

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

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# **Inquiry into the regulation of building standards, building quality and building disputes**

## **Submission from NSW Government**

Department of Customer Service, Better Regulation Division Fair  
Trading & State Insurance Regulatory Authority

icare

Department Planning, Industry and Environment

Fire and Rescue NSW

**Dated 28 July 2019**

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## Glossary of Terms

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<b>BCA</b>	the <b>Building Code of Australia</b> comprises Volumes One and Two of the National Construction Code and prescribes the technical provisions for the design and construction of buildings and other structures.
<b>BMF</b>	the <b>Building Ministers' Forum</b> is an interjurisdictional group of Australian Government, State and Territory Ministers with responsibility for building and construction.
<b>CC</b>	a <b>Construction Certificate</b> is required for building work undertaken under a development consent. It certifies that the proposed building work will comply with the Building Code of Australia and is in accordance with the development consent. A Construction Certificate can be issued by a council or an accredited certifier.
<b>CDC</b>	a <b>complying development certificate</b> is required for work that goes through a fast track approval process for routine development, including one and two storey homes, alterations, additions to existing buildings and outbuildings. It can be used for development that meets predetermined development standards listed in various State Environmental Planning Policies complying development certificate
<b>DA</b>	a <b>development application</b> is a formal application for development that requires consent under the <i>Environmental Planning and Assessment Act 1979</i> . It is usually made to the local council
<b>PCA</b>	A <b>principal certifying authority</b> is an accredited building certifier, the local council or an accredited body corporate who is appointed by the property owner by signing a written contract. Among other things, the PCA is responsible for issuing an Occupation Certificate for a new building or change of use for an existing building.
<b>The Board</b>	The <b>Building Professionals Board</b> issues certificates of accreditation for persons as accredited certifiers and are responsible for the complaints process and disciplinary scheme relating to accredited certifiers.
<b>SWC</b>	a <b>subdivision works certificate</b> will replace a construction certificate for a subdivision development consent.

# Terms of Reference

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## **Inquiry into the regulation of building standards, building quality and building disputes**

1. That the Public Accountability Committee inquire into and report on the regulation of building standards, building quality and building disputes by government agencies in New South Wales, including:

- (a) the role of private certification in protecting building standards, including:
  - (i) conflicts of interest
  - (ii) effectiveness of inspections
  - (iii) accountability of private certifiers
  - (iv) alternatives to private certifiers,
- (b) the adequacy of consumer protections for owners and purchasers of new apartments/dwellings, and limitations on building insurance and compensation schemes, including:
  - (i) the extent of insurance coverage and limitations of existing statutory protections
  - (ii) the effectiveness and integrity of insurance provisions under the *Home Building Act 1989*
  - (iii) liability for defects in apartment buildings,
- (c) the role of strata committees in responding to building defects discovered in common property, including the protections offered for all strata owners in disputes that impact on only a minority of strata owners,
- (d) case studies related to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower,
- (e) the current status and degree of implementation of recommendations made in reports into the building industry including the Lambert report 2016, the Shergold Weir report 2018 and the Opal Tower investigation final report 2019, and
- (f) any other related matter.

## Executive Summary

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The NSW Government welcomes the opportunity to make a submission to the Public Accountability Committee (the Committee) on the Inquiry into the regulation of building standards, building quality and building disputes (the Inquiry).

The purpose of this submission is to provide the Committee with information relevant to the Inquiry's terms of reference to assist the Committee and other interested stakeholders in understanding the building sector, including the laws and codes, the role of relevant Government bodies and the responsibilities of various building practitioners who operate within this framework.

Buildings and those that are responsible for their construction are regulated by several NSW Government agencies and departments and local governments under national and state laws related to construction and consumer protection. In addition, there is a national framework that sets out building codes and standards for construction.

Consumers have rights and protections under current laws in relation to building work, including the *Home Building Act 1989* and Australian Consumer Law. Together these provide the consumer with statutory warranties and consumer guarantees to ensure they have rights when services, including building work, are provided to them. Only qualified and experienced persons are licensed to undertake residential building work in NSW. They have duties placed on them including to ensure they exercise due care and skill and the work they perform is fit for purpose.

The Home Building Compensation scheme cover helps homeowners if their builder is unable to complete building work or fix defects under certain circumstances, such as death or insolvency. Compliance and enforcement officers of the State Insurance Regulatory Authority and NSW Fair Trading work closely to support the integrity of the insurance scheme.

For those living in strata properties, the framework under the *Strata Schemes Management Act 2015* ensures fair and democratic decision making for owners' corporations and strata committees. NSW Fair Trading also provides a free strata mediation service to help resolve disputes.

The Strata Building Bond and Inspections Scheme has commenced and is designed to ensure there is a clear process and incentives to build correctly and for developers, builders and owners' corporations to ensure that defective building work is identified early so it can be fixed promptly in a cost-effective manner.

The Government has made substantial progress in recent years to reform the State's building and construction sector to protect consumers and ensure construction follows best practice, is safe and sustainable. The Lambert Review and the 'Building Confidence Report' by Shergold & Weir have provided a robust assessment of the NSW building and construction sector and are informing government's action. As a result, the Government has introduced significant reforms to action recommendations from the reports into planning, certification, and the building and construction industry. The aim is to provide better protections for home owners and improve compliance in the building industry.

The *Building Stronger Foundations* discussion paper, released on 26 June 2019, focuses on the reforms proposed in the NSW Government Response to the Building Confidence Report.

A strengthened system for regulating certifiers is being introduced via the *Building and Development Certifiers Act 2018* and an action plan for certifiers that aims to: improve certifier independence; clarify the role and responsibilities of certifiers; strengthen conflict of interest provisions; and enhance compliance and enforcement provisions. These changes will help improve compliance in the certification industry and support better building outcomes.

Amendments to the *Environmental Planning and Assessment Act 1979* in November 2017 consolidated the provisions for building and subdivision certification. These provisions include new compliance powers, a revised occupation certificate regime and the introduction of subdivision works certificates. These changes are scheduled to start on 1 September 2019 and the Department of Planning, Industry and Environment has been working with stakeholders to make these reforms operational.

In response to the Grenfell Tower incident, the NSW Government announced an action plan in July 2017 to strengthen fire safety measures across the state. An interagency Cladding Taskforce was subsequently formed to spearhead efforts to ensure that fire safety requirements for residential buildings are prioritised and properly addressed.

A comprehensive scheme for unsafe building products under the *Building Products (Safety) Act 2017* has been introduced. This was followed in 2018 by the NSW Commissioner for Fair Trading issuing a building product-use prohibition for types of aluminium composite panels for certain multi-storey buildings.

The combined benefits of recent and current reforms to the building industry and the regulatory framework will transform the building industry and help to restore community confidence.



# Chapter 1 – Overview of the regulatory framework for building in NSW

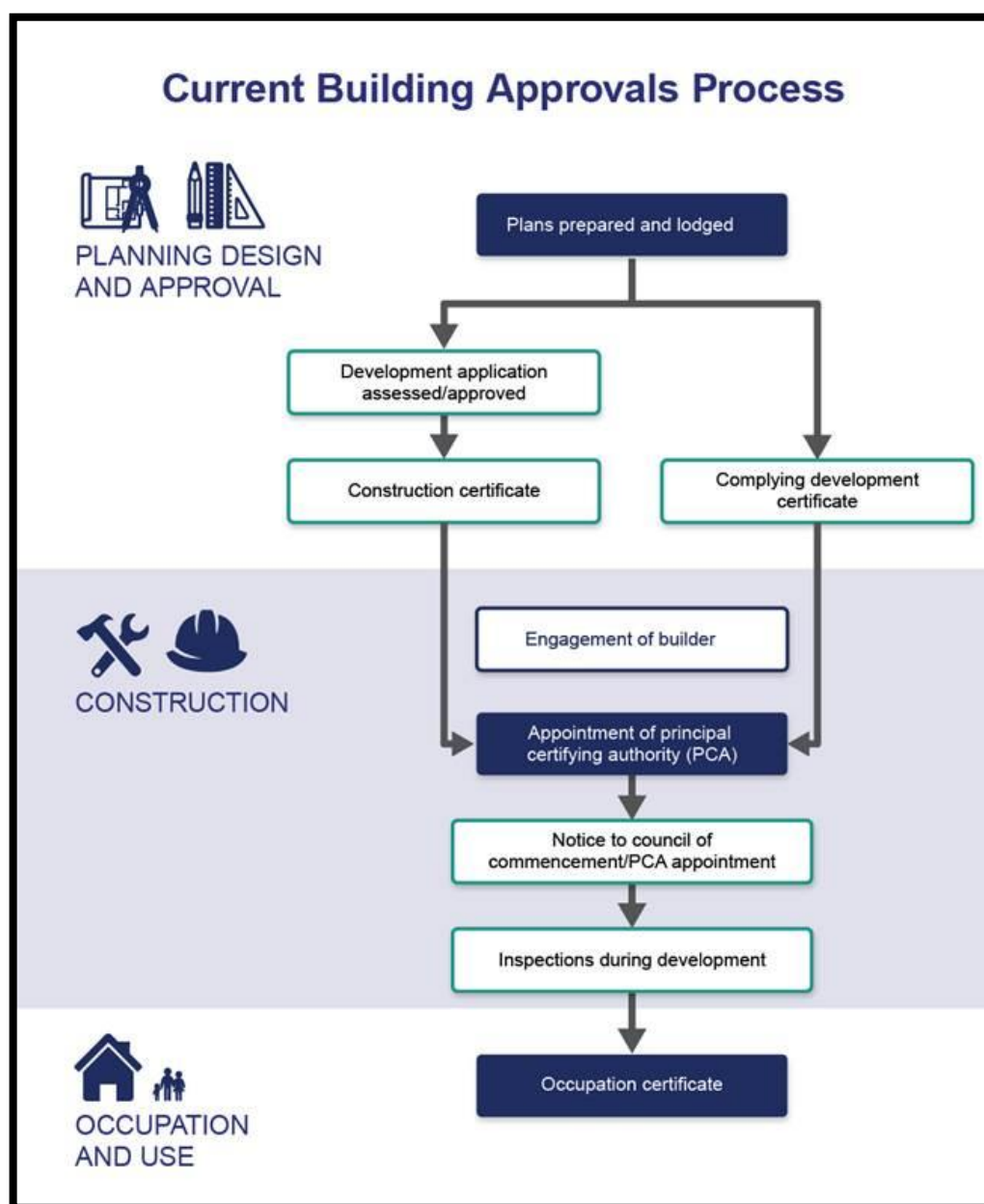
## 1.1 How the NSW building approvals process works

The approvals process for all buildings including residential, retail, commercial and industrial is primarily governed by the *Environmental Planning Assessment Act 1979* (the EP&A Act) and the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation).

There are three main stages in the process:

1. The 'planning design and approval' stage;
2. The 'construction' stage; and
3. The 'occupation' stage.

The three stages of the building process for all buildings are depicted in **Figure 1** below.



**Figure 1. Building Approvals Process**

## 1. Planning design and approval stage



Generally, building work must not be carried out without a development consent in the form of a planning approval. A Consent Authority, such as a local council or regional panel, is responsible for issuing development consent. Some types of minor home renovations and small projects such as the building of a carport, balcony, deck or garden shed do not need a planning or building

approval provided they meet specific standards and land requirements.

Other straightforward, low-impact residential, commercial and industrial developments that require planning approval may qualify for a fast-track approval process known as complying development. If the application meets specific standards and land requirements, a complying development certificate (CDC) can be obtained through an accredited council or private certifier without the need for a full development application or a construction certificate.

Local development is the most common type of development in NSW. This type of development requires a development application to and consent from the local council. This development can range from home extensions to commercial, retail and industrial developments.

In a minority of cases, a regional panel or the State Planning Minister (or their delegate) may determine the development application if the development meets certain thresholds such as size, economic value or potential impacts.

## 2. Construction stage



After obtaining development consent, whether from the council or regional panel or Planning Minister, a construction certificate is needed either from the council or an accredited private certifier. A construction certificate must be issued before building work can commence to confirm design and specifications satisfy criteria detailed in the relevant legislation. Where a CDC was issued, no

construction certificate is needed because a CDC is a combined planning and construction approval.

A principal certifying authority (PCA) must be also appointed before building work can commence. The PCA is responsible for ensuring critical stage and other inspections are carried out during construction and issuing occupation certificates. The PCA can be an accredited council or private certifier.

## 3. Occupation stage



The last step in the formal development and construction process is generally the issuing of the occupation certificate (OC). However, there could be ongoing 'operational' conditions such as maintaining appropriate noise levels or landscape maintenance. This step involves a post-construction check that necessary approvals, preconditions of a development consent and certificates are in place and that the building is suitable for occupation or use in accordance with its Building Code of

Australia classification. The OC is issued by the PCA and authorises the occupation and use of a new building or part of a building. For staged works, an interim OC may be issued which allows occupation of the partially completed building.

## 1.2 Legislative framework

There are various laws that govern the legislative framework. These are as follows:

- *Environmental Planning and Assessment Act 1979*
- *Home Building Act 1989*
- *Building Professionals Act 2005*
- *Building and Development Certifiers Act 2018* (to commence)
- *Building Products (Safety) Act 2017*
- *Strata Schemes Management Act 2015*
- *Local Government Act 1993*.

Together, these laws set out the planning, approvals and certification framework and detail administrative processes that must be followed by consent and certifying authorities, councils and others in relation to development. They also set out the accreditation or registration requirements for persons who undertake building or certification work.

### Environmental Planning and Assessment Act 1979 (EP&A Act)

The EP&A Act sets out a framework for decision making in relation to land use in NSW. Possibilities and constraints on the development of a site are dictated by these planning laws and the plans made under these laws. Provisions of the EP&A Act deal with the content of those plans. They describe when development consent is required. Building regulation and certification provisions in the updated EP&A Act, together with the *Building Professionals Act 2005* (BP Act) and the *Home Building Act 1989* (HB Act), play a key role in underpinning the design, construction and safety of buildings in NSW.

Under the EP&A Act, all new buildings and new building work must comply with the Building Code of Australia (BCA). The BCA is a component of the National Construction Code (NCC). The NCC is a uniform set of performance-based technical provisions for the design and construction of buildings throughout Australia. It is published and maintained by the Australian Building Codes Board (ABCB), on behalf of and in collaboration with the Australian Government and each State and Territory Government.

Major amendments were made to the *Environmental Planning and Assessment Regulation 2000* in 2017, to improve fire safety in new and existing buildings. These were aimed at improving rigour and checking of the design, approval, construction and maintenance phases of the building life cycle related to fire safety.

The Government has also updated the EP&A Act through a series of targeted amendments. These updates aim to build greater confidence in the planning system by enhancing community participation, strengthening upfront strategic planning and delivering greater probity and integrity in decision-making. The updates will make the system simpler and faster for all participants and help ensure that growth across NSW is carefully planned into the future. Of particular relevance is the amendments to Part 6 of the EP&A Act that consolidates building and subdivision certification provisions.

#### Part 6 of the EP&A Act

Amendments to the EP&A Act in November 2017 created a new Part 6 that consolidates building and subdivision certification provisions. The following Part 6 provisions are scheduled to commence on 1 September 2019:

- new compliance powers for private principal certifiers
- a revised OC regime
- a new subdivision works certificate (SWC).

The Department of Planning, Industry and Environment (DPIE) has been working with stakeholders to make Part 6 operational.

The DPIE will amend the *Environmental Planning and Assessment Regulation 2000* to introduce provisions which support Part 6 and will publish supporting guidelines, FAQ sheets, planning circulars and other guidance material to help stakeholders transition to the changes being made. Following commencement of Part 6, the Department may consider additional enhancements relating to OCs and compliance powers to further address recommendations from the Lambert Review and feedback received during stakeholder consultation.

The new compliance powers will require private principal certifiers to issue a written notice when they become aware of non-compliance with the development consent and approved plans. Most non-compliances under Part 6 that private principal certifiers become aware of are a result of complaints by neighbours, referrals from councils, or arise incidentally while on site. Councils will still have a role in managing neighbour complaints such as noise and traffic issues.

The revised OC regime will largely maintain the current approach of permitting staged occupation of developments still under construction, which assists developers in securing finance and payments for large developments. The new SWC will help clarify the difference between subdivision work and building work. A SWC replaces a construction certificate for a subdivision development consent.

## **Home Building Act 1989 (the HB Act)**

The HB Act sets out a broad range of regulatory requirements for residential building work and certain forms of specialist work. The Act provides the statutory framework for consumer protection specific to residential construction including licensing of builders and specialist and other trades, contracts and insurance, disputes and investigations. The HB Act provides the regulator with a diverse set of powers to conduct compliance and enforcement of individuals licensed under the framework.

It also sets out key protections for consumers in relation to defective building work. The HB Act implies a number of warranties into contracts for all residential building work carried out in NSW. They apply irrespective of whether they are included in a written contract, with no monetary threshold to which the warranties apply. These warranties apply to all residential building work.

The State Insurance Regulatory Authority (SIRA) is the NSW Government organisation responsible for regulating insurance and alternative indemnity products (building cover contracts) under the HB Act. Building cover contracts of insurance are regulated under Part 6 of the HB Act.

Home building compensation (HBC) cover helps homeowners if their builder is unable to complete building work or fix defects because they have become insolvent, died, disappeared or had their licence suspended for failing to comply with a money order made by a court or the tribunal in favour of the home owner. The builder or tradesperson must obtain a certificate of HBC cover for home renovations and new homes, including multi-unit dwelling of three storeys or less. HBC cover of at least \$340,000 is needed for any residential home or renovation project costing over \$20,000 including GST, unless exempt.

Further information about the HB Act can be found in chapter 3.

## **Building Professionals Act 2005 (BP Act)**

The BP Act regulates the accreditation and professional conduct of council and private certifiers in NSW. It sets out the necessary requirements for becoming accredited, such as being covered by professional indemnity insurance and meeting the conditions of registration. The BP Act also sets out the professional conduct and standards of behaviour required of accredited certifiers through the code of conduct, conflict of interest and other compliance provisions.

The Building Professionals Board (the BPB) undertakes the functions of the regulator for certifiers. The BPB provides for an accreditation scheme under the BP Act. The BPB are

responsible for reviewing and approving applications for accreditation and administering the complaints, disciplinary and enforcement processes for accredited certifiers.

Under the BP Act, a person can make a complaint against a certifier in relation to potential acts of professional misconduct or unsatisfactory professional conduct. The BPB investigates the conduct of certifiers to ensure they comply with their legislative requirements.

Under the accreditation scheme, the BPB authorises accredited council and private certifiers to issue building and development certificates in NSW. As at 25 July 2019, there were approximately 1,896 individual private and local council certifiers, excluding body corporates.

## **Building and Development Certifiers Act 2018 (BDC Act)**

In 2015, Mr Michael Lambert undertook a statutory review of the BP Act, and the [\*Independent Review of the Building Professionals Act 2005 Final Report\*](#) was released in September 2016. The Independent Review is commonly referred to as ‘the Lambert Review’. The Review found that the BP Act was not meeting its legislative objectives. In its response to the Review the NSW Government committed to re-writing the legislation governing certifiers.

The development of the BDC Act reflects the NSW Government’s commitment in its Response to more appropriately regulate the professional conduct of certifiers. The BDC Act also absorbs the functions of the BPB into the Department of Customer Service.

On 31 October 2018, the BDC Act received assent by NSW Parliament. The BDC Act plays an important role in setting out strengthened regulatory requirements for the registration of certifiers and supports the EPA Act which outlines a certifier’s role in carrying out functions in the integrated planning and approvals framework.

The BDC Act makes some key reforms to the existing certification legislation, including:

- clarifying the role and responsibilities of certifiers
- improving complaints handling and disciplinary procedures for certifiers by introducing a ‘show cause’ process and streamlined grounds for disciplinary action
- setting out and strengthening the powers of the Secretary of the Department of Customer Service as the regulator of registered certifiers
- introducing new requirements around the independence of certifiers through more robust conflict of interest provisions and stronger penalties
- allowing the accreditation of persons to carry out regulated work and for the approval of certain bodies corporate as accreditation authorities to exercise accreditation functions
- amending the *Home Building Act 1989* (HB Act) to require consumers to be given information about the role of registered certifiers before entering certain contracts and to prevent consumers being unduly influenced in the selection of a registered certifier with respect to work carried out under those contracts
- other reforms to streamline, modernise and update the structure of the legislation to align with other occupational licensing frameworks administered by NSW Fair Trading.

The BDC Act will repeal the BP Act and the *Building Professionals Regulation 2007* when it and its supporting regulation commences in 2020.



## **Building Products (Safety) Act 2017 (BPS Act)**

On 18 December 2017, the NSW Government introduced the BPS Act as part of its 10-point plan for fire safety.

The BPS Act is an important step in ensuring fire safety in high-rise buildings and provides enhanced powers to monitor and restrict the use of unsafe building products in NSW.

The powers under the BPS Act promote the safety of residential, commercial and industrial buildings by:

- giving the Commissioner for NSW Fair Trading (the Commissioner) the power to prohibit the use of a building product when satisfied on reasonable grounds that its use is unsafe
- enabling the Commissioner to identify buildings where building products have been used in a way that is prohibited (including buildings in which building products were used before the prohibition was imposed)
- enabling councils or other relevant enforcement authorities to require building products to be rectified, by giving the relevant authority the power to issue a rectification order to eliminate or minimise the identified safety risk
- enabling the investigation and assessment of building products so that unsafe uses of building products can be identified and prevented.

## **Strata Schemes Management Act 2015 (SSMA Act)**

The SSMA Act establishes a framework for owners' corporations and strata committees to make decisions on certain matters, including building defects and rectification.

The Strata Building Bond and Inspections Scheme (the Scheme) commenced on 1 January 2019.

The Scheme is designed to ensure there is a clear process to incentivise developers and builders to build correctly and to work collaboratively with owners' corporations. The Scheme will help to ensure that defective building work is identified early so it can be fixed promptly in a cost-effective manner.

Further information on strata schemes and committees can be found in Chapter 4.

## **1.3 Key Government Departments and their role**

Several Government Departments and agencies administer the planning and approvals, construction and occupation stages and their processes to help ensure compliance with the legislation.

### **Department of Planning, Industry and Environment (DPIE)**

DPIE brings together specialists in urban and regional planning, natural resources, industry, environment, heritage, Aboriginal and social housing, and regional NSW.

One of the responsibilities of DPIE is administering the planning laws.

DPIE engage early with business, industry and communities to plan and deliver homes, new infrastructure and a healthy environment while assessing the impacts and opportunities that growth offers.

They focus on:

- Regional strategic and statutory planning
- State and local planning policy
- Local government coordination
- State significant development and infrastructure assessments
- Post approval management
- Digitisation of planning system
- Planning Act compliance and investigations.

In terms of building, DPIE is also involved in the ongoing development and reform of the building and certification aspects of the planning legislation. Also, DPIE is responsible for coordinating the NSW input into the ongoing development and reform of the Building Code of Australia.

The Office of Local Government sits within Planning and Assessment to ensure NSW regions are front and centre in the decision-making process.

## Local Government

Local Governments (Councils) also play an important role in the building regulation and certification system.

Councils are responsible for authoring 'plans' under the EP&A Act, such as Development Control Plans and Local Environmental Plans, to guide development in their area of responsibility. These plans contain specific controls to guide certain types of development, land use and planning decisions made by council to achieve particular development outcomes relating to the land.

Councils can also be the consent authority for development. This means that they have the power to approve developments and place conditions on what can be built. In addition, councils can issue Construction Certificates (CCs) and Complying Development Certificates (CDCs) and act as the principal certifying authority to ensure that development complies with planning and building laws and relevant building codes and standards. As part of this role they can inspect building works during construction.

Councils also have certain compliance and enforcement powers under the EP&A Act, the *Local Government Act 1993* and other relevant legislation.

## Department of Customer Service

### Better Regulation Division - NSW Fair Trading

NSW Fair Trading (Fair Trading), is one of the key agencies in the Department of Customer Service which, safeguards the rights of consumers and advises business and traders on fair and ethical practice, with a focus on making it easier to do business in NSW.

Fair Trading also plays a key role in providing a wide range of services to protect the community and businesses throughout NSW. It regulates parts of the building sector, including but not limited to certifiers, builders, contractors, cladding, gas and electricity, plumbing and swimming pools.

Fair Trading supports this and other sectors through the following functions:

- providing advice, information and education to help consumers, businesses and organisations understand their rights and obligations
- ensuring consumer products comply with safety standards
- licensing, authorising and registering specific businesses, practitioners and organisations to set industry standards while minimising unnecessary regulatory burden
- assisting businesses and consumers to resolve disputes

- collaborating with industry, consumers, organisations and other regulators to deliver effective regulatory services
- monitoring compliance through data analysis, risk-based targeting, inspections, audits and investigations
- enforcing compliance through a range of sanctions and remedies including directions, rectification orders, recalls, penalty notices, disciplinary actions and prosecutions
- providing protection schemes including bond schemes, compensation funds and redressal schemes for mine subsidence and loose-fill asbestos insulation
- developing and implementing regulatory policies and guidelines to support legislative frameworks.

## **State Insurance Regulatory Authority (SIRA)**

The SIRA is a statutory body and NSW Government agency constituted under section 17 of the *State Insurance and Care Governance Act 2015*. The SIRA regulates home building compensation insurance in NSW, as well as workers compensation insurance and related activities, and motor accidents Compulsory Third Party (CTP) insurance. As a regulator, the purpose of SIRA is to hold insurers and service providers accountable so that our insurance and support systems are easy to deal with, deliver protection, recovery and restoration entitlements and good outcomes at an affordable price and in a sustainable way. The SIRA's customers include builders and home owners who are policy holders or beneficiaries of the home building compensation scheme.

## **Department of Family and Community Services and Justice**

### **Fire and Rescue NSW**

Fire and Rescue NSW (FRNSW) is the State Government agency established on 1 January 2011, which was formerly the New South Wales Fire Brigades (NSWFB) created in 1910. FRNSW is one of the world's largest urban fire and rescue services and is the busiest in Australia.

FRNSW is one of the key agencies involved in the response phase of most emergency or disaster events throughout NSW. It is responsible for the provision of prevention, education, fire, rescue and hazmat services in cities and towns across NSW. FRNSW conducts its duties in accordance with the:

- *Fire and Rescue NSW Act 1989*
- *State Emergency and Rescue Management Act 1989*
- *Environmental Planning and Assessment Act 1979* and other planning instruments.

FRNSW has an advisory role in the certification of buildings in NSW. This role includes the referral to FRNSW of fire-engineered alternative solutions for comment and FRNSW conducting inspections of certain buildings prior to occupation. Certifiers are required to consider FRNSW's comments and/or recommendations, but are not required to adopt these, if they disagree.

FRNSW also has enforcement powers in relation to fire safety matters in buildings in NSW. These include the conducting of inspections, issuing orders and issuing fines. Additionally, the Commissioner of FRNSW can compel Council's to inspect buildings or require attendance of Council at joint inspections of a building with FRNSW.

FRNSW's role in relation to building fire inspections in relation to Flammable Cladding is outlined in Chapter 5.



## Chapter 2 – The role of private certification

### Summary

#### Certifiers are independent

- Certifiers are recognised as ‘public officials’ and ‘public authorities’ under the *Independent Commission Against Corruption Act 1988* and the *Ombudsman Act 1974* respectively.
- Accredited certifiers inspect construction and subdivision work at critical stages, which differ according to the type of development. These inspections must be performed independently.

#### The NSW Government is introducing a strengthened certification system

- The *Building and Development Certifiers Act 2018* (the BDC Act) was passed and work on the supporting regulations is taking place.
- The BDC Act is aimed at improving certifier independence, clarifying the role and responsibilities of certifiers, strengthening conflict of interest provisions and enhancing compliance and enforcement provisions.
- Amendments to the *Environmental Planning and Assessment Act 1979* in November 2017 created a new Part 6 that consolidates building and subdivision certification provisions. The provisions include new compliance powers, a revised occupation certificate regime and the introduction of subdivision works certificates.
- The delivery of the four-point plan for certifiers will improve compliance in the certification industry and support better outcomes for buildings.

### 2.1 Certifier’s role

Certifiers are responsible for determining applications for construction certificates and complying development certificates and may be appointed as the principal certifying authority (PCA) for the development (if they hold the appropriate accreditation). The PCA issues the occupation certificate at the completion of the development.

Accredited certifiers inspect construction and subdivision work at critical stages, which differ according to the type of development. There are 24 categories of accredited certifier, each category requires specific knowledge, skills, qualifications and experience in the construction sector.

Under the *Environmental Planning and Assessment Act 1979* (the EP&A Act), the person with the benefit of the development consent has the right to appoint the PCA. This is usually the property owner except in cases where a development is being undertaken by a developer, then the developer may select the PCA. The PCA can be the local council, an accredited certifier or accredited body corporate.

### 2.2 Addressing conflicts of interest

The certification process is an integral part of the building and construction sector in NSW, and is essential to managing risks to safety, health, amenity, accessibility and sustainability in the design and performance of buildings.

Concerns about certifiers and the potential for conflicts of interest to impact upon the integrity of their work has been raised by submissions to the 2015 Independent Review of the *Building Professionals Act 2005* (BP Act) conducted by Michael Lambert (the Lambert Review).

Certifiers are entrusted with providing a public function. The community has a right to expect that certifiers will provide services without prejudice, and that the decisions they make are robust and independent. It is recognised that it can be a challenge for private certifiers in managing a for-profit business against their duty to act as a public official.

Certifiers are recognised as ‘public officials’ and ‘public authorities’ under the *Independent Commission Against Corruption Act 1988* and the *Ombudsman Act 1974* respectively. They must put the public interest first and only issue certificates if all legislative requirements are met.

A number of key reforms will be introduced by the BDC Act upon its commencement to help reduce conflicts of interest. Under the BDC Act, conflict of interest provisions have been redesigned to better reflect the type of conflicts that certifiers are likely to encounter. The provisions have also been broadened to cover all, rather than some types of certification work and redrafted to clearly explain what constitutes a conflict.

The BDC Act also introduces the concept of a ‘private interest’, which can be used as a benchmark for when a conflict of interest may arise. A range of examples have been included in the BDC Act to ensure that certifiers are clear in their understanding of what would constitute a private interest, such as where the person is obtaining the benefit of the certification work.

The strengthened powers introduced by the BDC Act will enhance compliance and enforcement to manage the behaviour of certifiers who fail to comply with the law. A range of prohibitions are introduced by the BDC Act to reduce conflicts of interest and ensure that certifiers act in an impartial manner when undertaking certification functions.

A certifier will not be able to give, offer or agree to give any benefit of any kind on the understanding that they will act otherwise than impartially in the carrying out of any certification work. The offence for doing so will be subject to heavy fines, attracting a maximum penalty of \$1.1 million, imprisonment for 2 years or both, to make it clear that improper conduct will not be tolerated.

Upon its commencement, the BDC Act will also provide the Secretary with the power to issue material such as a practice guide, that would become enforceable as a condition of the certifier’s registration. The proposed practice guide will set out the required approach to certification, outline key industry standards and aim to create a framework for better cooperation with other parties, such as councils and building practitioners.

To further explore options to manage potential conflicts of interest, the NSW Government released an options paper *Improving Certifier Independence*, for public comment for a period of four weeks during October 2018. The paper explored the possibility of introducing further measures to minimise the opportunities for certifiers to face pressures that could compromise their ability to act in the public interest. One option was to ‘rotate’ who is available to be used for certification of a specific development.

The options paper received a total of 176 submissions. Many submissions acknowledged that targeted measures could be introduced to strengthen certifier independence and/or increase compliance in the sector. However, submissions were divided on whether the new powers in the Act were sufficient to manage conflict of interest issues or if additional measures could be introduced.

A number of alternative options were proposed by stakeholders in response to the options paper. In particular, there was strong support for targeted auditing, as well as increased education and guidance for certifiers and the public, practice notes on conflicts of interest and mandatory disclosure of disciplinary action to owners.

Subsequently, in late December 2018 the NSW Government announced a plan to improve certification that commits the NSW Government to the following:

1. Increasing auditing of certifiers every year, with 25-30% of the industry to be audited every year.
2. Introducing a new disciplinary policy with harsher penalties for corruption and negligently signing off a building that is unsafe or structurally unsound
3. Providing better protection for strata buildings by not permitting certifiers to work on new strata developments if they have breached the Code of Conduct in the last 12 months
4. Increasing transparency by providing an enhanced register which will include more information on a certifier's compliance history.

Legislative change is required before the plan can be implemented. The Regulation that will support the BDC Act is currently being developed and will be the subject of public consultation during the last quarter of 2019.

Currently under the EP&A Act, private principal certifiers may serve a 'notice of intention to give an order' for non-compliances. While the EPA Act facilitates the use of notices for non-compliances, it does not require the certifier to issue them.

Part 6 of the EPA Act will help to resolve this conflict of interest by removing the 'notice of intention to give an order' for PCAs and introduce a mandatory 'written directions notice' for prescribed non-compliances.

## 2.3 Effectiveness of inspections

Accredited certifiers are required to undertake a number of mandatory critical stage inspections during the construction of a building. These inspections are a key function of certifiers and help to ensure that an occupation certificate can be issued for the development. A builder must inform the certifier at least two days before an inspection is required.

Under section 109E of the EP&A Act, a PCA is responsible for carrying out the inspection of building work and subdivision work. A certifier who is not a PCA can also undertake a critical stage inspection with the approval of the PCA. However, the last critical stage inspection after the building work has been completed and prior to the issue of the OC must be carried out by the PCA.

The EP&A Regulation sets out the stages at which building work must be inspected. The number and type of inspection varies depending on the class of building that the certifier is inspecting. The inspections required are outlined in **Table 1** below.

Building class	Minimum mandatory critical stage inspections under EP&A Regulation
1 or 10	<ul style="list-style-type: none"><li>• After excavation for, and prior to the placement of, any footings;</li><li>• Prior to pouring any in-situ reinforced concrete building element;</li><li>• Prior to covering of the framework for any floor, wall, roof or other building element;</li><li>• Prior to covering waterproofing in any wet areas;</li><li>• Prior to covering any stormwater drainage connections; and</li><li>• After the building work has been completed and prior to any occupation certificate being issued in relation to the building.</li></ul>
2, 3 or 4	<ul style="list-style-type: none"><li>• After the commencement of the excavation for, and before the placement of, the first footing;</li></ul>

Building class	Minimum mandatory critical stage inspections under EP&A Regulation
	<ul style="list-style-type: none"> <li>• Prior to covering of fire protection at service penetrations to building elements that are required to resist internal fire or smoke spread, inspection of a minimum of one of each type of protection method for each type of service, on each storey of the building comprising the building work;</li> <li>• Prior to covering the junction of any internal fire-resisting construction bounding a sole-occupancy unit, and any other building element required to resist internal fire spread, inspection of a minimum of 30% of sole-occupancy units on each storey of the building containing sole-occupancy units;</li> <li>• Prior to covering of waterproofing in any wet areas, for a minimum of 10% of rooms with wet areas within a building;</li> <li>• Prior to covering any stormwater drainage connections; and</li> <li>• After the building work has been completed and prior to any occupation certificate being issued in relation to the building.</li> </ul>
5, 6, 7, 8 or 9	<ul style="list-style-type: none"> <li>• After the commencement of the excavation for, and before the placement of, the first footing;</li> <li>• In relation to a class 9a and 9c building, prior to covering of fire protection at service penetrations to building elements that are required to resist internal fire or smoke spread, inspection of a minimum of one of each type of protection method for each type of service, on each storey of the building comprising the building work;</li> <li>• Prior to covering any stormwater drainage connections; and</li> <li>• After the building work has been completed and prior to any occupation certificate being issued in relation to the building.</li> </ul>

**Table 1: Building Classes and when critical inspections are conducted**

In addition to **Table 1**, inspections of building work must be made for swimming pools as soon as reasonably possible after the barrier for the pool, if one is required under the *Swimming Pools Act 1992*, has been erected.

During each inspection, certifiers are expected to give appropriate scrutiny to the supporting documentation provided to them by specialists. This includes, but is not limited to, checking that the relevant Building Code of Australia provisions are referenced in any documentation provided.

At the construction stage, the builder has the ultimate responsibility to build in accordance with the approved plans.

As part of the mandatory data reporting requirements which were commenced in 1 July 2018, the BPB collects data on critical stage inspections. The captured data includes whether an inspection was missed, unsatisfactory or satisfactory. NSW Fair Trading is continually working through the received data with certifiers and software developers to increase its reliability for the future.

## 2.4 Accountability of private certifiers

The NSW Government is focused on ensuring that certification and complying development processes continue to deliver substantial community benefits and that there is strong public confidence in the system.

The BP Act sets out a Code of Conduct (the Code) which outlines expected professional and ethical standards for conduct of certifiers. Breaches to the code may constitute unsatisfactory professional conduct or professional misconduct under the *Building Professionals Act 2005*. The Board has the power to investigate certifiers and impose a range of disciplinary actions.

The BP Act also has provisions around the accountability of certifiers, including that they must comply with all requirements as 'public officials' and 'public authorities' under the *Independent Commission Against Corruption Act 1988* and the *Ombudsman Act 1974* respectively.

While the BP Act has provisions around the accountability of certifiers, the BDC Act includes additional powers to strengthen and support the overall independence of certifiers.

The BDC Act places a greater emphasis on the importance of the Code by prescribing it in the regulations, rather than by a Ministerial Order. By prescribing it in the regulations, a series of penalties will be introduced for certain breaches of the Code where appropriate. While the Code establishes expectations around conduct, the Code will also be used as a tool to enhance certifier independence and to promote accountability of registered certifiers under the Act. The BDC Act will also extend the powers for authorised officers to investigate, monitor and enforce compliance. The powers will be key in promoting certifier accountability, as well as protecting the safety of consumers and the general public.

Authorised officers will have the power to:

- require a person suspected of having knowledge of a matter to answer questions or attend a place to answer questions if requested in writing
- keep responses to questions that are recorded as evidence providing the person has been informed that the recording is being made
- enter a premise during reasonable daytime or business hours, with or without a search warrant
- examine or inspect anything and take samples, photographs or recordings of a thing after lawfully entering a premise.

To support the additional powers for compliance and enforcement, penalty amounts have been increased from 50 penalty units to 1,000 penalty units for a body corporate and 200 penalty units in any other case for the obstruction of an authorised officer, and in situations where a person fails to comply with a direction.

These powers will be supported by key changes to Part 6 of the EP&A Act, such as the requirement for PCAs to issue written direction notices for certain non-compliances, to ensure that PCAs are held accountable for their functions.

## **Auditing and investigation of certifiers**

Investigations are carried out by the Building Professionals Board (the Board) under section 46 of the BP Act.

At the start of the 2016/17 financial year, the Board implemented a process of consolidating and expediting reports on multiple complaints made against individual certifiers into a section 46 investigation to enable the certifier's conduct to be dealt with a single disciplinary action.

The audit program commenced in mid-April 2019 and is risk based using data used to identify high-risk certifiers, with certifiers previously convicted of disciplinary action and/or subject to a warning notice, caution or reprimand, targeted in the initial pool of individuals subject to an audit.

The focus has initially been on private certifiers with A1, A2 and A3 accreditation as these categories do the greater portion of the work. Explanation of these categories appears at **Appendix A**.

The first round of eight audits were selected as a result of an extensive review of high-risk certifiers. At this early stage of the program, audits are taking approximately four weeks each to complete, allowing time for certifiers to respond to the Board's requests for information and documentation.

As at July 2019, six audits have fully been completed and eight were in progress. The audit team conducts 'lessons learnt' sessions to refine audit processes. It is expected audits will reduce in timeframe and the commencement of lower risk audits will further shorten time periods and increase the number of audits undertaken.

Certifiers can receive warning letters as a result of an audit where minor issues of non-compliance have been identified. Warning letters identify the certification issues the certifier must take action to rectify and also notifies the certifier of the potential for a follow-up audit to ensure such rectification action has taken place. The audit team schedules follow-up audits where appropriate.

If significant compliance issues are identified during an audit, it is finalised and referred to the Investigations team in NSW Fair Trading for further disciplinary action.

## **Investigations, determinations and disciplinary action**

The Board investigates formal complaints against certifiers, both council-employed and private, and may also conduct proactive investigations (i.e. without having received a complaint). A range of disciplinary actions may be taken by the Board if there is a finding of unsatisfactory professional conduct or professional misconduct.

The purpose of an investigation is to determine if there has been 'unsatisfactory professional conduct' or 'professional misconduct' as defined in the BP Act and to determine whether the certifier's conduct was unreasonable.

Under the BP Act, complaints must be investigated as expeditiously as possible, especially where there may be a threat to public safety. The Board can also investigate other issues relating to the certifier if it learns of their existence during the initial investigation, subject to notice being given to the certifier. However, a complaint may be dismissed at any stage by the Board if, for example, the Board thinks it trivial or misconceived or there is some other avenue the complainant would be better suited to pursuing.

Under section 22 of the BP Act, the Board may decide not to take any further action after receipt of a complaint. In practice, 'no further action' means there is no clear breach that is likely to result in a finding of 'unsatisfactory professional conduct' that would be supported by the NSW Civil & Administrative Tribunal. In such cases, the Board must notify the complainant and give written reasons for that decision. The Board must also tell the certifier that a complaint has been made, the nature of the complaint, and the Board's decision, together with written reasons.

In any other case, the Board must within 28 days after receipt of a complaint against a certifier tell the certifier the nature of the complaint and invite the certifier to provide written submissions.

For most investigations, there is a positive obligation on the Board to prepare a written report on the results of an investigation. The report may contain a recommendation that the Board consider taking certain action in respect of the certifier. All decisions made by the Board must be made in writing, with its findings based on material questions of fact, including how the decision was made, the reasons for the decision and reference to any evidence and other material.



## Chapter 3 – Adequacy of consumer protection and limitations on building insurance

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### Summary

#### Consumers have rights and protections under current laws in relation to building work

- Consumer protections for residential buildings are principally provided under the Home Building Act 1989 (the HB Act), which implies warranties into contracts for all residential building work carried out in NSW.
- There are also consumer guarantees in the Australian Consumer Law that ensure consumers have rights when services are provided to them.

Builders have legal duties including exercise due care and skill, the fitness of the work for its purpose, and that the work is provided within a reasonable time.

#### Many building professionals are regulated

- Persons carrying out residential building work valued at more than \$5,000 must be licensed by Fair Trading under the HB Act
- Only qualified persons can be licensed.
- Compliance and enforcement officers of State Insurance Regulatory Authority and Fair Trading work closely to support the integrity of the insurance scheme.
- A contract with prescribed terms and conditions must be entered into between the builder and the consumer for work valued more than \$5,000.

#### Home Building Compensation Fund provides additional consumer protection

- Cover is compulsory for low rise residential building work if the contract price for the work or reasonable market cost of the labour and material exceeds \$20,000.
- This cover compensates owners for losses arising from defective or incomplete work where a builder becomes unlicensed, goes bankrupt, dies or otherwise disappears.

### 3.1 Consumer protections provided under the Home Building Act 1989 and the Australian Consumer Law

#### Licensing

The HB Act requires that persons who carry out residential building work valued at more than \$5,000 are licensed or certificated. The HB Act sets out strict requirements for the issue of licences to ensure that, as far as is practicable, only fit and proper persons with appropriate skills and knowledge carry out residential building work. For example, the HB Act prescribes that any person who has been convicted of an offence of dishonesty in NSW or elsewhere within 10 years can be disqualified from obtaining a licence.

A person who is disqualified from holding any other licence, certificate of registration or other authority issued by the Secretary or is a holder of such a licence, certificate or authority while it is suspended, is also disqualified from holding a licence under the Act. The HB Act provides heavy penalties for persons who do any residential building work or specialist work without being the holder of a licence or permit.

The HB Act provides that only those who have appropriate qualifications can carry out building work. This includes specialist building work, such as plumbing and electrical work. The required qualifications are updated regularly to reflect changing skill sets.

The HB Act provides that if the building work to be carried out is valued at more than \$5,000, then the builder must enter into a building contract with the consumer. The HB Act sets out what information must be included in the contract, including the terms of the contract. Before entering into the contract, the HB Act requires the builder to give information that explains the operation of the HB Act and the procedure for the resolution of disputes that could arise relating to Home Building Compensation Fund. The consumer can rescind the contract if the information is not provided. A 'cooling-off' period also applies to building contracts. This allows the consumer to seek advice if they wish to do so.

The HB Act also provides a range of other consumer protections. These include that a builder can only receive a maximum of 10% of the contract price for the building work. The HB Act also strictly regulates the payment of progress payments for work done by the builder.

## **Consumer Guarantees**

The consumer guarantees provided under the Australian Consumer law (ACL) are intended to ensure that a consumer gets the service they paid for. There are three guarantees that apply to services:

### **Due care and skill**

There is a guarantee that service providers (such as builders) must carry out all services using an acceptable level of care and skill. Their work must be at least as good as what a competent person with average skills and experience would provide. They must take reasonable steps to avoid loss or damage when providing the service.

### **Fit for a particular purpose**

There is a guarantee that the services and any resulting products will be reasonably fit for any particular purpose specified. This guarantee does not apply to professional services provided by a qualified architect or engineer.

### **Services must be supplied within a reasonable time**

There is a guarantee that the services will be supplied within a reasonable time. What is 'reasonable' will depend on the nature of the services and any other relevant factors such as weather and availability of parts or supply of materials.

The consumer guarantees provided for under the ACL do not explicitly refer to the timing of the occurrence of failures in the provision of services. There are generally no time limitations for the taking of action under the ACL.

## **3.2 Extent of insurance coverage and limitations of existing statutory protections**

### **Statutory warranties under the *Home Building Act 1989***

The HB Act implies a number of warranties into contracts for all residential building work carried out in NSW. They apply irrespective of whether they are included in a written contract, with no monetary threshold to which the warranties apply.

Section 18B of the HB Act states that whenever licensed contractors carry out residential building work, there are certain warranties which may not be avoided.



They are:

- a warranty that the work will be completed with due care and skill in accordance with the plans and specifications set out in the contract
- a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new
- a warranty that the work will be done in accordance with, and will comply with, the Home Building Act or any other law
- a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time
- a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling
- a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor license or person required to hold a contractor license, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires to achieve, so as to show that the owner relies on the holder's skill and judgment.

The warranties outlined within the HB Act are effectively incorporated into every building contract as if they were warranties that had been agreed to within the signed contract. They have effect as terms of the building contract and proceedings against the builder can be initiated if they are breached.

Any proceedings for a breach of warranty must commence before the end of the warranty period. The warranty period is six years for a breach that results in major defects in residential building work, or two years in any other case. The warranty period begins on completion of the work to which it relates or for incomplete work, the date to which either the contract was terminated or work was ceased.

A major defect is classified under the legislation as a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:

- the inability to inhabit or use the building (or part of the building) for its intended purpose, or
- the destruction of the building or any part of the building, or
- a threat of collapse of the building or any part of the building, or
- if the external cladding of a building causes or is likely to cause a threat to the safety of any occupants of the building if a fire occurs in the building.

A major element of a building is an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including foundations, footings, floors, walls, roofs, columns and beams), as well as fire safety systems or waterproofing.

The primary means of redress for breaches of the warranties are to have the work rectified by the responsible builder or developer or seek financial compensation for the cost of rectification.

## Assistance with complaints, building disputes and inspections

Fair Trading provides advice to consumers who may be faced with a residential building dispute on its website. Consumers can also contact the Fair Trading call centre or speak to experienced officers at a Service NSW Centre. If they have not been able to resolve the complaint themselves, a consumer can lodge a complaint with Fair Trading.

Fair Trading operates a Building Inspection Service. Fair Trading Building Inspectors are experienced in residential building work. On receipt of a complaint, the role of a Fair Trading Building Inspector is to assist the consumer and the builder to resolve a dispute. In most cases the inspector will arrange to meet with the consumer and the builder on-site to inspect the work under dispute and discuss the issues reported in the complaint. Fair Trading inspectors do not undertake a general inspection of the work. They visit the site to look at the specific items implicated in the dispute.

The inspector will either:

- issue a Rectification Order if there are matters that the contractor needs to rectify, or
- conclude that the builder is not responsible for the alleged defects.

A Rectification Order will:

- list work to be rectified or completed.
- outline conditions for both parties to comply with the Order, and
- set a date for the work to be completed.

A staged Rectification Order will specify the stages in which an order must be complied with.

If the Order is not complied with, or the consumer is not satisfied with the decision made, the consumer can lodge a claim with the NSW Civil and Administrative Tribunal (the Tribunal). If a claim is lodged, the Order ceases to have effect and the Tribunal will hear the matter.

To assist consumers, Fair Trading provides funding for a Home Building Advocacy Service (HoBAS) run by the Western Sydney Community Centre.

HoBAS offers consumers access to a range of services including:

- advice to consumers on their rights, responsibilities and on what action can be taken to resolve their home building dispute
- advocacy on behalf of consumers in disputes with home building licensees or relevant parties via telephone, letters or face to face representation
- negotiation of disputes between consumers and builders or the relevant party
- assistance in the preparation of cases for the Tribunal hearings, and
- representation of residential home building consumers at the Tribunal hearings where considered appropriate.

HoBAS can only assist consumers after they have completed the Fair Trading dispute resolution process.

## Pursuing building claims in the Tribunal

The HB Act provides that any person can make a claim to the Tribunal to determine a building dispute. In strata schemes, the claim is generally made by the owners' corporation on behalf of all the owners. The Tribunal has a current jurisdictional claim limit of \$500,000. If the amount exceeds \$500,000 then the matter is transferred to the Supreme Court of NSW. The HB Act specifically provides that the Tribunal is to have regard to the principle that rectification of the defective building work by the responsible party is the preferred outcome.

The majority of applications to the Tribunal in relation to building disputes relate to a breach of the statutory warranties provided under the HB Act and the time limitations provided for in the HB Act to commence proceedings applies.

In determining any claim, the Tribunal may have regard to, but is not bound by any report prepared by a Fair Trading inspector. The Tribunal may also have regard to any report provided under Part 11 (Strata Defects Bonds) of the *Strata Schemes Management Act 2015*. The Tribunal can appoint its own experts from a panel of experts to advise the Tribunal as to any matter that the Tribunal refers to the expert for advice.

In determining a building claim, the parties provide their own expert evidence, generally derived from on-site inspections by experienced consultants, to the Tribunal, to assist in resolving the dispute.

In determining a building claim, the Tribunal is empowered to make one or more of the following orders as it considers appropriate:

- an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,
- an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,
- an order that a party to the proceedings:
  - do any specified work or perform any specified service or any obligation arising under the HB Act or the terms of any agreement, or
  - do or perform, or refrain from doing or performing, any specified act, manner or thing.

The HB Act provides that disciplinary action can be taken by the Secretary against a person who does not comply with an order of the Tribunal or who fails to carry out rectification work ordered by a Fair Trading inspector. Disciplinary action can lead to the suspension of a contractor’s licence or disqualification from holding a licence.

Summary of current HBC scheme coverage and limitations

The minimum cover and limitations for insurance under the HBC scheme are established under Part 6 of the HB Act, Part 6 of the Home Building Regulation 2014, and relevant Insurance Guidelines issued under the HB Act.

A short scheme history is shown in **Figure 2**.

History of building insurance schemes in NSW since 1972

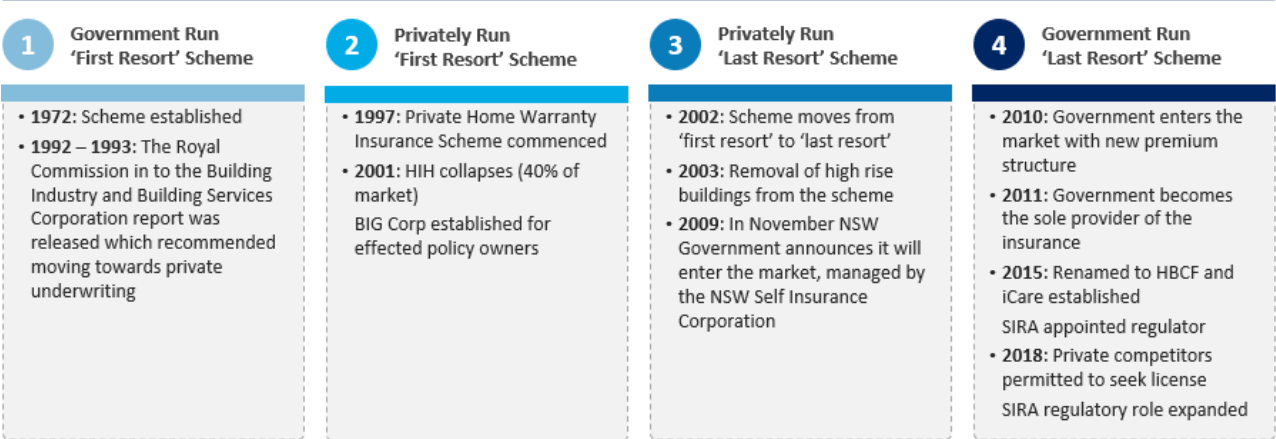


Figure 2: Summary of the building insurance schemes in NSW since 1972

Key parameters of the insurance are as follows.

### **Requirements to have insurance**

The insurance is compulsory for residential building work above a prescribed financial threshold, unless the work is of a sort that is exempt. Currently the threshold is if the contract price for the work exceeds \$20,000 including GST, or if the contract price is not known, if the reasonable market cost of the labour and material exceeds \$20,000 including GST.

The party responsible for taking out a policy of insurance is the holder of the contractor licence that is the head contractor for the work or that is doing work other than under a contract (for example where a licensed contractor builds dwellings on land that the licenced contractor owns). Sub-contractors do not need to take out their own policy. A home owner who does work under an Owner-Builder Permit does not require and cannot obtain the insurance for work they do under that permit (see s 95 of the HB Act), but any parties who they contract to do residential building work on their behalf must each take out a policy of insurance (subject to the usual thresholds and exemptions).

The holder of the contractor licence must take out the insurance before doing any work, or requesting or receiving any payment for the work (including a deposit). The holder of the contractor licence must provide a certificate of insurance to the home owner. In the case of work done on behalf of a developer, the developer must provide the certificate of insurance to the consumers to whom they sell any dwellings.

There are a variety of exemptions that may result in work not requiring insurance, either because the particular type of work is not deemed to be residential building work (e.g. a standalone contract limited to work involved in building an ornamental pond or water feature is excluded from the definition of a 'dwelling' and is therefore not 'residential building work' and does not require insurance), or because the work is exempt from insurance (e.g. contracts to do built-in furniture work are exempt from insurance).

In the context of this inquiry, there has been since 31 December 2003 an exemption from insurance for the construction of multi-storey buildings with a 'rise in storeys' of more than three, and containing two or more dwellings. Insurance continues to be required for other residential building work involving the alteration, repair or additions to multi-storey buildings irrespective of height (e.g. a contract to repaint the exterior of a multi-storey building over three storeys high may require insurance if the value of the work is over \$20,000 including GST). Similar exemptions for multi-storey buildings operate in the building insurance schemes of other States and Territories.

Historically, some work done by or on behalf of certain public sector agencies or under certain programs has been exempt from insurance. Since 1 September 2018, the HB Act has provided a new general exemption for some work done by or on behalf of public sector agencies (under s 103E).

The HB Act also provides for persons to apply to the SIRA to grant an exemption from insurance requirements in a particular case (under s 97), if there are exceptional circumstances or if full compliance is impossible or would cause undue hardship. In 2018-19, the SIRA received nine such applications for exemptions, of which seven were approved and two were declined. All approved exemptions relate to work that includes delivery of NSW Government funded social or affordable housing.

### **Who may buy insurance**

Before the holder of a contractor licence may take out insurance under the HBC scheme, they must first apply to an insurer (currently only icare HBCF) for eligibility. Insurers assess the licence holder against financial and non-financial requirements of the insurer's eligibility model. Insurers must use an eligibility model that meets the requirements of the Home Building Compensation (eligibility) Insurance Guidelines issued by the SIRA under the HB Act. If the licensed contractor

satisfies the insurer's eligibility criteria, the insurer will issue the licensed contractor an eligibility profile outlining:

- the value and number of individual projects permitted to be under construction by the licence holder at any time, and
- the maximum contract limits for each construction type for which the licence holder has been granted eligibility.

Only holders of contractor licences that intend to do work requiring insurance need to apply for eligibility (e.g. licensed contractors that only sub-contract trades work would not need eligibility). Consequently, only a minority of licensed contractors in NSW hold eligibility to purchase insurance. As at 30 June 2018, there were 18,881 licensed contractors eligible to purchase insurance under the HBC scheme.

### **Summary of what the insurance covers and limits on liability**

Since 1 January 2018, it has been possible for an insurer to offer HBC insurance as a single contract of insurance (which was the existing practice) or as two separate contracts of insurance, with one insuring risks during the period in which the building work is being done (a construction period insurance contract), and the other insuring risks during the warranty period after the building work is complete (a warranty period insurance contract). It is also possible for cover to be offered in the form of an 'alternative indemnity product'. Currently, icare HBCF offers insurance only as a single contract of insurance, and this submission focuses on those arrangements.

The insured amount for each contract of insurance must be not less than \$340,000. Where a contract of insurance is for more than one dwelling, there is a prescribed calculation to determine whether a single amount of \$340,000 covers the work, or a multiple of \$340,000 reflecting the number of dwellings in the building (e.g. for the construction of a multi-dwelling building there may be one contract of insurance, but several certificates of insurance each attaching to one dwelling in the building, and each certificate with an insured amount of \$340,000)

The insurance beneficiary (see clause 37 of the Home Building Regulation 2014) is the person that contracted the work to be done, or the purchaser of land on which insured work is done and their successors in title. Insurers are not required to insure licensed contractors who did the insured work, developers, certain associated parties or mortgagees in possession (for the latter see s 103BC of the HB Act).

The insurance must allow a beneficiary to claim if the licensed contractor responsible for the work:

- has died
- has disappeared (cannot be found in Australia)
- becomes insolvent, or
- has their licence suspended for failing to comply with a court or tribunal order to compensate the home owner that is making the claim (deemed insolvency under s 101 of the HB Act).

In those circumstances, a summary of the losses the insurance must cover is:

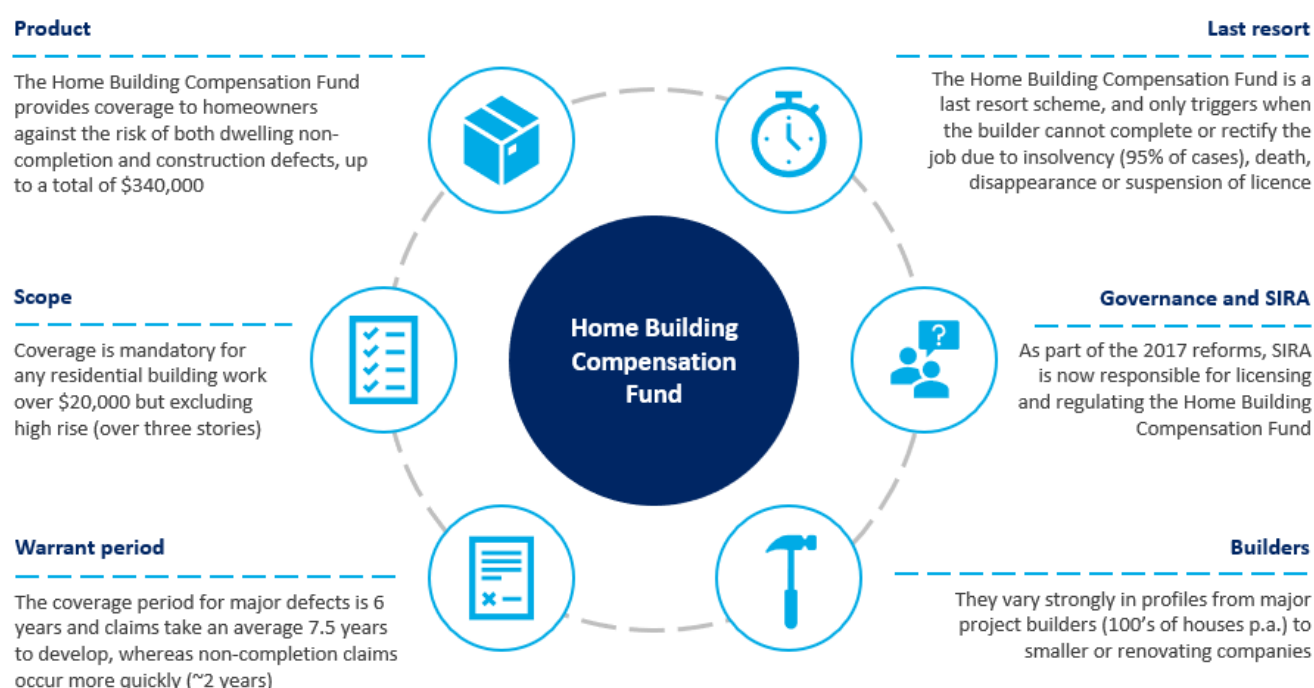
- loss resulting from incomplete work because of early termination of the contract (conditions apply)
- loss resulting from a breach of statutory warranty, such as:
  - if the work is not done with due care and skill
  - if the work is not done per the plans and specifications set out in the contract
  - if the materials used are not suitable
  - if the work does not comply with the law
  - if the work is not done within the time stipulated in the contract or within a reasonable time if the contract does not stipulate a time



- loss resulting from faulty design provided by the builder
- reasonable costs of alternative accommodation, removal and storage
- loss of deposits or progress payments (conditions apply)
- legal or other reasonable costs incurred in seeking to recover compensation;
- reasonable costs incurred in taking action to rectify the loss or damage;
- loss resulting from the work done by the subcontractors of the builder;
- loss resulting from the work done by the builder to rectify the problem after completion of the work.

The minimum period of cover offered by the insurance is prescribed in the legislation (in particular see s 103B, 103BB and 103BC):

- Loss arising from non-completion of the work must be covered for a period of not less than 12 months after the failure to commence or after cessation of the work the subject of the cover
- Loss arising from a breach of statutory warranty aligns to the 6 year period of warranty for major defects, and 2 years for other matters. If the insurance is under a single contract of insurance or a warranty period insurance contract, there is an 'extended claim period' if the loss becomes apparent in the last 6 months of the period of insurance, which permits a claim in respect of the loss to be made within 6 months after the loss becomes apparent. There is also provision for a 'delayed claim' to be made up to 10 years after the completion of the work, if the loss was properly notified to the insurer during the period of insurance (or within 6 months after the loss became apparent in the case of a loss that became apparent in the last 6 months of the period of insurance), and the beneficiary making the claim has diligently pursued the enforcement of the statutory warranty after the loss became apparent. (See **Figure 3** summary below).



**Figure 3: Summary of the Home Building Compensation Fund currently managed by icare**

### 3.3 Insurance provisions under the Home Building Act 1989

#### Customer Service Cluster administration of insurance functions

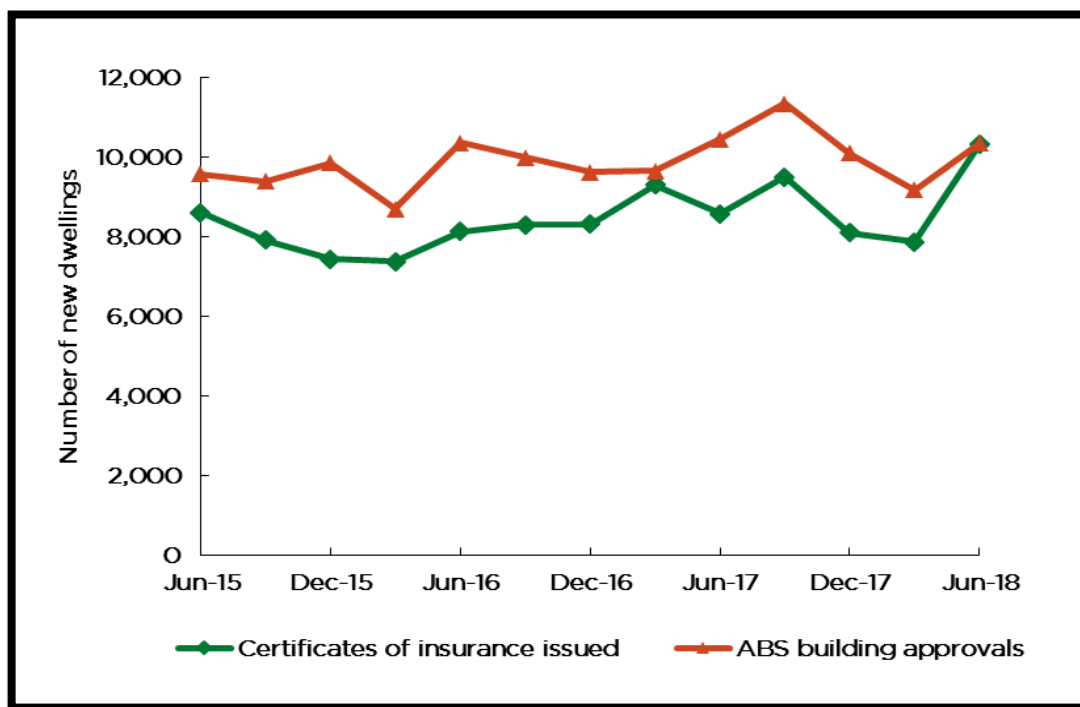
Officers of the SIRA and Fair Trading (both within the Customer Service cluster) work closely in respect of compliance and enforcement of insurance obligations under HB Act, to support the integrity of the insurance scheme. Since 1 January 2018, this has included the SIRA producing 'certificate evidence' under s 131(2) of the HB Act, which enables a statement establishing certain factual matters about insurance to be admitted as evidence in court proceedings. The SIRA issued 68 certificates of evidence during 2018/2019 financial year.

In 2019, the SIRA has begun examining data from Department of Customer Service (DCS) certifier database to assess its potential to better inform compliance and enforcement activity to support the integrity of the HBC insurance scheme. For example, to proactively identify instances where home building projects may be unlawfully uninsured. This work is ongoing and is enabled by amendments to the BP Act that allow DCS to centrally collect building and certification information from persons who carry out certification work, accreditation holders under that Act and certifying authorities.

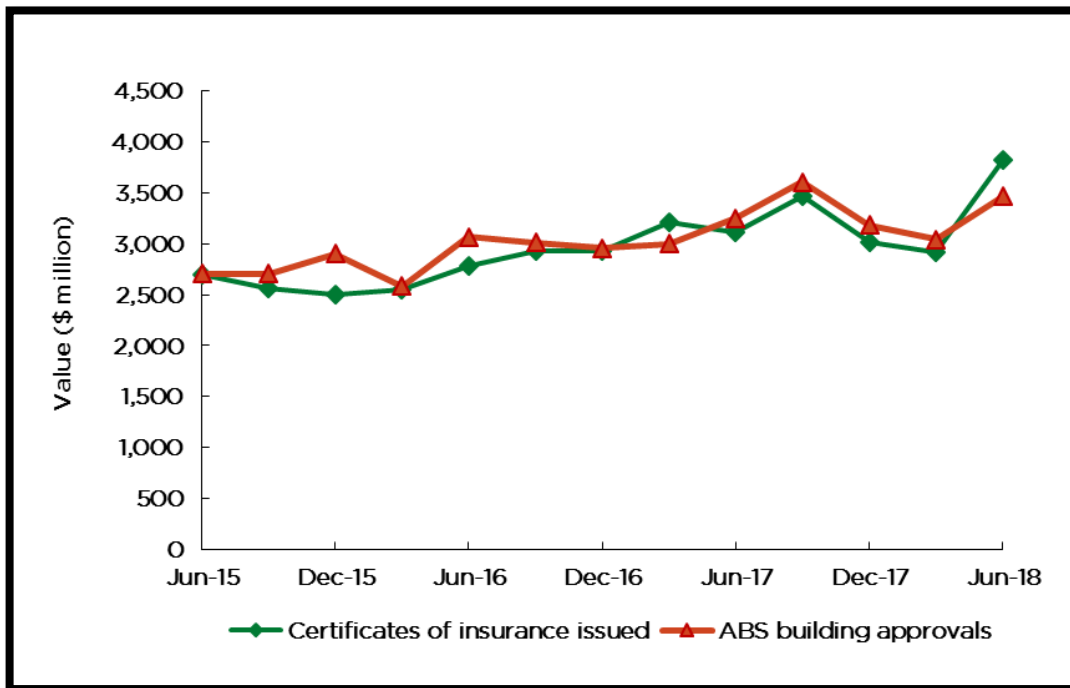
The SIRA's existing use of data to monitor scheme integrity includes tracking the number of certificates issued against Australian Bureau of Statistics (ABS) NSW building approvals data. The SIRA regularly publishes this information in scheme reports available from the SIRA's website. **Figures 4 and 5** below, display:

- the number of certificates of insurance issued for new single and new multiple dwellings of three storeys or less with ABS NSW building approvals data; and
- the total building contract value listed on the certificates of insurance issued between the two sources.

Note: Public sector work has been excluded from the ABS data. However, the ABS data will include some work that is exempt from the requirement to purchase HBC contract of insurance.



**Figure 4: Number of ABS building approvals and certificates of insurance issued over time**



**Figure 5: Value (\$ millions) of ABS building approvals and certificate of insurance issued over time**

### Supervision of insurers by the SIRA

icare HBCF (acting for the NSW Self Insurance Corporation) is currently the only provider of home building compensation cover in NSW and deemed to be a licensed insurer under s.105B(1) of the Act. icare HBCF transitioned and demonstrated compliance with the requirements of the HBC Insurance Guidelines by 31 December 2018.

Supervision activities by the SIRA with icare HBCF include:

- analysis of data to identify risks and non-compliance with legislative and guideline requirements
- annual assessment of the business plan, prudential information, claims management and eligibility models for compliance with the relevant guidelines
- analysis and investigation of complaints against icare HBCF with expectations that a resolution is achieved within specified time periods
- regular engagement meetings between SIRA and icare HBCF to discuss performance and any risks and issues, both current and emerging.

During the 2018/2019 financial year the SIRA received two complaints about the conduct of icare HBCF. On investigation, the SIRA found icare HBCF to be in full compliance and no further action taken. The SIRA has conducted one 'regulator compliance review' about icare's management of a customer claim. In that case the SIRA did not substantiate non-compliance with legislative obligations or the documented approach to complaint and dispute management.

Since 1 January 2018 two licence applications have been made to the SIRA to become licenced providers for the provision of alternative indemnity products (AIPs). One application has since been withdrawn, and the other application remains open.



## Key statistics about the HBC Scheme for insurance issued since 1 July 2010

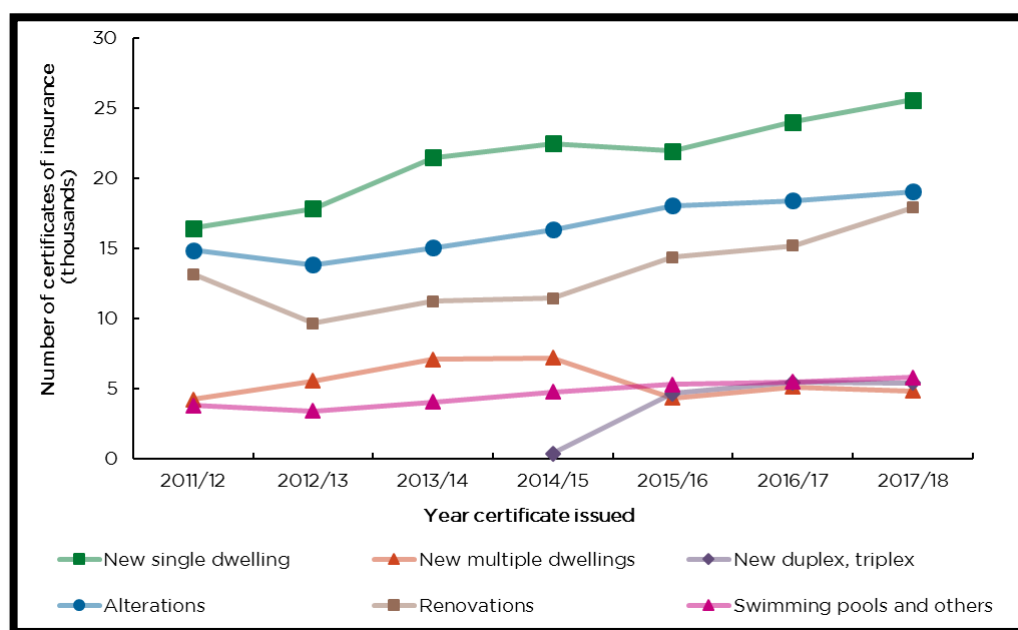
### Customer enquiries to SIRA about the HBC Scheme

During the 2018/2019 financial year SIRA received 999 general enquiries about home building compensation. SIRA provides an online self-service tool 'HBC Assist' which helps customers determine whether they need insurance by asking them a series of questions about their circumstances.

### Certificates of insurance

The total number of certificates of insurance issued over 2017/2018 was 78,440 – a 7% increase from 2016/2017 levels (see **Figure 6** below). The 'renovations' construction type has experienced the largest growth in the number of certificates of insurance issued over 2017/2018.

Over 2017/2018, average contract values of certificates of insurance increased by 3% for 'new single dwellings', the largest construction type as measured by the number of certificates of insurance issued and total premium received.



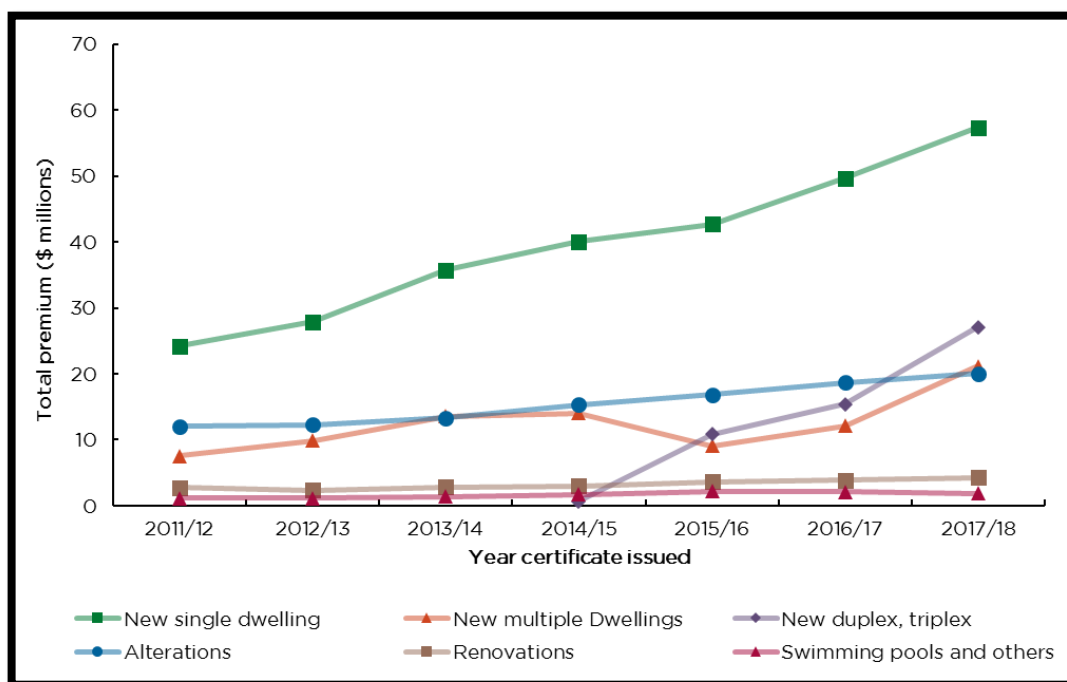
**Figure 6: Number of certificates of insurance by issue year and construction type**

Note:

- 'Alterations' relate to works which are mostly structural, whereas 'renovations' relate to works which are mostly non-structural. Both alterations and renovations construction types include works on single or multiple dwellings or duplexes/triplexes.
- 'New duplex, triplex' was combined with 'New multiple dwellings' until it commenced under its own category from 2014/2015.

### Insurance premiums

The total premium reported over 2017/2018 was \$132 million (excluding GST, stamp duty and any additional fees that may be charged on top of HBC premiums such as brokerage). See **Figure 7** below.



**Figure 7: Total premium reported (\$ millions) by construction type and year**

## Insurance claims and payments

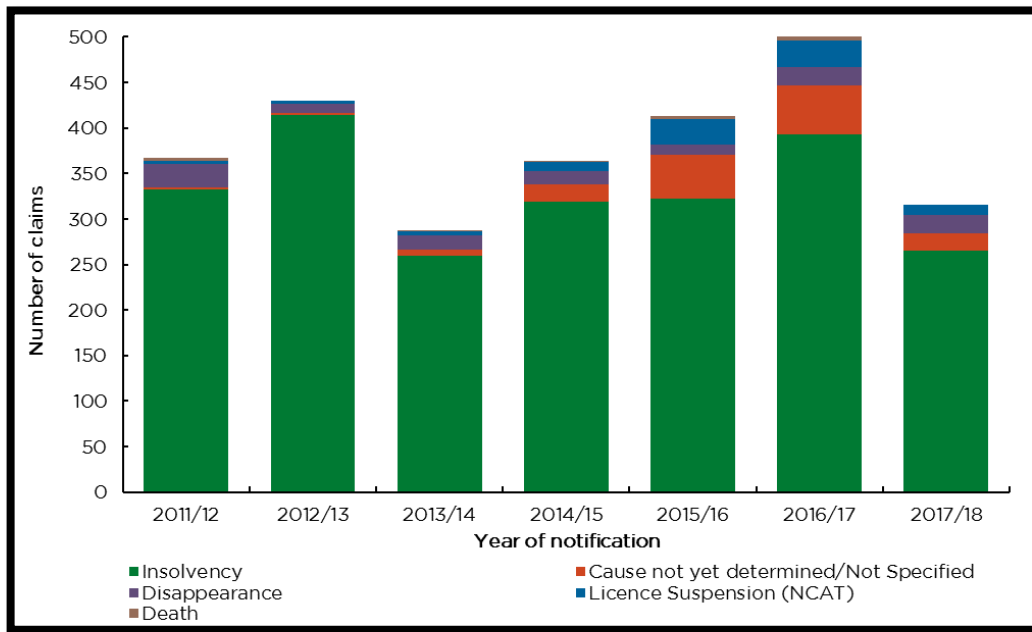
Over 2017/2018, there were 762 'notifications of loss', and 316 claims (i.e. notifications of loss which have progressed to become claims lodged **Figure 8**). Note that not all notifications of loss become a claim. Notifications of loss can be finalised with no claim lodgement, for example if a home owner succeeds in obtaining remedy from their builder while they are still solvent.

Over 2017/2018, there were \$55 million in payments made on approximately 700 claims. Note that single claims may receive multiple payments over several years.

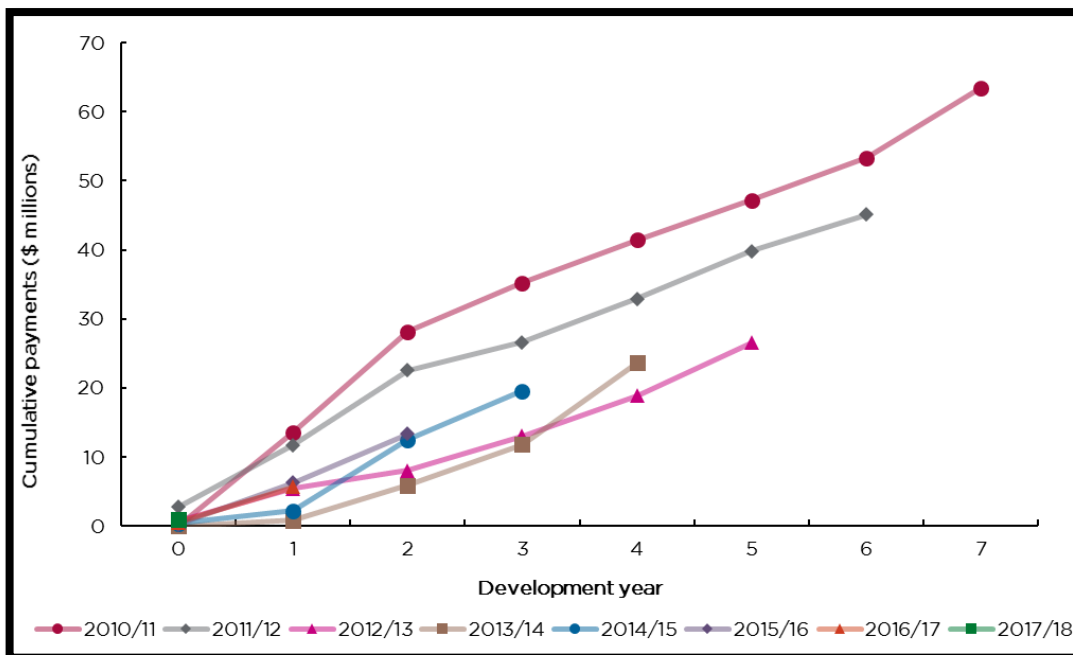
Of all claim payments made over 2017/2018, \$32 million related to major defects.

New single dwelling, alterations and new multi dwellings accounted for 41%, 32% and 22% respectively of all claim payments made over 2017/2018.

Care needs to be taken when interpreting recent claim payment experience as HBC is a 'long-tailed' product. It is important to consider payment "emergence/development patterns" when assessing experience. Defect payments have a longer "emergence/development pattern" than non-completion payments. The greater the volume of certificates of insurance issued (exposure), the higher the expected payments, all else being equal. Claim payment development charts facilitate a comparison of cumulative claim payments by year insurance issued at the same stage of development. That is, they allow experience to be compared on a like-for-like basis. See **Figure 9**.



**Figure 8: Number of claims lodged by year and principal cause**



**Figure 9: Total claims – Cumulative payments (\$ millions) by year insurance issued**

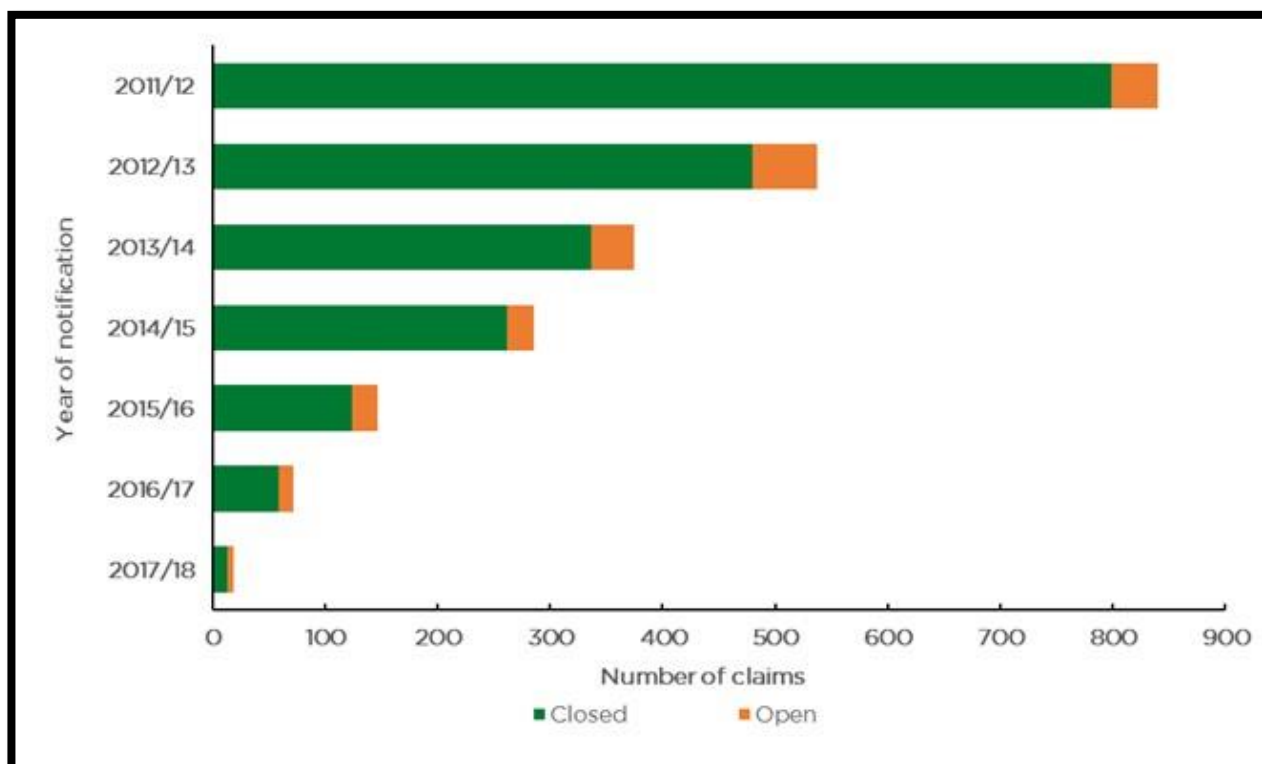
Note:

- The 'development year' refers to the difference between the financial year of payment and the financial year in which the certificate of insurance was issued.

## Insurance policies issued up until 30 June 2010

Insurers who issued policies on or before 30 June 2010 ('runoff insurers'), continue to manage and settle claims on policies written up until that date.

There were 18 claims lodged with runoff insurers in 2017/2018 (compared to 72 in 2016/2017). The volume of runoff insurer claims is expected to continue the downward trend as remaining policies expire. See **Figure 10**.



**Figure 10: Number of runoff insurer claims lodged by year and claim status**

### 3.4 Liability for defects in apartment buildings

There are a number of existing obligations and options for the rectification of building defects and recovery of the costs of rectification. These are varied and depend on both the type of defect and the length of time which has passed after the discovery of the defect.

Under the EP&A Act, a civil action for loss or damage arising out of or in connection with defective building work can be brought for up to 10 years after the date of completion of the work. This provision does not operate to extend any period of limitation under the *Limitation Act 1969* or the HB Act.

The *Limitation Act 1969* dictates the time within which a claim must be brought for damages arising from a breach of duty. This time period relates to any action founded on contract or tort, as well as actions for breach of statutory duty, and is prescribed as 6 years.

These and other protections are summarised in **Table 2**.

Legislation	Protection	For
<i>Environmental Planning and Assessment Act 1979</i>	Civil action for loss or damages – within 10 years after work is completed.	Anyone.
<i>Home Building Act 1989</i> – statutory warranties	Claim for breach of implied statutory warranties – within 6 years after work completed for major defects, and 2 years for other defects.	Residential building owners.
<i>Home Building Act 1989</i> – Fair Trading Dispute Resolution and Inspection Service	Mediation of disputes and enforceable ‘rectification orders’ to direct builders to meet their statutory warranty obligations.	Residential building owners.
<i>Strata Schemes Management Act 2015</i>	Developers required to lodge a building bond to secure funds to meet the costs of rectifying building defects.	Owners corporations.

**Table 2: Legislative protections against building defects**

## Chapter 4 – The role of strata committees in responding to building defects

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### Summary

**The NSW Government has established a framework to ensure fair and democratic decision making for owners corporations and strata committees**

- Under the *Strata Schemes Management Act 2015* (SSM Act), decisions must be made fairly and democratically, which is why generally a majority of owners are required to agree to decisions that affect other owners.
- NSW Fair Trading provides a free strata mediation service for those who are unable to resolve a strata dispute through discussions or through the governance and decision-making powers of the owners' corporation.
- It is available to anyone who lives in, owns or works in the strata sector or in a community scheme.

**The NSW Government has introduced a scheme to rectify defective building work early in the life of new high-rise strata buildings**

- The Strata Building Bond and Inspections Scheme (the Scheme) commenced on 1 January 2019.
- The Scheme is designed to ensure there is a clear process to incentivise developers and builders to build correctly and to work collaboratively with owners' corporations. The Scheme will help to ensure that defective building work is identified early so it can be fixed promptly in a cost-effective manner.

### 4.1 The role of strata committees in responding to building defects

Strata schemes are small, self-governing communities operating as a democracy. The owners decide collectively how best to manage the property that they share. Buying into a strata scheme means entering into a particular form of title which combines collective ownership (common property) and private ownership (the particular 'stratum' of an owner's lot).

The SSM Act establishes a framework for owners' corporations and strata committees to make decisions on certain matters. Owners act collectively through the authority of the strata committee and the owners' corporation. All owners of lots in a strata scheme are members of the owners' corporation which is required to meet at least once each year.

This framework acknowledges that these decisions must be made fairly and democratically, which is why generally a majority of owners are required to agree to decisions that affect other owners.

Common property borders on every lot, so each owner has a collective stake in the repair, maintenance and safety of every part of the building no matter how close or far away it is to a particular owner's lot.

Owners corporations have a duty to maintain and repair property. There is an exemption from this general requirement if the owners' corporation determines by special resolution – that is, by a 75% majority – that it is inappropriate to maintain, renew, replace or repair the property. However,

this exemption does not apply if this decision not to act may affect the safety of any structure or common property in the strata scheme.

Accordingly, the SSM Act recognises the primacy of safety and an owners' corporation's obligation to maintain and repair property where safety is at risk, such as where structural defects exist.

This duty is further highlighted in section 106(5) of the legislation, which provides a right of legal action by an owner to recover losses incurred due to the owners corporation's failure to comply with its statutory duty to maintain and keep the common property in a state of good and serviceable repair.

Section 119 specifically sets out when an owners' corporation may carry out work to rectify certain structural defects that affect another lot or the common property, and other defects that affect water, sewage and other services within a lot. If this work requires changes to common property, then a special resolution would be required. That is, a 75% majority must agree.

These provisions work together to place an obligation on owners' corporations to maintain and repair property, while ensuring big decisions – such as the manner of responding to structural defects – are made with the approval of a clear majority of owners.

In addition to the role of the owners' corporation, the legislation sets out the role and functions of the strata committee. The owners' corporation elects a strata committee to enable quicker decision making on many of the day-to-day decisions about running the scheme. The role of the strata committee is to act on behalf of the owners and ensure collective decisions are executed.

The owners' corporation, being all lot owners, can vote to overrule its strata committee's decisions or put limits on what they can make decisions about. This provides a safeguard against the strata committee acting against the interests of the majority of owners. Accordingly, it ensures the democratic principles that underpin the strata regulatory framework are maintained.

## 4.2 Strata Building Bonds and Inspection Scheme

The Strata Building Bonds and Inspection Scheme, is a structured process implemented under Part 11 of the SSM Act. It is designed to promote the identification of building issues and have them resolved quickly and cost-effectively.

The Scheme aims to incentivise developers and builders to build correctly and to correct any problems early in the life of the building. It also incentivises owners' corporations to work with developers and builders to identify defects and work collaboratively to have them rectified early in the building's life. The process aims to reduce costs for all parties involved, minimise time delays, and reduce the incidence of drawn-out and expensive legal action.

The Scheme is not intended to displace the rights of an owners' corporation, developer or builder to pursue legal action under any other law, including the *Home Building Act 1989* (HB Act). This is why the general 2-year statutory warranty period provided under the HB Act is extended by a further 3 months once a building bond is lodged with the Secretary of the Department of Customer Service (the Secretary).

The scheme applies to building work that is not subject to the requirement to obtain insurance under Part 6 of the HB Act. It only applies to building work if the building work was carried out for the purpose of, or contemporaneously with, the registration of a strata plan of subdivision of a development lot.

The SSM Act also provides that any court, tribunal or other body may take into account any payment made, rectification work completed, or any other action taken in relation to building work, when it is determining a matter relating to the work.

## How the scheme operates

The scheme requires the developer of any new high-rise strata building to pay a bond, equivalent to 2% of the contract price of the building work, to the Secretary. The bond will be held in a trust until an independent inspector identifies any defects that had been found earlier in an interim inspection that had not been rectified, or that an attempted rectification of the defect by the builder had caused a further defect. The defects bond will be released (in whole or in part) either back to the developer or to the owners' corporation, depending on whether the final report identifies any outstanding defects.

The owners' corporation must meet to decide whether or not to agree to the proposed appointment of the inspector by the developer. The developer, if they are an owner in the strata scheme cannot vote in any meeting of the owners' corporation if a matter relates to building defects.

If a developer is unable to appoint a building inspector, then the Secretary will appoint the inspector. The SSM Act provides that costs of the inspector and any reports are to be met by the developer.

The qualified building inspector will inspect the work and provide an interim defect report not earlier than 15 months and not later than 18 months after completion of the building work. If the interim defect report identifies any building defects then the builder can enter the strata scheme and attempt to rectify them if they wish to do so.

Section 3C(2) of the HB Act provides that the date of completion of building work occurs on the date of issue of an occupation certificate that authorises the occupation and use of the whole of the building.

The building inspector can take into account any building defects reported to them by the owners' corporation prior to the interim inspection, or any defects reported by the developer.

The agenda of the first annual general meeting of an owners' corporation must include an item to consider building defects and rectification.

Not later than 18 months after the date of completion of the building work, the developer is to arrange for the building inspector to conduct a further inspection of the building work.

The final inspection and report identifies any defects that were identified in the original report, and whether these have been rectified. The report cannot identify any building defects that were not identified in the interim inspection report.

A building inspector is required to give a copy of any interim or final report to the developer, the owners corporation, the Secretary, and the builder responsible for any defective building work.

An owners' corporation is required to give written notice to the owners of lots in a strata scheme of the receipt of any interim or final report. The notice must include details of the report as prescribed in the *Strata Schemes Management Regulation 2016*.

The Secretary uses the final inspection report to determine the amount of the building bond to be released to the owners' corporation to rectify the defects identified in the final report.

## Commencement of the scheme

The Scheme commenced on 1 January 2018.

Further amendments were made to clarify the role of the building inspector in the operation of the Scheme. The *Strata Schemes Management Amendment (Building Defects Scheme) Act 2018* was passed by NSW Parliament in September 2018. This includes providing a 'good faith' immunity from being sued for both the building inspector and their professional association. The Amendment Act also amended Part 11 to provide the Secretary with a means of assuring the total cost of building works on which the 2% building bond is calculated, has been correctly



determined by the developer. This will be rolled out once the Regulation are developed. As at 12 July 2019, two building developers have lodged building bonds under the Scheme.

### 4.3 Strata mediation services

NSW Fair Trading maintains strata mediation services for those who are unable to resolve a strata dispute through discussions or through the governance and decision-making powers of the owners' corporation. The mediation service is free and resolves over 65% of the strata disputes that are received and undergo the mediation pathway. It is available to anyone who lives in, owns or works in the strata sector or in a community scheme.

An applicant may apply for mediation if the owners disagree about whether to pursue a developer, builder or original owner for defective materials or building defects. Strata mediation applications between an owners' corporation and a builder/developer cannot be mediated under SSM Act. However, dispute resolution services are provided under the HB Act.

An applicant with a complaint about building defects is most likely to choose one of the following topics for mediation:

- Duties of owners' corporation, secretary or treasurer
- Additions, alterations and repairs
- Changes/damages to common property (new topic, introduced 2018/2019 financial year).

The statistics below, in **table 3**, relate to all applications in each of the topics identified and are not representative of mediations which related to or mentioned building defects.

Number of mediations (sorted by topic)			
Financial year	Duties of owners' corporation, secretary or treasurer	Additions, alterations and repairs	Changes/damages to common property
2014/2015	159	161	N/A
2015/2016	421	305	N/A
2016/2017	668	352	N/A
2017/2018	719	338	N/A
2018/2019	563	330	240

**Table 3: Number of mediations by topic**

## Chapter 5 – Flammable cladding on NSW buildings

### Summary

**The NSW Government has acted on combustible cladding and strengthened fire safety across the state**

- The NSW Government has worked to address the risks of combustible cladding following cladding-related fires at the 'Lacrosse' building in Melbourne in November 2014 and Grenfell Tower in June 2017.
- The NSW Government committed to an increased focus on addressing these risks in New South Wales.

**In July 2017 the NSW Government announced its 10-point plan in response to the Grenfell Tower incident to strengthen fire safety measures across the state**

- As part of the 10-point plan, an interagency Cladding Taskforce was established to spearhead the NSW Government's efforts to ensure that fire safety requirements for residential buildings were prioritised and properly addressed through a whole-of-government action plan for dealing with the fire safety risks associated with external wall cladding.

**The NSW Government has introduced a comprehensive scheme for unsafe building products**

- On 18 December 2017, the NSW Government introduced the *Building Products (Safety) Act 2017*.
- On 15 August 2018, the NSW Fair Trading Commissioner published a building product use ban for aluminium composite panels comprised of a core of greater than 30% polyethylene for certain multi-storey buildings.

### 5.1 Background

The fires at the Lacrosse Building in Melbourne in 2014 and the tragic fire at Grenfell Tower in London in 2017 highlighted public safety risks posed by the inappropriate use of certain combustible types of cladding on the external surfaces of buildings.

To address the problem, the NSW Government developed a comprehensive plan to address fire safety, including the creation of a Cladding Taskforce, to ensure that fire safety requirements for residential buildings were prioritised and properly addressed through a whole-of-government action plan for dealing with the safety risks associated with use of certain types of aluminium composite panel (ACP) cladding.

#### What is ACP?

ACP is a type of cladding which can form part of cladding system on the external areas of buildings. It can be used in a variety of ways, such as covering a part of a wall or covering the whole wall, or as a decorative feature around windows and doors, on balconies and awnings and signage on walls.

ACP cladding is typically comprised of sandwich-type panels, usually between 2mm and 5mm in thickness, that consist of two metal outer layers and a core material (see **Figure 11**). The panel

cores are made of a variety of materials, including polyethylene (PE), which may vary considerably in terms of their combustibility and ability to spread fire.

The various types of ACP are distinguished by the composition of their core. The composition of the core is important as it is considered to significantly influence the fire properties of the panel.

Certain types of ACP cladding may be problematic when used on multi-storey buildings because of the potential for rapid fire spread via the external areas of the building. However, the presence of external combustible cladding on a building does not necessarily mean it is a fire hazard. Its risk to safety depends on the type of building, where the cladding has been applied and the building's overall fire safety measures.

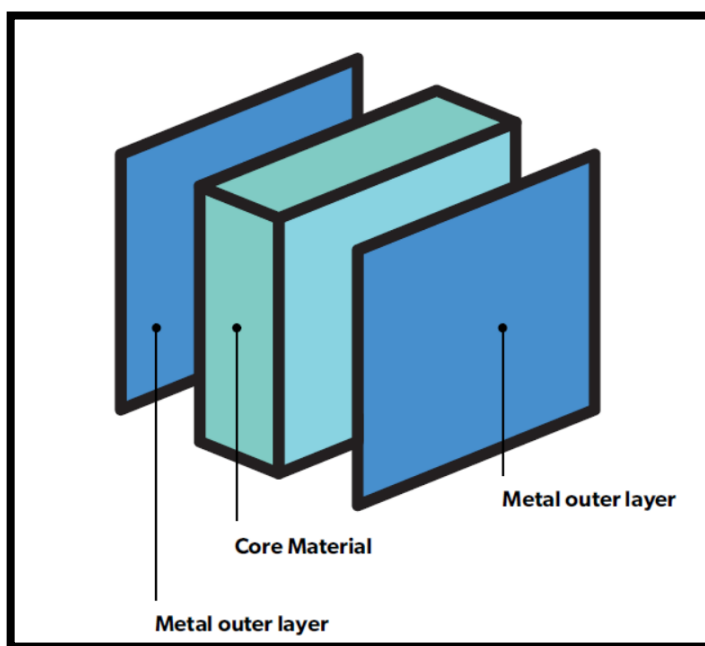


Figure 11: Cladding composition

## 5.2 The role of the Cladding Taskforce

The NSW Government established the NSW Fire Safety and External Wall Cladding Taskforce ('the Cladding Taskforce') in July 2017 to develop new policies and operational proposals and as a coordinating forum for actions undertaken by member agencies. It meets regularly to plan and coordinate the Government's response to combustible cladding risks, and the implementation of the 10-point plan for fire safety.

It consists of representatives from across NSW Government, including:

- Department of Customer Service (DCS)
- Department of Planning, Industry and Environment (DPIE)
- Fire & Rescue NSW (FRNSW)
- Office of Local Government (OLG)
- Data Analytics Centre (DAC)
- NSW Treasury (Treasury)
- Department of Premier and Cabinet (DPC).

## 5.3 Progress towards the NSW Government's 10-point plan for fire safety

### Achievement of actions from the 10-point plan

- |                                                                                                                         |           |
|-------------------------------------------------------------------------------------------------------------------------|-----------|
| 1. The introduction of a comprehensive building product safety scheme to prevent the use of dangerous building products | Completed |
|-------------------------------------------------------------------------------------------------------------------------|-----------|

#### The Building Products (Safety) Act 2017 (the BPS Act)

On 18 December 2017, the NSW Government introduced the BPS Act as an important step in ensuring building safety and providing enhanced powers to monitor and restrict or prohibit the use of unsafe building products in NSW.

The powers under the BPS Act promote the safety of residential, commercial and industrial buildings by:

- giving the Commissioner for Fair Trading (the Commissioner) the power to prohibit the use of a building product when satisfied on reasonable grounds that its use is unsafe
- enabling the Commissioner to identify buildings where building products have been used in a way that is prohibited (including buildings in which building products were used before the prohibition was imposed)
- enabling councils or other relevant enforcement authorities to require building products to be rectified, by giving the relevant authority the power to issue a rectification order to eliminate or minimise the identified safety risk
- enabling the investigation and assessment of building products so that unsafe uses of building products can be identified and prevented.

Additionally, under the BPS Act, the Secretary of the Department of Customer Service and authorised officers have the necessary investigative and assessment powers to help them identify any unsafe uses of a building product. Builders, building product suppliers, manufacturers and importers can also be compelled to produce their records so dangerous building products can be tracked and pinpointed.

On 15 August 2018, under these new powers, the Commissioner published a building product use ban. The ban was for aluminium composite panels comprised of a core of greater than 30% polyethylene for certain multi-storey buildings. Under the BPS Act, it is an offence for a person to cause a building product to be used in a building in contravention of the cladding ban. It is also an offence for a person, in trade or commerce, to represent that a building product is suitable for use in a building if that use would contravene the cladding ban. Any person or corporation who does not comply with the cladding ban can be subject to fines. A corporation can be fined up to \$1.1 million, and individuals can be fined up to \$220,000.

- |                                                                     |         |
|---------------------------------------------------------------------|---------|
| 2. Identify NSW buildings that may have aluminium or other cladding | Ongoing |
|---------------------------------------------------------------------|---------|

The Taskforce coordinated an initial audit by the DAC. The DAC analysed more than 185,000 building records dating back to 1985. The records were reviewed to detect the actual or possible presence of cladding on buildings of all classes. This data audit helped to inform the Taskforce as to the scale of the issue within NSW.

DPIE also conducted an audit of developments for which a previous Minister for Planning or DPIE was the consent authority.

Subsequently, potentially affected buildings were also identified through reports from local councils and FRNSW proactively visiting and assessing local sites.

From October 2018 onwards, buildings have also been identified through self-registrations by building owners on the online Cladding Register (refer to Item 5 in this section).

**3. Communicate to building/strata managers or owners of identified buildings and encourage inspections of the cladding and installation of cladding**

**Completed  
/ Ongoing**

Following the data audit, more than 33,000 letters have been sent and hand delivered to building owners, residents and local councils since July 2017. These letters were sent to the owners of identified buildings to provide information about risk reduction and the engagement of suitable fire safety practitioners to undertake assessments of building fire safety. Letters were also delivered to all occupants of residential buildings identified as having a potentially higher risk. Local Councils were also made aware of all identified buildings in their local government area.

Additionally, the letters further outlined actions the Taskforce is undertaking, including visual inspection by FRNSW officers and referral of buildings to local councils for assessment and any necessary action including issuing any necessary fire safety orders. The Taskforce is continuing to write to the owners of any buildings newly identified as being of potentially higher-risk due the presence of cladding.

**4. Fire and Rescue NSW to visit all identified buildings as part of a fire safety education program**

**Ongoing**

As a Taskforce member, FRNSW has visited and inspected buildings identified in the Taskforce's initial data audits, while inspections of all buildings registered by owners on the online Cladding Register are ongoing.

As at 24 July 2019, FRNSW has undertaken visual inspections of 4,019 buildings.

FRNSW has spent well over 29,000 hours inspecting buildings suspected of having cladding.

These visual inspections are based on operational experience and were undertaken by firefighters from FRNSW's Cladding Taskforce, who were specifically trained to look at the NCC classification of the building (based on the use of the building), height, construction type, occupancy and the cladding arrangement, quantity and location. FRNSW developed an application to allow the information to be captured and fed into the NSW Government Cladding Taskforce's database.

For all building considered to be at potentially higher risk, FRNSW has undertaken Pre-Incident Planning (operational familiarisation site inspections), and this program is continuing for newly identified buildings. Where these buildings were high-rise residential, FRNSW has also undertaken Home Fire Safety Checks, where firefighters would visit sites and discuss home fire safety with residents, and/or provided home fire prevention material.

The completed visits have aided FRSNW in gathering information to proactively prepare for any potential fires that may take place within the identified building. FRNSW also provided further information to building owners related to the Taskforce and actions undertaken.

5. Establish a new fire safety declaration to require high-rise residential buildings to inform state and local government, and Fire and Rescue NSW if their building has cladding

Completed

Amendments to the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) have been introduced. They require owners of certain multi-story buildings to register the building on an online portal if it contains metal composite panel cladding or an insulated cladding system. Information from these registrations is referred to relevant enforcement authorities and FRNSW for assessment.

For registration purposes, owners don't have to be certain about the level of combustibility of the cladding on their building. The identification of these buildings will enable FRNSW to educate the occupants about fire prevention, and to respond appropriately in the event of a fire. Registration also assists councils in their role as building control authorities to determine what further actions (if any) are necessary.

The requirements to register buildings under the EP&A Regulation also applies to Government-owned buildings.

6. Fast-track reforms to improve the regulation of building certifiers

Ongoing

The *Building and Development Certifiers Act 2018* (BDC Act), which was passed by NSW Parliament in October 2018, will replace the *Building Professionals Act 2005* (BP Act) when it is proclaimed. Work is ongoing on the supporting regulations.

The new legislative framework will strengthen the independence of building certifiers and improves the administration of certifier registration, including revamped investigation and disciplinary provisions to allow the regulator to take effective action against certifiers who have engaged in misconduct, and undertake proactive audits of certifiers' work.

7. Implement an industry-based accreditation scheme, ensuring that only skilled and experienced people can carry out fire safety inspections

Completed

In August 2017, the EP&A Regulation was amended to allow industry schemes to be established. These reforms were aimed at improving the quality of checks made throughout the design, approval, construction and maintenance phases of fire safety systems.

Part of these reforms require certain functions to be undertaken by a competent fire safety practitioner including:

- endorsing plans and specifications for relevant fire safety systems
- endorsing fire safety performance solution reports
- endorsing exemptions to the Building Code of Australia for minor works to existing relevant fire safety systems
- assessing the ongoing performance of essential fire safety measures in a building and endorsing the annual fire safety statement.

The amended Regulation came into effect on 1 October 2017.

Applications were sought from industry organisations who wish to operate an accreditation scheme for fire safety practitioners. The Department of Customer Service has assessed

applications received and assists applicant organisations to develop and document satisfactory accreditation processes. As at May 2019, one scheme has been approved.

#### 8. Establish a whole-of-government taskforce to coordinate and implement the reforms

Completed

The Cladding Taskforce, which was established and first met on 21 July 2017, is the central forum for ensuring that initiatives and communications are consistent and coordinated across state and local governments. Its key achievements are:

- overseeing the identification of cladding affected buildings across NSW
- FRNSW inspecting and assessing all identified buildings, and formulating 'pre-incident plans' for higher-risk sites
- referral of all potentially higher-risk sites to enforcement authorities (local councils or the DPIE)
- monitoring of local councils' progress regarding inspecting and reporting back on each referred building
- sending over 33,000 letters to building owners, managers, agents and residents of cladding-affected buildings to provide them with information about how to address safety risks
- awareness campaigns via newspaper advertisements, social media and targeted online advertising to make apartment residents aware of cladding risks and what they can do to ensure the owners of their building are taking appropriate action
- ongoing co-ordination of the reforms and activities of the 10-point plan.

Since its establishment, the Taskforce has met more than 50 times and will continue to meet to coordinate the roll out of the 10-point plan. Further details of the Taskforce's work is available at: <https://www.finance.nsw.gov.au>

#### 9. Provide instructions to all government departments to audit their buildings and determine if they have aluminium cladding

Completed

In July 2017, the Secretaries of all NSW Government clusters were advised that the Government expected Government building constructors, owners and managers to take immediate action to assess and, if needed, remedy any fire safety issues arising from the presence of cladding. Department Secretaries were instructed to take action within their own clusters to ensure all cluster properties were verified as fire safe as they relate to cladding, and generally.

In January 2018, cluster Ministers and Secretaries were requested to report back to the Taskforce to outline the progress of reviewing and assessing cluster properties; the outcomes of that process, and specific details of any at-risk buildings that need further assessment and/or may require rectification.

All clusters have completed the reviews and investigations of properties and are reporting on plans, milestones and progress to the Taskforce.



In February 2016, the then Secretary of DPIE wrote to councils to bring to their attention potential fire safety risks associated with combustible cladding. Councils were also encouraged to consider whether there was an issue in their area and, if so, what actions should be taken. This was requested as a matter of urgency in the context of council's powers pursuant to section 121B(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The then Secretary of DPIE wrote to all Councils again in 2017 requesting that they provide information regarding action taken, or planned, following the Secretary's earlier letter.

Councils responded with information about buildings in their local government areas that may be affected by combustible cladding.

Where FRNSW identified sites with cladding which required further assessment, it has written to the relevant local council requesting they inspect each affected building, and report back.

Consent authorities, being either local Councils or DPIE, are responsible for issuing fire safety orders (where deemed necessary) and enforcing compliance. Residents should contact local Councils for updates on their progress.

The Taskforce continues to liaise with councils regarding specific buildings to ensure all identified buildings are properly assessed.

### **Risk mitigation and enforcement action in relation to cladding**

FRNSW has powers to refer buildings to local councils where councils are the consent authority for those buildings. These referrals require the council to cause the building to be inspected for the purpose of determining the adequacy of the fire safety provisions contained in the building. A report of the inspection is then to be provided to FRNSW.

FRNSW has progressively referred buildings identified as 'higher risk' to the relevant consent authority, which is responsible for assessing whether the cladding requires remediation.

In response to the FRNSW referral, under section 9.32 (6) of the EP&A Act, the local council is required to inspect the building to determine whether or not adequate provision for fire safety has been made in or in connection with it and provide a report to FRNSW. The report must be provided as soon as possible after conducting the inspection. FRNSW continues to work with councils regarding the inspection and assessment of these buildings. Consent authorities are responsible for issuing fire safety orders (where this is deemed necessary) and enforcing compliance.

## **5.4 Regulatory changes and reforms introduced**

### **Ban on the use of certain types of external cladding**

#### **Ban on the use of certain types of cladding**

On 17 December 2017, the NSW Government developed the BPS Act (see section 5.3 of this submission for further details).

On 15 August 2018, the Fair Trading Commissioner published a building product use ban for ACP comprised of a core of greater than 30% polyethylene in any external cladding, external wall, external insulation, facade or rendered finish in certain multi-storey buildings, subject to specific exceptions (the cladding ban). The Commissioner considered a broad range of sources when making the cladding ban, such as the public submissions, expert advice, relevant national and international reports, and NSW Cladding Taskforce data.

Under the BPS Act, it is an offence for a person to cause a building product to be used in a building in contravention of the cladding ban. It is also an offence for a person, in trade or commerce, to represent that a building product is suitable for use in a building if that use would contravene the cladding ban. Any person or corporation who does not comply with the cladding ban can be subject to fines. A corporation can be fined up to \$1.1 million, and individuals can be fined up to \$220,000.

For existing buildings, where cladding has been used contrary to the ban, local councils or other relevant enforcement authority may issue an order requiring the building owner(s) to take action to eliminate or minimise fire safety risks. Local councils and enforcement authorities may determine what rectification work is required in each particular case, and by what date action is required.

## **Environmental Planning and Assessment Amendment (Identification of Buildings with External Combustible Cladding) Regulation 2018**

In consultation with the Cladding Taskforce, the NSW Government made the *Environmental Planning and Assessment Amendment (Identification of Buildings with External Combustible Cladding) Regulation 2018* (the Regulation) as part of the NSW Government's 10-point plan.

The regulation contributes to the current regulatory framework by assisting in the identification of buildings with combustible cladding that could otherwise present a risk to the safety of persons or to the spread of fire. The regulation came into effect on 22 October 2018. Under the regulation, owners of certain buildings with external combustible cladding are required to register their building with the NSW Government through a simple, user friendly NSW Cladding Registration portal. For buildings occupied before 22 October 2018, the deadline for registration was 22 February 2019. Owners of new buildings will be required to register their building within four months of the building first being occupied.

Problems with metal composite panels and insulated cladding systems relate mainly to multi-storey buildings because of the potential for rapid fire spread via the external areas of the building. Certain products can ignite easily and melt at relatively low temperatures. The regulation applies to the following building types (both new and existing buildings) of two or more storeys where it has external combustible cladding.

- residential apartment buildings
- other types of residential buildings where people sleep. For example, hotels, boarding houses, backpackers, student accommodation
- aged-care buildings
- hospitals and day surgeries (and any single dwellings within the building)
- public assembly buildings. For example, theatres, cinemas, schools and churches (and any single dwellings within the building).

It does not currently apply to offices, shops, factories, warehouses, carparks and commercial buildings unless they also contain a use listed above. However, these building types may be included later. The details of the buildings registered are provided to FRNSW and the local council for further investigation.

The regulation defines external combustible cladding as:

- any cladding or cladding system comprising metal composite panels, including products that consist of aluminium, zinc, or copper outer layers and a core material that is applied to any of the building's external walls or to any other external area of the building; or

- insulated cladding systems including systems comprised of polystyrene, polyurethane, and polyisocyanurate that is applied to any of the building's external walls or to any other external area of the building.

The regulation also includes an amendment to clause 144 of the EP&A Regulation to require the plans and specifications for certain new building work involving external combustible cladding to be referred to FRNSW. This is in addition to the existing referral requirements that currently apply.

The additional FRNSW referral applies to the following building types when an alternative solution is proposed to meet specific performance requirements of the Building Code of Australia (for more information on building classifications refer to **Appendix B**):

- Class 2, 3 or 9 buildings of two or more storeys including any related class 4 part of a class 9 building of two or more storeys; and
- Class 5, 6, 7 or 8 buildings of three or more storeys including any related class 4 part of a class 5, 6, 7 or 8 building of three or more storeys.

## Chapter 6 – Mascot and Opal Towers

### Summary

#### **The NSW Government has provided assistance to the residents, tenants and owners of the Opal Tower and Mascot Towers**

- In response to both the Opal Tower and Mascot tower incidents the NSW Government has provided assistance ranging from providing key information for residents and tenants to providing free complaint resolution and mediation services.
- Mascot Towers residents whose homes are temporarily unsafe to occupy were also provided accommodation assistance.

#### **Opal Tower building is structurally sound although rectification work is required**

- The then Department of Planning and Environment engaged engineering experts to investigate the damage to the tower. The final report concluded that the building was structurally sound although some rectification work was required.

### 6.1 Opal Tower

The Opal Tower, located at Sydney Olympic Park, is a high-rise residential building consisting of 36 storeys above ground and 3 basement levels below ground. The Opal Tower was built by Icon Co and occupation of the building commenced in August 2018. The development has 392 apartments, a retail precinct and childcare centre.

#### **The incident**

On 24 December 2018, residents were evacuated from the Opal Tower after Fire and Rescue NSW established the presence of a split concrete panel on Level 10 of the building. Most of the residents returned back to the building by 27 December 2018, however a number of apartments remained inaccessible to residents. Damaged sections of the building were evacuated as a precautionary measure while engineers continued to carry out investigations. An exclusion zone was established, water and gas were shut off and the tower was isolated from the power grid as engineers assessed the structural integrity of the building.

#### **The investigation**

In response to the incident, on 27 December 2018 the then Department of Planning and Environment engaged three eminent engineering experts to investigate possible causes of the incident, review proposed rectification work and make recommendations to prevent similar incidents in future.

The engineering experts engaged were Professors John Carter, Mark Hoffman and Stephen Foster. The outcome of the professors' investigations was outlined in a final report dated 22 February 2019 which was published on the DPIE's website at:

<https://www.planning.nsw.gov.au/News/2019/Final-Report-on-Opal-Tower-Released>

The final investigation report concluded that the building was overall structurally sound and not in danger of collapse, but significant rectification works were required to repair and strengthen damaged beams and panels that rest on them. The causes of the observed damage were related to a combination of design and construction matters.

The report acknowledges that the authors were briefed on the structural remediation, indicating 'in-principle' that the works were sound. The report also recommended however that the final design details be checked by an independent and qualified structural engineer.

The expert panel found that there was no evidence that the building certifiers had been deficient in regard to their statutory expectations.

They also made five separate recommendations for consideration by government and regulatory bodies. The recommendations broadly align with the direction of the NSW Government's response to the Shergold Weir report.

The DPIE Compliance team also investigated the matter focusing on the certification process. The Compliance team found that all the necessary documentation required under the development consent had been completed, including construction certificates and occupation certificates. As a result, the DPIE did not take any formal enforcement action under the *Environmental Planning and Assessment Act 1979*.

## Government actions to assist residents in Opal Tower

DPIE and Fair Trading have been actively involved in providing information, assistance and intervention to the residents, tenants and owners of the Opal Tower since late December 2018.

Government's involvement has included:

- DPIE's engagement with owners and residents at site visits, information sessions and strata committee meetings
- the addition of frequently asked questions and answers for owners and residents to the Fair Trading website, which included key contacts for free financial and general counselling services
- updated messaging on Fair Trading's general enquiries phone line to include a specific option for matters relating to Opal Tower
- arrangement of support services for residents through the Acute Care Team of NSW Health Western Sydney Local Health District
- DPIE's intervention into complaints to assist tenants and residents resolve ongoing concerns with their landlords and the strata managing agent
- working with Sydney Olympic Park Authority and the owners' corporation to assist in obtaining building insurance.

## Current Status

Currently there are 235 apartments which have been cleared for re-occupation, and a further 157 apartments are progressively being cleared for re-occupation.

However, there are 34 apartments which are subject to rectification works and can only be returned to the owners following completion of the rectifications works.

The structural rectification works have been completed with the DPIE representatives attending a site inspection of the works the week commencing 29 July 2019 to facilitate re-occupation of the building. There will be external works which will need to be completed such as painting and landscaping (to be completed by September 2019) however these works would not impede the re-occupation of the building.

The builder, Icon Co, advised DPIE that as of June 2019 it had provided approximately \$12 million in support to owners and tenants.

The NSW Government continues to assist impacted owners by facilitating ongoing discussions between all the relevant parties including Icon, the owner's corporation, the strata managers, the developer Ecove and a range of independent engineers.

## 6.2 Mascot Towers

Mascot Towers is a ten-story mixed residential and commercial building which was completed approximately 12 years ago.

### The incident

On Friday, 14 June 2019 all occupants were evacuated from the building after cracks developed throughout the building. The cause of cracking is yet to be determined. All 132 apartments and some of the retail premises remain evacuated and engineers are working to determine the cause of cracking.

On 14 July 2019 the Mascot Towers Owners Corporation announced that engineers were still continuing in their assessments of the building which continued to show "further signs of stabilisation".

### Government actions to assist residents in Mascot Towers

In response to the Mascot Towers incident, NSW Fair Trading provided rapid support for the displaced residents, including:

- establishing a telephone hotline within 24 hours of the incident and publishing frequently asked questions on the website – at close of business 9 July 2019, 100 calls have been received, with 85 answered (33 deemed to be Mascot Towers related and 52 transferred to an alternate queue line)
- posting information on Fair Trading's social media sites outlining support options – as at 9 July 2019, there have been 6,755 views of the Mascot Towers news page and 147 searches on "Mascot" related terms
- providing information to affected parties outlining the rights and obligations of tenants, landlords, owners' corporations, strata committees, strata managers, building managers and licensed real estate agents
- providing information on the Tenants' Advice and Advocacy Service (TAAS), supported by Fair Trading
- informing residents and owners about the Salvation Army Moneycare Western Sydney Financial Counselling Service services, supported by Fair Trading, where they can get advice from a financial counsellor
- informing residents and owners about Lifeline Crisis Support available 24 hours to support personal crises care, counselling or support resources.

Fair Trading also offers support in the following areas:

- free complaint resolution/mediation services for disputes between tenants and landlords, and strata owners and strata managers/owners' corporations
- information about lodging a tenancy or strata matter with NSW Civil and Administrative Tribunal (the Tribunal). The Tribunal can make legally binding and enforceable orders on tenancy and strata matters and retail lease disputes.

The NSW Government announced a temporary accommodation support package on 23 June 2019 providing accommodation assistance to residents whose homes in Mascot Towers are temporarily unsafe to occupy. This was announced within 5 working days of the incident.

Residents of one-bedroom units are able to access funding for accommodation of up to \$220 per night, up to \$300 per night for two-bedroom units and up to \$400 per night for three-bedroom units, paid subject to actual costs incurred.

Assistance is only available for the period a unit is unsafe for occupation. The assistance is available on the basis it will be repaid if the recipient later receives compensation or payment for accommodation costs under an insurance policy or by other means.



## Chapter 7 – Implementation of recommendations into building industry reports

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### Summary

#### **NSW Government has progressed recommendations in the *Independent Review of the Building Professionals Act 2005***

- In September 2016, the *Independent Review of the Building Professionals Act 2005* Final Report ('the Lambert Review') was released.
- At the same time, the NSW Government released its response to the Report. Work has continued on the implementation of the supported Review recommendations.

#### **The NSW Government delivering reforms outlined in the NSW Response to the *Building Confidence Report***

- In August 2017, the Building Ministers' Forum commissioned Professor Peter Shergold AC and Ms Bronwyn Weir to examine building regulatory systems across Australia. The outcomes were reported in the *Building Confidence Report* (the BC Report) in 2018.
- In February 2019, the NSW Government released its response to the BC Report, supporting the majority of its recommendations.
- The *Building Stronger Foundations* discussion paper, released 26 June 2019, focuses on delivering the reforms outlined in the NSW Response to the BC Report and is progressing additional complementary reforms.

### 7.1 Independent Review of the Building Professionals Act 2005 Final Report

In September 2014, Mr Michael Lambert was appointed by the then Assistant Minister for Planning to assess the effectiveness of the *Building Professionals Act 2005* (the BP Act) and conduct a broad review to examine certification and its application in the wider building industry.

The Review's broad terms of reference gave Mr Lambert the ability to:

- assess the validity and efficacy of the BP Act
- examine building and subdivision certification and its application in the wider building industry
- make recommendations for reform.

The terms of reference were deliberately kept broad to ensure that the role and performance of certifiers and of the Building Professionals Board could be assessed in line with the broad context within which they operate.

This includes:

- planning and building controls outlined in the EP&A Act and Regulation and the *Local Government Act 1993*
- certifier obligations under the NCC and Australian Standards
- the interaction between certifiers and the local government (e.g. development approvals, compliance and record keeping processes, etc.)
- the role of the regulator.

The final report of the Lambert Review made 150 recommendations.

In September 2016, the NSW Government released its response to the Lambert Review. The response supported 72 recommendations in full or in part. Eight recommendations were not supported.

In its response, the NSW Government committed to prioritising a series of priority reforms which it has completed or is progressing. Notable amongst these reform areas were fire safety in 2017<sup>1</sup> and the regulation of certifiers in 2018.<sup>2</sup> The remaining recommendations are under consideration by the NSW Government with a number being considered as part of the NSW Government response to the Building Confidence report by Shergold & Weir and others being considered nationally, by the Building Minister's forum.

The NSW Government remains committed to completing implementation of these reforms as a priority.

## Major reforms

The NSW Government has progressed a significant number of the supported recommendations.

Examples of the major reforms which have been introduced or are progressing are categorised under the ten themes of the Lambert Report below:

### 1. Create a principles-based legislative framework for building regulation

This theme is being progressed through reform to the legislation governing certifiers, including the re-write of the BP Act and the *Environmental Planning and Assessment Act 1979* (EP&A Act). The EP&A Act was reformed, rewritten and assented to in 2017 and the BP Act in 2018. While the EP&A Act has mostly commenced, the *Building and Development Certifiers Act 2018* (BDC Act) will commence once the supporting regulations are developed in 2020.

### 2. Strengthen the administration of building regulation and certification

This theme has been achieved through reform and consolidation of key responsibilities for building regulation and certification. Key regulatory functions, including legislative and operational responsibilities, were consolidated within the Better Regulation Division of the Department of Customer Service. As part of the NSW Government response to the BC Report, a Building Commissioner has been appointed to act as the single regulator for building regulation in NSW. Mr David Chandler OAM was appointed as the NSW Building Commissioner on 1 August 2019.

In addition, reform of the EP&A Act included consolidation of the building and certification provisions into a single Part under Part 6 of that Act. Further consolidation of legislative responsibilities for building regulation will be achieved by allocating this Part to the Better Regulation Division.

### 3. Implement an information systems strategy for the building regulation and certification system

This theme is underway and ongoing through the development of the NSW Planning Portal system, the Certability App and software solutions for mandatory certifier data collection.

Further reforms are being developed under the NSW response to the BC Report, which committed to critical building plans and specifications being lodged with the Building Commissioner, possibly in a digital format.

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<sup>1</sup> *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017.*

<sup>2</sup> *Building and Development Certifiers Act 2018.*

#### **4. Enhance the accountability and clarify the role of certifiers**

This theme is underway through the development of the BDC Act, which received assent in 2018. Work is ongoing to develop the supporting regulations.

The reforms will be further progressed through ongoing and future work to develop a 'practice guide' for certifiers and enhance the Code of Conduct, which will form part of the work on the regulations to the BDC Act. Additional work is being progressed through the delivery of the four-point plan for certifiers, which was announced in December 2018.

#### **5. Establish a partnership model between the state and local government in respect to building regulation and certification**

Under the NSW Government response to the BC Report, the Building Commissioner will develop collaborative mechanisms in consultation with the key government regulators, agencies and stakeholder groups.

#### **6. Achieve and maintain a best practice building regulation and certification system**

This theme is being progressed through reform to the legislation governing certifiers, including the re-write of the BP Act and the EP&A Act, practice reforms and guidance, as detailed in point 1.

Further reforms to strengthen best practice in the building sector are being developed as part of the NSW Government response to the BC Report.

An example of significant reforms in response to the Lambert Report was reforms to the EP&A Regulation in 2017 to improve fire safety in new and existing buildings. The reforms included a new role of competent fire safety practitioner where independent, specialist expertise is required; new requirements for documentation of plans for certain fire protection systems and new critical stage inspections for buildings where people sleep.

#### **7. Enhance the professionalisation of certifiers through accreditation, education, training and support for certifiers and;**

#### **8. Refocus of the complaints handling process**

These reforms are underway through the delivery of the BDC Act and work on the supporting regulations. Specifically, the BDC Act revises the complaints handling and disciplinary procedures by introducing a 'show cause' test and clarified grounds for disciplinary action.

Additional work is being progressed through the delivery of the four-point plan for certifiers, which was announced in December 2018.

#### **9. Enhance the sustainability of Professional Indemnity Insurance**

Reforms to certifier professional indemnity insurance (PII) are being progressed under the auspices of the Building Ministers' Forum (BMF).

The NSW Government has also been consulting with certifier industry associations and the insurance sector about options for reforms to the requirements for certifier PII, associated risks and liabilities, and insurance arrangements.

#### **10. Appropriate resourcing and funding**

The design and implementation of the reforms has been driven by Ministers responsible for building regulation, in close consultation with key industry stakeholders and the community.

Resourcing and funding arrangements for the implementation of the reforms have been established as required.

## 7.2 The ‘Building Confidence’ Report by Shergold and Weir

In August 2017, the BMF commissioned Professor Peter Shergold AC and Ms Bronwyn Weir to examine building regulatory systems across Australia. The goal of the assessment was to enhance public trust through effective implementation of building and construction standards that protect the interests of the public.

In February 2018, Mr Shergold and Ms Weir detailed their findings through the Building Confidence Report which made 24 recommendations, and broadly found that there were a number of problems affecting the building sector.

The Shergold Weir Report focussed on shortcomings in the implementation of the National Construction Code (NCC). The NCC contains the technical requirements and standards for the construction of buildings and for plumbing work. The NCC is adopted by each jurisdiction in its own building and plumbing legislation.

The recommendations were aimed at improving the national best practice model for effectively implementing building regulation and the National Construction Code.

The Shergold Weir Report was the subject of further discussion between Ministers and Senior Officials throughout 2018. The BMF convened an industry roundtable with major sector stakeholders at its meeting held in August 2018. There was widespread industry support for the direction of the Shergold Weir Report and BMF Ministers committed to developing a national *Building Confidence Report – Implementation Plan* (the Implementation Plan). On 18 July 2019, Building Ministers agreed to a national approach to the implementation of the *Building Confidence* report.

### How the Government is actioning the recommendations from the Shergold Weir Report

In February 2019, the NSW Government released its response to the Shergold Weir Report (the Report). The NSW Government Response to the Report indicated support for the majority of the Report’s recommendations.

Issues raised by the Report have been considered in other reviews of building, construction and planning systems. Most notably, the Independent Review of the BP Act and, internationally, the independent review of United Kingdom’s building regulations led by Dame Judith Hackitt. Both of these reviews highlight that compliance and enforcement problems across building systems are not isolated to any one jurisdiction and emphasise the need for broad-scale regulatory and cultural change to achieve real reform.

The NSW Government response to the Report acknowledges these issues and takes a holistic approach to the recommendations of the Report and other Reports to deliver wholesale changes. Specifically, it committed to the following major reforms to deliver a more robust regulatory system for buildings:

- requiring categories of building practitioners who are defined as ‘building designers’ to formally declare that plans, specifications and performance solutions they provide are compliant with the Building Code of Australia (BCA), and that builders declare that buildings are built according to the declared plans
- introducing a new registration scheme for ‘building designers’
- ensuring an industry-wide duty of care is owed to subsequent homeowners
- appointing a Building Commissioner to act as the consolidated regulator for building in NSW.

Details of NSW's progress in implementing the specific recommendations of the Report are outlined in the *Building Stronger Foundations* discussion paper and demonstrate that NSW has completed or is progressing 20 recommendations, with the remaining four recommendations under active consideration. Outside of the reforms highlighted in the NSW Government response to the BC Report, the NSW Government has made significant progress in implementing supplementary reforms that correlate to recommendations of the Report.

The NSW Government is also supporting the Report on a national scale by progressing the Implementation Plan, which was published by the BMF in March 2019. The Implementation Plan outlines a national roadmap for reforms arising from the Report.

The NSW Response to the Report supports ongoing complementary reform work following its response to the Lambert Review, such as the development of *Building and Development Certifiers Act 2018* and the delivery of the four-point plan for certifiers.

## Discussion paper – Building Stronger Foundations

On 26 June 2019, the NSW Government released a discussion paper entitled *Building Stronger Foundations* (the discussion paper) for public consultation.

This discussion paper takes the next steps in implementing the NSW Government response to Shergold Weir Report by engaging with stakeholders to shape the direction of these reforms. The NSW Government recognises that industry input is vital in developing the reforms and delivering on a stronger building regulatory system for professionals and the community. Specifically, the paper seeks feedback on the scope of the reforms and considers how the reforms can be designed to work in the future.

The NSW Government will ensure that the reforms integrate efficiently with processes and requirements of both building regulation and the approvals system. It also intends to strike an appropriate regulatory balance between the existing legislative landscape and ongoing reforms in the building and construction sector more broadly.

The NSW Government is committed to getting these reforms right and will use feedback from industry and the community to work through any technical and practical issues that are raised.

Following consultation on this paper, the NSW Government plans to table enabling legislation in NSW Parliament by the end of the year.

## National implementation and reform

On 18 July 2019, Building Ministers agreed to a national approach to the implementation of the Shergold Weir *Building Confidence* Report. Ministers committed to work together to build a stronger building and construction sector in Australia.

Building Ministers resolved to strengthen the Australian Building Codes Board. The strategic plan of the Australian Building Codes Board will be recast to better reflect the current challenges in the building sector. The Australian Building Codes Board will be expanded to include greater representation and engagement from industry.

To achieve this, an implementation team will be established as part of the Australian Building Codes Board. The implementation team will be tasked with developing and publicly reporting on a national framework for the consistent implementation of recommendations of the Shergold Weir Building Confidence report, as well as the design, construction and certification of complex buildings.

The national framework will be responsive to the most efficient mechanism to achieve the desired outcome and will result in amendments to the National Construction Code NCC and/or the development of other guidance as required.

Adoption of the framework and ultimate implementation of the Shergold Weir Report recommendations will remain the responsibility of the state and territory governments.

## Appendices

### Appendix A – Types of certifiers (Building Professionals Act – Accreditation Scheme)

Categories	Description of work
<b>A1, A2 and A3</b>	<p>Building surveyor grades 1, 2 and 3:</p> <p>A1 certifiers can certify all buildings</p> <p>A2 certifiers can certify all class 1 and 10 buildings, and certain class 2-9 buildings (restrictions apply, so ask your certifier)</p> <p>A3 certifiers can certify class 1 and 10 buildings that meet the deemed-to-satisfy provisions of the Building Code of Australia.</p> <p>A1, A2 and A3 certifiers can also act as the PCA for building work, and certify compliance of swimming pools and spa pools.</p>
<b>A4</b>	building inspector
<b>A5</b>	Port development certifier: State Environmental Planning Policy (Three Ports) 2013
<b>E1</b>	<p>swimming pool certification:</p> <ul style="list-style-type: none"> <li>inspect and issue certificates of compliance under Swimming Pools Act 1992 for existing swimming pool barriers</li> <li>CAN NOT assess/ approve proposed plans for swimming pools.</li> </ul>
<b>B1</b>	subdivision certification
<b>C1</b>	private road and drainage design compliance
<b>C2</b>	private road and drainage construction compliance
<b>C3</b>	stormwater management facilities design compliance
<b>C4</b>	stormwater management facilities construction compliance
<b>C5</b>	subdivision works and building works (location of works as constructed) compliance
<b>C6</b>	subdivision road and drainage construction compliance
<b>C7</b>	structural engineering compliance
<b>C8</b>	electrical services compliance
<b>C9</b>	mechanical services compliance
<b>C10</b>	fire safety engineering compliance
<b>C11</b>	energy management compliance (Building Code of Australia classes 3, 5 to 9)
<b>C12</b>	geotechnical engineering compliance



Categories	Description of work
C13	acoustics compliance
C14	building hydraulics compliance
C15	stormwater compliance
C16	speciality hydraulic services compliance
D1	strata certification

## Appendix B - Classes of building under the National Construction Code – Building Code of Australia

Classes of building		
Class 1	Class 1a	A single dwelling being a detached house, or one or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit.
	Class 1b	A boarding house, guest house, hostel or the like with a total area of all floors not exceeding 300m <sup>2</sup> , and where not more than 12 reside, and is not located above or below another dwelling or another Class of building other than a private garage.
Class 2	A building containing 2 or more sole-occupancy units each being a separate dwelling.	
Class 3	A residential building, other than a Class 1 or 2 building, which is a common place of long term or transient living for a number of unrelated persons. Example: boarding-house, hostel, back-packers accommodation or residential part of a hotel, motel, school or detention centre.	
Class 4	A dwelling in a building that is Class 5, 6, 7, 8 or 9 if it is the only dwelling in the building.	
Class 5	An office building used for professional or commercial purposes, excluding buildings of Class 6, 7, 8 or 9.	
Class 6	A shop or other building for the sale of goods by retail or the supply of services direct to the public. Example: café, restaurant, kiosk, hairdressers, showroom or service station.	
Class 7	Class 7a	A building which is a car park.
	Class 7b	A building which is for storage or display of goods or produce for sale by wholesale.
Class 8	A laboratory, or a building in which a handicraft or process for the production, assembling, altering, repairing, packing, finishing or cleaning of goods or produce is carried on for trade, sale or gain.	
Class 9	A building of a public nature.	
	Class 9a	A health care building, including those parts of the building set aside as a laboratory.
	Class 9b	An assembly building, including a trade workshop, laboratory or the like, in a primary or secondary school, but excluding any other parts of the building that are of another class.
	Class 9c	An aged care building.
Class 10	A non-habitable building or structure.	
	Class 10a	A private garage, carport, shed or the like.
	Class 10b	A structure being a fence, mast, antenna, retaining or free-standing wall, swimming pool or the like.

Type of construction		
Rise in storeys	Class of building 2, 3, 9	Class of building 5, 6, 7, 8
4 or more	A	A
3	A	B
2	B	C
1	C	C