforms.

Building regulation consists of four key elements:

- i. National building standards in the form of the Building Code of Australia (BCA) which is part of the NCC.
- ii. Approval processes for the undertaking of building work which can require council or state planning approval or are classified as exempt or complying development and subject to Codes, and certification of proposed building work prior to commencement by council or private building certifiers (e.g. complying development certificates or construction certificates in NSW).
- iii. Processes for monitoring and checking that building work is being undertaken in accordance with the building standards and building approvals (critical stage inspections, design certification from competent fire safety practitioners, and the issuance of a final fire safety certificate for fire services and an occupation certificate in NSW).
- iv. Licensing and accreditation of building practitioners to ensure that those undertaking the work have the necessary qualifications, training, experience and PI insurance and are accountable for their work.

The regulatory problems lie in the main, particularly in NSW, with elements ii, iii and iv, though there is at the national level the need for a compulsory certification process for higher risk building products such as external cladding. With item ii the problem is that the quality of the documentation forming part of the complying development and construction certificates is often inadequate. With item iii there is a major problem with the lack of certification by building practitioners with respect to the design and construction of the building and its critical elements and systems, together with a lack of accountability for building certifiers and a lack of a formal requirement for buildings to conform to the NCC. Finally, with item iv there is not licensing and proper accountability across the range of building practitioners.

The key problems and a broad overview of the necessary solution are summarised in the table below. It should be noted that the first two problems are substantially NSW problems while the others generally apply across all jurisdictions. The non-NSW specific problems and solutions are identified in both my report and in the Shergold Weir report.

Building Regulation Problems	Solutions
<p>1. Inflexible, prescriptive and hard to understand legislation and building codes which are a barrier to understanding requirements and do not allow for evolution in regulatory approach in line with best practice</p>	<p>Create a principles-based Building Act and rewrite the Complying Development Codes in consultation with key stakeholders, each backed with practice guides.</p> <p>(It is noted that the building regulation sections of the Environmental Planning and Assessment Act were rewritten and consolidated in one part of the Act and the Building Professionals Act was rewritten as the Building and Development Certifiers Bill, which has yet to be enacted. The underlying deficiencies were not addressed-it was a matter of form over substance.)</p>

<p>2. Fragmented, under resourced and incorrectly located building regulation function with lack of suitable building industry and regulation knowledge and skills and not an active role in auditing of building practitioner work, or of building certifiers.</p>	<p>Establish an NSW Building Regulation agency with broad powers to audit building work and take effective compliance and enforcement action across the building sector, including the commercial building sector, located in a regulation hub in the Department of Finance, Services and Innovation, not in Fair Trading.</p> <p>Establish a Building Regulation Advisory Committee to advise both the Building Commissioner and the Minister on building regulation reform and practice, with membership drawn from suitable persons in key parts of the industry and relevant consumer representative organisations, each with relevant knowledge and experience and a commitment to best practice regulation and industry performance.</p> <p>Ensure that local government are committing adequate resources to the building compliance and enforcement function and if necessary, facilitate additional funding through a levy on DAs and CDCs</p>
<p>3. Inadequate registration of building practitioners to ensure suitable qualifications, training and experience and proper accountability for their work</p>	<p>Registration on a consistent national basis of building practitioners involved in the design, construction, ongoing use (this relates to consistency with any fire engineering or other Performance Solutions forming part of the original building approval to ensure the ongoing use is consistent with the original approval) and maintenance of buildings, with required competency, training, experience, insurance and continuing professional development in the NCC and the approval/certification process.</p> <p>Registered building practitioners be required to document and certify that the work that they have undertaken complies with the NCC and this covers all aspects of the building project including critical building elements and systems such as design, structural, engineering, mechanical, hydraulics, electrical and fire safety protection (ideally registered building practitioners should sign off on all areas of the BCA, not just critical building elements).</p> <p>Registration be based on a co-regulation model where-ever possible with the professional association involved in the co-regulation required to undertake a full professionalisation process oversighted by the Professional Standards Authority.</p> <p>Amend legislation so that a building certifier relying on a certificate from a building practitioner can rely on that certificate (in the same way as the current compliance certificate)</p>

<p>4. Given that building certifiers are important regulatory agents it is of concern that there is a lack of clarity of the role and responsibility of building certifiers, inadequate accountability for the proper undertaking of their public official role and lack of support and professional development</p>	<p>Provide practice guides for building certifiers and each other class of certifier of building work, setting out their role and responsibilities to which certifiers are held to account.</p> <p>Undertake a regular audit program of the work of building certifiers.</p> <p>Provide support for certifiers in the form of a help desk and a panel of experts on which they can draw for advice and a Reference Panel for mandatory reviews of select designated complex and higher risk developments.</p> <p>Put in place controls to mitigate conflicts of interest and increase the independence and transparency of engagement of building certifiers</p> <p>Provide building certifiers with enhanced supervisory powers and mandatory reporting obligations in respect to building non-compliance.</p> <p>Establish and maintain a program of Continuing Professional Development for all building certifiers.</p> <p>Require that building certifiers are members of recognised professional associations and that the association is subject to a full professionalisation process supervised by the Professional Standards Authority.</p>
<p>5. Absence of digitally based and accessible building information system that captures building plans, the nature of developments and approvals and, for higher risk buildings, records information on building systems, products and maintenance</p>	<p>Establish a digitally based information system for all buildings that keeps information on building plans, approvals and certifications.</p> <p>Establish digitally based building manual for all commercial (Class 5, 6, 9a, 9b and 9c) buildings and residential (Class 2 and 3) buildings with a rise in storeys of 4 or more (as sprinklers are now required in these residential buildings, whereas previously sprinklers were only required where the effective height of the building was more than 25m. This was to some extent initiated by the residential fire in the Bankstown residential building which resulted in 1 major injury and 1 death) that is accessible to the building owner, fire authorities and the building regulator that records information on the building plans, approvals, critical building systems and elements, including fire protection systems and all post occupancy work undertaken. This should become mandatory for all of the abovementioned buildings and be phased in for existing buildings.</p>
<p>6. Lack of an effective working relationship between those with a building regulatory role, namely between private sector building certifiers and councils and between the building regulator and councils and private sector building certifiers</p>	<p>Establish a requirement for councils and private sector building certifiers to work together, including a requirement for mandatory reporting to councils by private sector building certifiers of non-compliance and for councils to act on such notices and keep the building certifier informed of developments.</p> <p>State building regulators establish formal mechanism for effective working relations with local government and private sector building certifiers.</p>

<p>7. No national mandatory product certification scheme for higher risk building products which was exposed as a significant issue with the Docklands cladding fire in Melbourne and Grenfell Towers fire in London.</p>	<p>Establish a national mandatory building products testing and certification scheme applying to higher risk building products. Ideally this would apply to all products and systems in the built environment as recent issues with imported products (including glass and steel) were not necessarily higher risk building products.</p>
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4. Building Regulation Reforms Undertaken to Date in NSW

What is notable about the reforms undertaken to date in NSW since both my report and the Shergold Weir report is how limited and piecemeal the follow up actions have been and in the case of Shergold Weir recommendations, the absence of a nationally consistent approach. The very recent agreement at the Building Ministers’ Forum to adopt a nationally coordinated approach is very welcome.

The only “reforms” in NSW that have been progressed are the following:

- Providing the Minister for Better Regulation with responsibility for building regulation and transferring the Building Professionals Board to the Finance, Services and Innovation portfolio: however the building function should be established as a standalone entity (though able to draw on central corporate services), directly responsible to the Minister, with a suitable level of staffing and skills and the necessary roles and functions
- Consolidated and rewrote the building regulation parts of the Environmental Planning and Assessment Act in one part of the Act: however, it should be in a standalone Building Act and needs to be rewritten on a principles-based basis supported by more detailed practice guides.
- Enacted a regulatory requirement for certification of fire protection system design and annual review by competent fire protection professionals: competent fire protection professionals was defined as those deemed so by building owners or who are accredited. However, to date there has been a failure to put in place an accreditation scheme for fire protection professionals, despite considerable work and input from the Fire Professions Association Australia over the last two years.
- Building and Development Certifiers Bill was written to replace the Building Professionals Act, once again a case of form over substance and to date it has not been enacted.

5. Discussion Paper Reform Proposals

The four proposals and my assessment of each are set out below.

5.1 Introducing ‘building designers’ into NSW legislation and registration of building designers

I have combined the treatment of the first two proposals as they are in effect a matched pair. What is proposed (in the Shergold Weir report) is that building designers would have the obligation to declare that plans that they have prepared comply with the BCA and demonstrate how any performance-based solution used in the design complies with the BCA. In addition builders will have an obligation to certify that buildings have been constructed according to building plans which are BCA compliant. Building designers would be registered.

While this is a step in the right direction it is only part of a more comprehensive reform that is needed which was set out both in my report and the Shergold Weir report. The broader reform requires that key categories of building practitioners involved in the design, construction and maintenance of buildings are registered; that registration requires certified training and competency and experience requirements, including Continuing Professional Development on the NCC; compulsory insurance; and that building practitioners are accountable for their work through certifying the work conforms to the BCA. The Shergold Weir report endorsed this as well as making the registration system consistent across jurisdictions.

It is essential to include all building practitioners who are involved in the design, installation/construction and maintenance of all critical building systems and elements. Critical building systems cover design, structural elements, hydraulics, mechanical systems, water proofing, fire protection and electrical system. The Shergold Weir list of categories is builders, site or project managers, building inspectors, architects, engineers,

designers/draftspersons, plumbers and fire safety practitioners (it also includes building certifiers/surveyors but these are regulatory agents and are better handled as a separate matter).

The current proposal is deficient in that it only proposes self-certification of design and not building work and hence does not include the range of building practitioners who design, construct and install the critical building systems and elements. This means it is a very partial approach which leaves major gaps such as water proofing which is an area which generates major problems and complaints as well as with the installation of fire safety systems which is critical for safety.

In turn, this partial approach to accountability and registration of building practitioners results in major problems for the building certifier who issues an approval to build (CC or CDC in NSW) based on documentation which is invariably incomplete, undertakes inspections of only some of the building work, relies on certification from builders and sub contractors, and issues a Certificate of Occupancy at completion of the project. This is the key regulatory agent in the building sector. The building certifier is required to certify that the building on completion is suitable for occupancy and that the building is built in conformity with the approved plans and in accord with the BCA. Building certifiers are accredited and act as public officials. While the majority of building certifiers undertake their role conscientiously, the defined role is not capable of being undertaken for complex building projects due to the range of technical requirements across each aspect of the building project. While there is provision in NSW for the issue of compliance certificates by building practitioners which are legally binding, these are rarely issued and hence the building certifiers have to rely on their own assessment of the building work which includes the building design and technically complex building systems and elements such as fire protection systems which require detailed technical knowledge and experience. What is instead necessary is for each or the relevant building practitioners working on the building to certify that the building design and work they have carried out has been undertaken in full conformity with the BCA and the building practitioner is fully accountable by being registered and subject to professional standards, audit and disciplinary action and holds a suitable level of insurance. The term building practitioners includes building designers who also need to certify that the built form subject to their design certification complies with their design (i.e. the BCA and plans). The building certifier can then issue the OC and must also rely on this certification prior to issuing the OC. The building certifier obtains the certificates from each building practitioner including the design professional and is able to rely on these when issuing the final occupancy certificate. This creates a proper chain of accountability and is a fundamental requirement for effective building regulation and quality building outcomes. This cannot be deferred as a medium- or longer-term matter, as it is in the NSW response to the Shergold Weir report.

In regard to registration of building practitioners, including building certifiers, a co-regulatory model should apply wherever possible. What this means is that where the category of building practitioner are members of a professional association with established requirements for membership and continuing professional development, the professional association could establish and administer the accreditation or registration process subject to its approval and oversight by the Building Regulator. The benefit of this approach is that it draws on the existing expertise and knowledge of the relevant associations, but maintains an oversight role for government. In my report I recommended that where a co-regulation approach is followed, the Building Regulator should require that the association involved work with the Professional Standards Authority to put in place over time a professionalism program for the association and its members. The Professionals Standards Authority is an agency within the NSW Department of Finance, Services and Innovation with a national charter for developing and applying professional standards and acts as a regulator for professional associations nationwide. It has developed a model that identifies forty elements of professionalism and uses this as a benchmark for assessing the professional standards of organisations and as a means to transition professional associations to conformity with the benchmark.

5.2 Duty of care of building practitioners

This is not a recommendation from either the Shergold Weir report or my report. There is no in principle objection to it and it may assist in improving the culture and hence performance in the building sector. However, it is a third best reform and is predicated on providing a clearer ground on which to allow legal action to be undertaken against building practitioners by owners of the building concerned. This is a course of action that most building and strata owners would very much wish to avoid given the time, cost and uncertainty involved in legal actions. The following reforms will have a much more direct and more general favourable impact on building outcomes:

- Establishing proper accountability for all building practitioners as described in outline in section 5.1 above
- Strengthening the independence, accountability and effectiveness of the building certifier
- Establishing an effective NSW building regulator to oversight the performance of the building system and building regulation

- Improving the financial protection for consumers of building works who are the victims of poor and non-conforming building work. This is further addressed in section 6.

The first three matters listed above are directed at achieving a quality building product while the fourth is the first line of defence in the event that there is non-conforming and poor-quality building work. Only in the event that each of the above prove incapable of addressing the issue would there be a need to consider addressing the matter through legal action.

5.3 Appointment of a Building Commissioner to act as the consolidated regulator for the building industry

This is included in the Discussion Paper as the fourth reform but no supporting information is provided. The NSW Government Response to the Shergold Weir Building Confidence Report, February 2019 provides a brief outline of the role of the Building Commissioner which is said to include the following:

- Licensing and authorisation of building practitioners
- Residential building investigations
- Building plan regulation and audit
- Residential building inspections and dispute resolution
- Plumbing regulation
- Electrical and gas safety regulation
- Strata building bond schemes
- Building product safety
- Building and construction security of payments scheme
- Engagement and strategic collaboration with local government

The paper goes on to state that a critical part of the role is an “intensive, risk-based approach to auditing building plans lodged by practitioners”. While there is an in-principle benefit in having a Building Commissioner, this is totally inadequate as a reform proposal in that it fails to address crucial issues which include the following:

i. Relation to the existing building regulation and policy functions

As noted in my report, NSW has a fragmented approach to building regulation. At that time there was the Building Professionals Board, supported by the Department of Planning and Environment, the Building Policy Unit within the Department of Planning and the Environment and various building regulation and home building services located in Fair Trading, within the Department of Finance, Services and Innovation. After the submission of my report the Building Professionals Board was relocated to Fair Trading. Hence at the present moment there are two areas of government with a building regulation and policy function: the Building Policy Unit in the Department of Planning and the Environment, which advises the Minister for Planning on the NCC, and the Home Building Services part of Fair Trading.

Both functions should be combined into an Office of Building Regulation within the Department of Finance, Services and Innovation.

Second, the function should be located outside Fair Trading in a separate regulatory area of the Department of Finance, Services and Innovation, which was the agreed approach when I submitted my report. The reason for proposing this relocation is that the culture and philosophy of Fair Trading is at variance with what is required of an Office of Building Regulation. This is not meant as reflecting adversely on Fair Trading but is due to the different culture, philosophy and approach required of the Building Regulator relative to Fair Trading. An Office of Building Regulation is regulating the functioning of an industry and hence needs to be actively involved in monitoring the industry, undertaking ongoing investigations and audits, overseeing the accreditation and performance of registered building professionals, ensuring the proper performance, training and development and accountability of building certifiers as regulatory agents and public officials, as well as ensuring that proper support and assistance is provided to them in undertaking their role and advising the Minister on the performance of regulation and building policy issues.

The regulatory function is quite distinct from the consumer protection role which is the core function of Fair Trading and requires a proactive approach to identifying and correcting practices in the building industry that produce poor building outcomes which is at variance with the more reactive approach of consumer protection.

While it is true that Fair Trading's Home Building Services has operated a licensing system for various categories of building practitioners, the approach used is at variance with what is required for the registration function of building practitioners who are subject to active audit and investigation and have requirements for continuing professional development and the holding of insurance cover.

ii. Level and Type of Resourcing of the Function

A comparison of the current level and type of resourcing of building regulation in NSW relative to Victoria and Queensland reveals that NSW commits far fewer resources to the function and undertakes a less active approach. This issue was highlighted in my report and it has yet to be addressed. If it is intended to audit 25% of registered building practitioners each year it will require a substantial increase in both the level of staff and funding and a significant change in the skills and experience of staff, with the need for industry-based skills and knowledge.

It also needs to be recognised that the function is shared between State and local government, with local government having a development approval role and having the enforcement and compliance powers for approved projects. Hence it is important that local government is able to properly resource its building regulation function.

iii. Legal and Governance Structure

The term Building Commissioner implies that there will be a Building Commission. This can take the legal form of a statutory authority with a board of governance, the model that applies in Victoria, Queensland and Western Australia or it can be a government agency that is directly accountable to a Minister. Either model can work effectively with the right level of resourcing and an appropriate regulatory model. What will not work will be a continuation as a division of Fair Trading.

It is also vital that there is a formalised relation with the building industry in the form of a Building Regulation Advisory Committee which would advise both the Minister and the Building Commissioner. The Committee would be drawn from prominent industry persons covering major building areas as well as consumer representatives such as the Owners Corporation Network. Such Advisory Committees are in place in all other jurisdictions and the absence in NSW is a major deficiency.

iv. Setting out the role and approach of the Commission

There needs to be a clear statement on the mission, approach, functions and resourcing of the Commission before a considered response can be given to establishing such a body. It is strongly suggested that in addition to the functions listed above, that the Commission have a direct role in the continuing professional development, audit and discipline of building certifiers and an oversight role with respect to these functions in the case of registered building practitioners.

There are a number of functions for the Building Commission listed above that are qualified by the word, "residential", namely:

- Building investigation
- Building plan regulation and audit
- Building inspection and dispute resolution

It is strongly recommended that the functions cover the entire building sector, though not the construction sector. In my report I made the mistake of accepting the position of Fair Trading that the commercial building sector was capable of self-regulating. I no longer accept that position though I accept that most, though not necessarily all, major builders/developers do effectively self-regulate. The issue is that it does not apply to all operating in the commercial sector and that the lack of any licensing requirements for builders in the commercial sector has encouraged the entry of builders who do not operate to the necessary standards.

6. Required Additional Reforms

The proposals set out in the discussion paper only touch on a small portion of the necessary reforms to establish an effective building regulation function. The current problems and proposed solutions were set out in section 3.

There is also a need in NSW for enhanced consumer protection in regard to building work. At present in NSW there are two schemes to provide financial compensation for costs incurred in rectifying defective building work. For residential buildings three stories or less there is the Home Owners Warranty scheme which provides cover for two

years from completion for minor defects and for six years for major defects. Major defects are defects that make the building uninhabitable. For residential buildings that are four stories or higher builders are required to put up a deposit of 2% of the building cost which is held in trust for 24 months from the issue of the occupation certificate to meet the cost of rectifying defects identified in that period.

In 2018 the insurance premiums paid for the Homeowners Warranty Insurance Scheme was \$84million while the claims paid in that year was \$204million. That would indicate that the scheme is unsustainable on current premiums with the level of current building defects. A robust regulatory scheme along the lines set out in this paper would substantially reduce the incidence of defective work and make directly accountable the building practitioners for the cost of rectification. It is suggested that the two year and six-year period for notification of minor and major defects should be extended to a common seven years which until recently was the claim period.

In regard to the scheme for residential buildings four stories and greater, the 2% deposit requirement is inadequate in the case of the major defects that have come to light in Sydney over the last two years. Furthermore, 24 months from the issue of the occupation certificate provides insufficient time to identify defects. Ideally the two schemes should be merged into one Homeowners Warranty Scheme as there is no in principle reason to differentiate based on the height of the residential building. If that is not acceptable then the scheme should increase the deposit to 5% of the value of the building work and the period of coverage be extended to seven years. It is also essential to address the issue of builders establishing companies that are the contracted builder for a project and are then wound up on completion. These are the so-called phoenix companies.

Set out below are the full range of reforms that will address the problems in the NSW building industry and mitigate the impact on affected consumers. These are divided as between NSW specific reforms and those that are to be pursued on a nationally consistent basis.

NSW Specific Reforms

1. Clear principles- based building legislation

- i. Create a principles-based Building Act in plain English and rewrite the exempt and Complying Development Codes in consultation with key stakeholders, each backed with practice guides.

2. Establish the NSW Building Commission with appropriate powers and governance

- i. Establish an NSW Building Regulation agency with broad powers to audit building work and take effective compliance and enforcement action across the building sector, including the commercial building sector, located in a regulation hub in the Department of Finance, Services and Innovation, not in Fair Trading and incorporating the building policy function currently in the Department of Planning , Industry and the Environment.
- ii. Establish a Building Regulation Advisory Committee to advise both the Building Commissioner and the Minister on building regulation reform and practice, with membership drawn from suitable persons in key parts of the industry and relevant consumer representative organisations, each with relevant knowledge and experience and a commitment to best practice regulation and industry performance.
- iii. Ensure that local government are committing adequate resources to the building compliance and enforcement function and if necessary, facilitate additional funding through a levy on DAs and CDCs

3. Enhanced consumer protection

- i. Extend coverage under the Homeowners Warranty Insurance Scheme to seven years and for the scheme for residential buildings four stories and more preferably incorporate in the Homeowners Warranty Insurance Scheme or if that is not acceptable, for the existing scheme increase the deposit requirement to 5% of the building work and extend the period of coverage to seven years.
- ii. Require that all building practitioners who certify their works do so as a registered member of a government approved registered scheme that recognises the concept of proportionate liability.

Nationally consistent reforms

4. Registration and holding to account building practitioners involved in the design, construction, maintenance and ongoing use of buildings

- i. Registration on a consistent national basis of building practitioners involved in the design, construction and maintenance of buildings, with required competency, training, experience, insurance and continuing professional development in the NCC and relevant enabling legislation.
- ii. Registered building practitioners, including building designers, be required to document and certify that the work that they have undertaken complies with the NCC and this covers all aspects of the building project including critical building elements and systems such as design, structural, engineering, mechanical, hydraulics, electrical and fire safety protection.
- iii. Registration be based on a co-regulation model where-ever possible with the professional association involved in the co-regulation required to undertake a full professionalisation process oversighted by the Professional Standards Authority

5. Enhanced accountability, support and professional development of building certifiers

- i. Provide practice guides for building certifiers and each other class of certifier of building work, setting out their role and responsibilities to which certifiers are held to account.
- ii. Undertake a regular audit program of the work of building certifiers.
- iii. Provide support for certifiers in the form of a help desk and a panel of experts on which they can draw for advice and a Reference Panel for mandatory reviews of select designated complex and higher risk developments.
- iv. Put in place controls to mitigate conflicts of interest and increase the independence and transparency of engagement of building certifiers and building practitioners.
- v. Provide building certifiers with enhanced supervisory powers and mandatory reporting obligations in respect to building non-compliance.
- vi. Establish and maintain a program of Continuing Professional Development for all building certifiers
- vii. Require building certifiers to be members of an approved professional association with is subject to a full professionalisation process oversighted by the Professional Standards Authority

6. Digitally based building information system

- i. Establish a digitally based information system for all buildings that keeps information on building plans, approvals and certifications.
- ii. Establish digitally based building manual for all commercial buildings and residential class 2 and 3 buildings that is accessible to the building owner, fire authorities and the building regulator that records information on the building plans, approvals, critical building systems and elements, including fire protection systems and all post occupancy work undertaken. This should become mandatory for all new commercial and residential class 2 and 3 buildings and be phased in for existing buildings.

7. Create an effective relation between the building regulators and regulatory agents

- i. Establish a requirement for councils and building certifiers to work together, including a requirement for mandatory reporting to councils by building certifiers of non-compliance and for councils to act on such notices and keep the building certifier informed of developments.
- ii. State building regulators establish formal mechanism for effective working relations with local government and private sector building certifiers and building practitioners.

8. National building products compliance scheme

- i. Establish a national, mandatory building products testing and certification scheme applying at least to higher risk building products.