

**INQUIRY INTO FURTHER INQUIRY INTO THE  
REGULATION OF BUILDING STANDARDS**

**Organisation:** Local Government NSW

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# **Submission to the Public Accountability Committee: Further inquiry into the regulation of building standards**

August 2021

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## Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and related entities. This is a draft submission until it is endorsed by the LGNSW Board. We will advise at that time if there are any substantive changes to the submission.

LGNSW welcomes the opportunity to make a submission to this further inquiry into the regulation of building standards. LGNSW has long advocated for tighter and more effective building regulation. Our position has been well-documented in no less than 17 submissions over the last decade (including two submissions to the Public Accountability Committee in 2019) and reiterated by LGNSW President Cr Linda Scott at public hearings in August, November and December 2019<sup>1</sup>.

The local government sector's heightened concerns about poor regulation of building and combustible cladding led to a number of resolutions at the 2019 Annual Conference. Details are contained in the LGNSW Policy Platform.

## Response to Terms of Reference (ToFR)

LGNSW's previous submissions provide the broad context and position of local government on matters relevant to this current inquiry. The sector's views on the regulation of building standards have been well-documented and remain largely unchanged.

To supplement this information, some additional comments are provided below on the adequacy of building regulation, private certification and cladding (under ToFR (a)) as well as matters raised under (b) which include: expansion of complying development, the cost of compliance and enforcement and asbestos management.

### ***(a) the efficacy and adequacy of the government's regulation of building standards***

#### **NSW Building Commissioner's Reform Program**

LGNSW has welcomed the NSW Building Commissioner's proactive reform program and the progress and achievements made in the two years since his appointment in August 2019. After 20 years of inaction and deregulation of the building and construction sector by successive state governments, it has been refreshing to see the Building Commissioner's recent actions, new legislative powers come into effect, and evidence in certain areas of strong regulatory enforcement underway.

LGNSW also acknowledges and appreciates the Building Commissioner's engagement to date with local government. The sector looks forward to continued cooperation and collaboration, particularly in the area of compliance and enforcement, to help rebuild trust and confidence in the public safety and quality of all buildings.

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<sup>1</sup> <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2540#tab-hearingsandtranscripts>

***Recommendation 1:*** *That the Committee acknowledges the work and achievements of the NSW Building Commissioner and his team over the past 2 years towards strengthening building regulation to rebuild public confidence in the building and construction sector.*

### **Focus on multi-unit residential (Class 2) buildings**

The NSW Government's current focus of reform is on high-rise residential construction (referred to as Class 2 buildings). As noted in previous submissions, to ensure momentum is maintained, LGNSW would like a commitment from the NSW Government to a program 'roadmap' (with clear timeframes and resources) for extending the application of the new building reforms which commenced 1 July 2021 beyond the current focus on Class 2 buildings.

These reforms must continue so that in future other buildings are captured under this new legislation. Next priority should be on those building forms where people sleep at night and whose occupants rely on the safeguards of others to protect them, as follows:

- Class 1b (smaller boarding houses).
- Class 3 (which includes boarding houses, guest houses, hostels/backpacker accommodation).
- Class 9 (ie 'public' buildings which include health-care, child-care, education and public-assembly facilities).

Other building classes that accommodate retail, warehouses and factories are also considered by some councils to be of sufficient importance in the next stage, because of concerns in some cases around fire safety. Some councils also report seeing considerable non-compliance with building standards for Class 1a buildings (single detached dwellings and town house, row houses or the like) and would like to see these included too.

***Recommendation 2:*** *That the NSW Government commit to a program, timeline and sustained resources to extend the application of the new building reforms, which commenced 1 July 2021, beyond Class 2 buildings, with priority on other forms of building where people sleep at night (Classes 1b and 3) and those whose occupants rely on the safeguards of others to protect them (Class 9).*

#### **(i) the cost, effectiveness and safety concerns arising from the use of flammable cladding**

LGNSW President, Cr Linda Scott, outlined the issues for local government with the management of combustible cladding in NSW at the Committee's hearing in December 2019.

The safety concerns arising from the use of combustible cladding are well known and documented, as are the significant costs to building owners. What is far less appreciated are the costs incurred by councils, from the outset four years ago, to meet State Government expectations to investigate, assess and regulate the remediation of approximately hundreds of buildings with external combustible cladding. This amounts to yet another cost shift.

LGNSW and councils have consistently raised these concerns with the Minister for Better Regulation and Innovation and the Cladding Taskforce.



LGNSW welcomed the Cladding Product Safety Panel in 2020, but unfortunately, the panel's Terms of Reference fall short of addressing wider deficiencies in the overall governance of the cladding response. The local government sector would like to see the NSW Government take the lead with cladding in the same way as it has with asbestos management, whereby a central coordination body – the Heads of Asbestos Coordination Authorities (HACA) - coordinates NSW Government agencies and councils to ensure the safe management of asbestos across all areas of workplace health, public health and environment protection.

LGNSW also acknowledges the NSW Government's Project Remediate Program and appreciates the Office of the Building Commissioner's engagement to date on the start-up of this program. In the three years it has taken the Government to announce this program councils have been left to work through their cladding lists and determine whether and how property owners should rectify the cladding on their building. As detailed in our previous submissions and the public hearings, resourcing this work remains challenging for councils. With rectification work under Project Remediate still to commence on any buildings, there are general concerns that the delayed rollout is creating uncertainty for all involved – strata investors, owners, residents and councils.

Further, Project Remediate only deals with certain criteria of buildings, and therefore provides little assistance for owners and councils in dealing with the many other buildings affected by combustible cladding. As previously indicated, LGNSW would like to see the Government commit \$600 million in lieu of interest-free loans to help fund individual unit owners' remediation costs for private residential buildings, and also towards funding to assist councils.<sup>2</sup> We also expect appropriate funding to be made available for Fire and Rescue NSW to ensure it can undertake inspections of possibly hazardous buildings in a timely manner.

***Recommendation 3: That the NSW Government:***

- *commit \$600 million to fund a program to fix the cladding on private residential buildings, including direct funding support for individual unit owners;*
- *reimburse councils for the significant costs to investigate, assess and regulate the remediation of hundreds of buildings with cladding; and*
- *commit to take the lead with management of combustible cladding in the same way as it has with asbestos management.*

***(ii) private certification of and engineering reports for construction projects***

LGNSW opposed private certification when it was first proposed almost 25 years ago, for all the reasons that we are now seeing unfold in the building system. The inadequacies of the building regulation and private certification system led the Local Government Annual Conference in 2019 to adopt a policy position which calls for a review of the private certification system and consideration of phasing out private certifiers. This reflects a long-held dissatisfaction with the entire private certification system, weak and ineffective regulation of certifiers and concerns about potential and perceived conflicts of interest with the private certification system. Councils reported that the conflict of interest issue made some certifiers reluctant to take enforcement action.

LGNSW is confident that the Building Commissioner is well aware of these issues and is taking steps to address these concerns through a range of reforms. Nevertheless, councils can cite numerous cases of building practitioners and certifiers failing to meet building standards and

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<sup>2</sup> LGNSW 2021-22 Budget Submission

requirements. LGNSW has welcomed the Building Commissioner's invitation for councils to report these cases to his Office for further investigation.

LGNSW also welcomes the audit program which we have called for over many years to reduce the opportunity for poor outcomes arising from conflicts of interest to occur. It will be incumbent on the NSW Government to continue to resource and fund these audit programs and other enforcement measures over the long term to strengthen the confidence in, and integrity of, the private certification scheme.

**Recommendation 4:** *That the NSW Government continues to properly fund and resource the Department of Customer Service (Fair Trading) and Office of the Building Commissioner to conduct regular audits and investigations of private certifiers and developers to reduce the opportunity for conflicts of interest to occur and to take appropriate enforcement action when non-compliance is detected.*

***(b) any other related matter.***

**Expansion of complying development**

Complying development was introduced in 2008 for development that can be determined through a fast-track assessment (tick the box) by a council or private registered certifier, without the need for a development application (DA) to be lodged and assessed by the council.

This one-size-fits-all statewide approach was originally intended to be used only for low impact, small scale and relatively straight forward development (such as project home development). However, the NSW Government has progressively expanded the type of activities and development that can be approved by private certifiers without the need for development consent from council, particularly over the past 18 months, making the codes<sup>3</sup> that contain these rules increasingly complex.

In 2015, Michael Lambert found that these codes are not well understood by the industry, including certifiers, and that the complying development policy framework “does not provide a robust and reliable framework ... suitable to further expand the coverage of complying development”<sup>4</sup>.

LGNSW, councils and communities continue to question the appropriateness of a certifier undertaking these forms of complex assessment and exercising regulatory power over matters which should be rightfully assessed by councils. The latest round of planning reforms proposes a raft of changes to significantly expand complying development activities - these extend well beyond what would be considered low impact development.<sup>5</sup>

Councils are most often the first port of call for complaints or questions triggered by complying development approved by private certifiers, yet they do not have a line of sight to these developments.

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<sup>3</sup> State Environmental Planning Policy (Exempt and Complying Codes) 2008 (known as the 'Codes SEPP')

<sup>4</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005*, 2015, p 13

<sup>5</sup> Most recently, LGNSW opposed wide-ranging changes to complying development in business and industrial zones proposed in the Department of Planning, Industry and Environment's Building Business Back Better Explanation of Effects (EIE).



LGNSW remains opposed to the expansion of state-wide complying development pathways to increasingly complex developments. Complying development should be limited to low risk or low impact development.

***Recommendation 5: The NSW Government ceases its expansive changes to state-wide complying development pathways and limits exempt and complying development to low risk or low impact development.***

### Cost and funding of compliance and enforcement

The NSW Government recently introduced a compliance levy on developers to support the oversight of the compliance work being undertaken by the Office of the NSW Building Commissioner and NSW Fair Trading. Detailed justification for this levy is provided in the Second Reading Speech for the Building Legislation Amendment Bill 2021.

At the same time, the State Government made regulatory changes that prohibit councils the option of charging a similar levy on developments to help pay for their ongoing local compliance responsibilities. The revenue loss to councils because of this change is estimated to range between hundreds of thousands of dollars up to over one million dollars.

It is difficult to accept the Government's justification for introducing a levy on developers to help the State fund its own regulatory costs while at the same time removing the ability of councils to do the same.

The Government is expecting councils to carry out an ever-expanding list of compliance work associated with complying development. Added to this, the Building Commissioner is looking to councils to assist with compliance and enforcement of the State's new building regulations and councils face increasing pressure on resources to enforce combustible cladding rectification work.

At the very least, councils need a mechanism to enable them properly and fairly recover the costs of their compliance activities, in the same way that the State Government has justified the introduction of its compliance levy.

In discussions with the Office of the Building Commissioner, LGNSW has received support for a 'local compliance levy' so that councils can maintain functioning compliance teams and continue to support the Office of the Building Commissioner in its important work.

***Recommendation 6: That the NSW Government introduce a compliance levy on all Development Applications or Compliance Certificates – analogous with that which has been legislated for the NSW Building Commissioner - to support local government's expanding compliance responsibilities.***

### Asbestos

Many councils think the codes and regulations around asbestos and development could be strengthened and that certifiers could do more to ensure asbestos is identified, removed and disposed of legally and safely. One consequence of this not happening properly is the illegal dumping and illegal disposal of asbestos waste. Another consequence is the contamination of recycling material with asbestos waste. There is also a range of data from councils and the Environment Protection Authority about the cost to society and councils for the clean-up and



disposal of illegally dumped or illegally disposed of asbestos. Recommendations to improve asbestos management include the following:

- The codes and Environmental Planning and Assessment (EP&A) Regulation 2000 could be stronger and more specific about how to identify and manage asbestos.
- Asbestos should not be able to be removed under exempt development.
- Certifiers need better training in ensuring asbestos is managed correctly.
- The ability of certifiers and councils to pursue compliance where asbestos is not managed correctly should be improved.
- Where asbestos is not managed correctly then certifiers should bear some of the responsibility and consequences should they not be able to demonstrate they did their job correctly.

## Summary of Recommendations

**Recommendation 1:** That the Committee acknowledges the work and achievements of the NSW Building Commissioner and his team over the past 2 years towards strengthening building regulation to rebuild public confidence in the building and construction sector.

**Recommendation 2:** That the NSW Government commit to a program, timeline and sustained resources to extend the application of the new building reforms, which commenced 1 July 2021, beyond Class 2 buildings, with priority on other forms of building where people sleep at night (Classes 1b and 3) and those whose occupants rely on the safeguards of others to protect them (Class 9).

**Recommendation 3:** That the NSW Government:

- commit \$600 million to fund a program to fix the cladding on private residential buildings, including direct funding support for individual unit owners
- reimburse councils for the significant costs to investigate, assess and regulate the remediation of hundreds of buildings with cladding; and
- commit to take the lead with management of combustible cladding in the same way as it has with asbestos management.

**Recommendation 4:** That the NSW Government continues to properly fund and resource the Department of Customer Service (Fair Trading) and Office of the Building Commissioner to conduct regular audits and investigations of private certifiers and developers to reduce the opportunity for conflicts of interest to occur and to take appropriate enforcement action when non-compliance is detected.

**Recommendation 5:** The NSW Government ceases its expansive changes to state-wide complying development pathways and limits exempt and complying development to low risk or low impact development.

**Recommendation 6:** That the NSW Government introduce a compliance levy on all Development Applications or Compliance Certificates – analogous with that which has been legislated for the NSW Building Commissioner - to support local government's expanding compliance responsibilities.

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LGNSW would welcome the opportunity to assist with further information during this review to ensure the views of local government are considered.

To discuss this submission further, please contact LGNSW Strategy Manager, Planning