

INQUIRY INTO FURTHER INQUIRY INTO THE REGULATION OF BUILDING STANDARDS

Organisation: Australian Institute of Building Surveyors

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Submission

Further Inquiry Into the Regulation of Building Standards

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Who we are

The Australian Institute of Building Surveyors (AIBS) is recognised nationally and internationally as the peak professional body representing building surveying practitioners in Australia.

Our Mission

AIBS is committed to ensuring a safer Australia through continuous improvement and development of the profession of Building Surveying. The overarching objective of the Institute can best be summarised as follows:

To achieve the highest standard of professionalism through Professional Development, such as education pathways and training, and Advocacy in representing the profession and establishing standards.

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Preparation

This submission has been prepared in response to an invitation to the public to make submissions relevant to the terms of reference for the Legislative Council's Public Accountability Committee inquiry into the efficacy and adequacy of the government's regulation of building standards.

Overview

The NSW system of regulation of the building industry is an example of how a regulatory system can be the cause of non-conformity through complexity, and at the same time be an example of why complex legislative environments can act as a shield from responsibility.

For consumers, accountability of those from whom they have bought goods or services, including building work, is crucial to investment confidence and therefore has flow on effects for development of the economy. Consumers also expect the regulators to be accountable for upholding appropriate standards via regulation of the industry.

Some would argue that a complex industry needs a complex system of regulation, to meet the needs of the consumer in a rapidly innovating global industrial environment, and that the regulatory system must also support industry to innovate and efficiently support economic development.

As the NSW regulatory environment has become more complex, it is clear that there is in fact a point of diminishing returns effect where additional regulatory complexity actually drives non-compliance and can also protect those who should be responsible from criticism for failure to regulate, and also protect practitioners from liability due to the cost of compliance and enforcement actions in a complex regulatory environment.

Regulation of the industry should be measured not only in terms of creating effective consumer outcomes, but on also providing clear and effectual regulation of the industry via an economic compliance and enforcement regime. Reform is desperately needed in NSW to ensure that the fundamental importance of safe building outcomes is placed ahead of regulation of planning controls and regulation of the environment. With appropriate attention and resourcing a reformed building regulatory environment should deliver exactly what the community needs.

AIBS advocates for macro reform of the NSW building regulatory environment designed to create an improved capacity for compliance and safer buildings. In addition, AIBS advocates for very specific reforms that also have potential to provide a quantum shift in sector performance but can

be quickly and easily achieved. Specifically, the registration requirements for statutory building surveyors should be amended to realise the opportunities offered by coregulation of building surveying practitioners who have been authorised pursuant to Professional Standards Act (NSW) nationally.

In Detail

Background:

Legislative complexity is associated with increased costs of construction (The Hon Nick Greiner AC, 2017), and where uncertainty about the law exists, it is more likely that non-conformity will arise ((Cth), 2021). The consequences of non-conformity can be life threatening, as has all too often been widely reported in relation to fires that have spread via combustible elements of building facades in many countries including Australia (Gillett, 2015). Non-conformity can be financially crippling, particularly evident in the example of forced evacuation of residents from high rise apartment buildings in NSW due to concerns about structural or other defects, most notably the Opal Tower (BBC, 2018) and the Mascot Tower (Daly, 2020).

Indeed, the need for regulatory reform and the reasons supporting this were the subject of a study into building confidence procured jointly by all Building Ministers and the Federal Industry Minister in 2018 (Weir & Shergold, 2018). This study was intended to inform Building Ministers and the Federal Industry Minister about how to arrest an apparent decline in public confidence in the building industry and more pertinently, how it is regulated.

From all of this, it is clear that it is important the regulation of the building industry is clear so that high levels of compliance are more easily achieved. Let's consider how the NSW legislative environment addresses this objective.

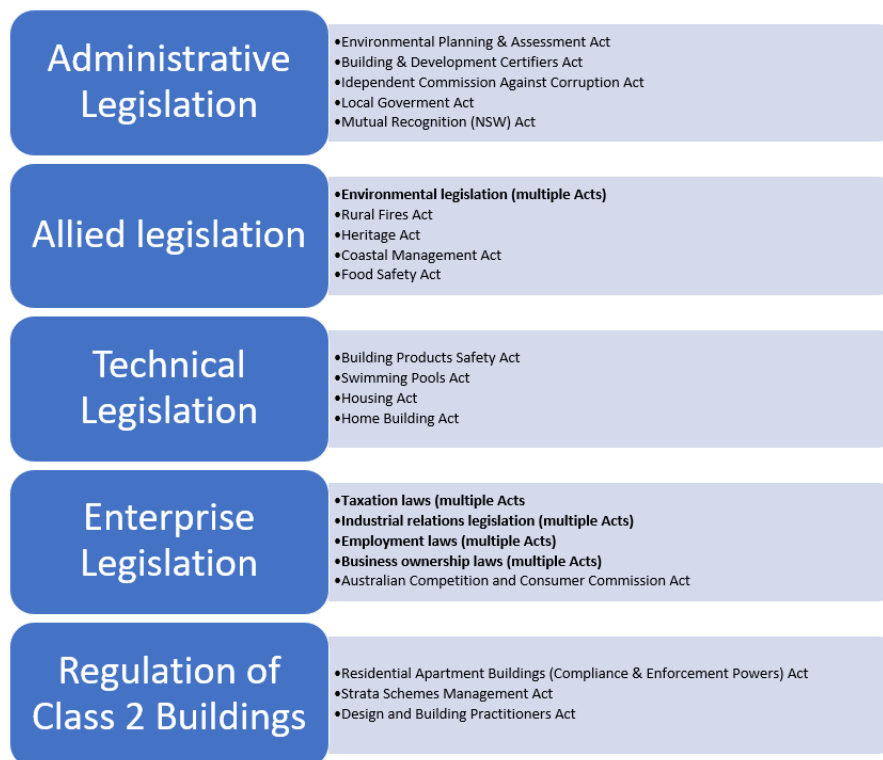


Figure 1 Regulation of the building industry in NSW

The legislative landscape:

The building industry in NSW is regulated via a system comprised of multiple layers of control. These can be categorised into five main areas as shown in Figure 1. No single entity has responsibility for administration of all requirements, nor is there a singular Ministerial portfolio with responsibility for all of the areas shown in Figure 1. Additionally, there is no single government department with coverage of all of the instruments of building industry regulation. The relationship of relevant government departments and other statutory agencies is depicted in Figure 2.

AIBS notes that there are no fewer than 16 separate Acts with appurtenant Regulations that apply in NSW and which have a bearing on the building industry. These didn't arise by accident. All have deliberately been put in place by the NSW Parliament in full view and knowledge of all existing legislative provisions. It is not clear if this complexity is deliberate and intended or a consequence of decades of development of regulatory instruments addressing niche issues in the absence of consequential consolidation of requirements.

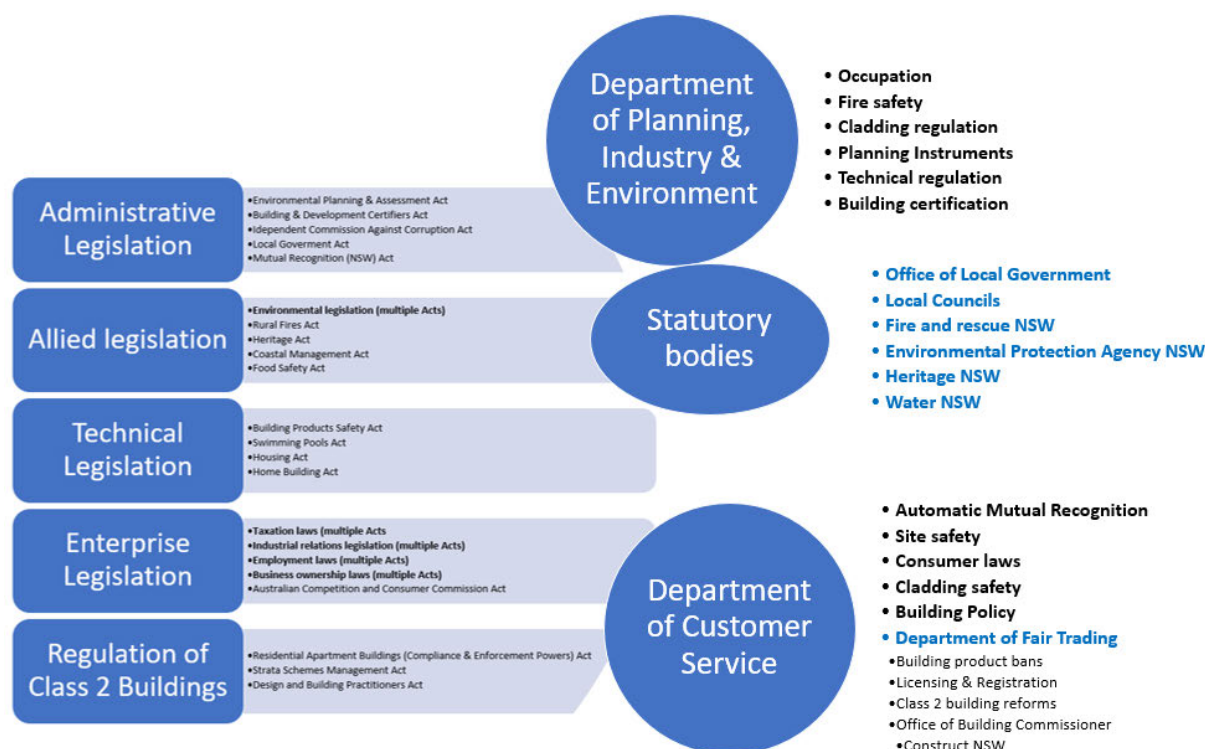


Figure 2 - Statutory agencies involved in regulation of building work in NSW

AIBS notes the powers for the NSW Building Commissioner only relate to Class 2 buildings, which also includes buildings that have Class 2 parts within them, even if the work being proposed and undertaken is not within the Class 2 part. Effectively, Therefore, Class 2 buildings are subject to 16 sets of legislation, not to mention other statutory instruments, where building work for all other classes is subject to a mere 13 Acts.

The role of statutory building surveyors:

Statutory building surveyors (Registered Certifiers) have direct responsibility for the application of requirements contained in just 2 Acts, and yet, statutory building surveyors are held out to be responsible in some degree for global compliance achievement through an indirect involvement in ensuring that requirements are met. For example, a building surveyor has no authority within the Strata Schemes Management Act or appurtenant Regulations except that a practice standard, established via the Building and Development Certifiers Regulation that imposes a condition on registration obliging compliance with the practice standard, requires that a building surveyor in the capacity as a registered certifier in NSW cannot proceed to allow certain activities to occur unless the required Strata Bond has been paid by the Developer (NSW Government, 2020) without the existence of a power to refrain from acting.

The consequences of having limited direct authority alongside broad indirect responsibility is considerable. For building surveyors, this presents a challenge for anyone seeking to act

professionally, or who seek to demonstrate to prospective insurers that appropriate risk mitigation practices are in place, or for practitioners who just want to understand what is required with an acceptable degree of confidence.

The threat to one's reputation from getting something wrong is also considerable, particularly so within an environment of increasing scrutiny and frequent public barbs about "risky certifiers" (Chandler, 2021).

Professional Standards Schemes:

To assist practitioners to counter the headwinds they face, AIBS has been successful in achieving authorisation to operate a professional standards scheme for building surveyors nationally. This scheme was first approved in NSW and is mutually recognised by mirror authorities in all Australian jurisdictions so that it operates nationally. Membership with AIBS involves a commitment to standards of professionalism encompassing a minimum level of qualification, experience and good character for entry to the profession, and a commitment to maintenance of skills and knowledge by participation in a continuing professional development scheme, to upholding the requirements of the professional code of conduct and submitting to a regular audit of their activities. By the nature of these commitments and through the oversight of and reporting obligations to the Professional Standards Authority / Council, the AIBS Professional Standards Scheme is acknowledged as coregulatory in nature and effect.

The full value to government of the existence of the AIBS Professional Standards Scheme for building surveyors is not able to be realised unless there is support from regulators via recognition of participation in the registration process and also in respect of practitioner oversight. If a regulator recognises that a scheme participant has pre-requisite qualifications and other credentials for registration without further assessment, there is a reduction in burden on the registration authority in vetting applications for registration. Additionally, if the regulator is able to re-focus oversight resources from auditing of elements of conduct of scheme participants to other practitioners, further advantage can be won without detriment to oversight of building surveyors.

The effect is further enhanced by ensuring that practitioners who seek registration or registration renewal not as a member of a PSS are required to demonstrate their suitability through having met at least equal standards to that demanded of scheme participants with respect to auditing, continuing professional development and professionalism so that registration pathways outside of participation in a scheme is not a path of least resistance weakening the attractiveness of participation.

The presence of a Professional Standards Scheme for Building Surveyors will significantly improve the professional level of private certification, at least in the areas of certification covered by building surveyors who are members of a scheme. This is further enhanced when Professional Standards Schemes and Government regulatory authorities work in partnership to provide effective co-regulation and replicate the same level of professional accountability in the registration of all building surveyors to those who are members of a Professional Standards Scheme.

The benefit to consumers of a Professional Standards Scheme is an assurance that the professional standards of Scheme Members meet those as approved by the Professional Standards Council and enacted through Professional Standards legislation, meaning that consumers are well served by appropriately qualified, experienced, ethical, and responsible building surveyors.

Advantages of complexity:

The consequences for the government of a complex regulatory environment are very different to those of consumers. Complexity and disparate responsibility could very easily be a handy shield against Ministerial accountability. It is not likely that a government would deliberately set out to create such an environment for that purpose and we certainly don't suggest that this is something that the NSW government has engaged in.

For anyone contracted to deliver a building, the legislative complexity is highly valuable. It is akin to the relationship between an anemone and a clownfish. The coating of mucus employed by the clownfish protects it from the stinging effect of the fronds of the anemone which are otherwise excruciatingly painful for unprotected organisms (Yong, 2013). In return for sheltering the clownfish from predators, the clownfish chase away butterfly fish which prey on the anemone. The analogy arises because the legislative complexity is seemingly impenetrable to anyone who isn't financially insulated against the sting of significant legal costs. In return, industry players don't often call for reform.

The consequences of complexity:

For consumers, it is completely bewildering, and some are even left feeling like prominent industry watch dogs are not on their side (Fellner & Gladstone, 2021). That is only true where it is possible for a consumer to identify that a government watchdog of relevance exists and which ministerial portfolio may be responsible for the actions or in actions of such watchdogs. Many are not able to achieve this understanding and feel completely alone in their quest for assistance.

Reform initiatives:

Reform of the NSW legislative system and supporting bureaucratic framework has been repeatedly recommended in reports provided to the NSW Parliament, notably including in 2015 (Lambert, 2015) and at least as far back as 2002 (Campbell, 2002). A review of departmental websites (DPIE, 2021) (DCS, 2020) and the terms of reference for the Construct NSW working group examining fire safety in Class 2 buildings for NSW, provides a view of several reform programs currently underway that appear to include a degree of overlapping coverage, suggesting either a departmental difference in opinion about how particular reforms should be contemplated or perhaps an absence of coordination of legislative reform work.

AIBS is also alert to the overlap between the reforms identified above and national reform co-ordination work (ABCB, 2021) that have been supported most recently by Minister Andrews, but initially by Minister Kean (DISER, 2021) at the Building Minister's Forum, now re-badged as the Building Minister's Meeting group (DISER2, 2021).

From this, it is apparent that there is overlapping of reform effort, not just between the NSW initiatives and the national approach, but also within the NSW government between different departments, and bizarrely, between reform initiatives that are within the same government department.

A way forward:

AIBS has a firm view about what should be happening, set out in the *AIBS Policy: Building Regulatory Reform in Australia*, first developed in 2017 and last updated in April 2019 (AIBS, 2019). The Policy calls for a single dedicated Building Act overseen by a dedicated Building Minister with responsibility for maintenance of the Building Act, Regulations, and the policy and regulatory bodies required to implement the legislation. AIBS's policy does not argue in favour of a single Act incorporating all elements of the industry. It recommends bringing key components together and provides a far cleaner line of responsibility for all concerned.

Interestingly, the term 'building' appears in limited circumstances in figures 1 and 2 representing an attempt to illustrate, as simply as possible, the current legislative and departmental framework that applies to the building and construction industry in NSW. Shouldn't this be simpler and above all, shouldn't it focus on building safer and better buildings in NSW?

To achieve AIBS's policy position, a NSW Building Act will need to cover the following five main areas, each of which relates to multiple elements:

1. Approvals processing and industry participation infrastructure including:
 - o Definition of technical requirements;
 - o Limitation on participation to specific classes of practitioners;
 - o A product assurance scheme;
 - o Compliance and enforcement infrastructure;
 - o Definition of work that must be approved & how applications are processed;
 - o A process for authorisation of construction;
 - o A process for verification of construction compliance;
 - o A process for commissioning a building;
 - o Defining ongoing essential safety measure maintenance requirements;
 - o The occupation authorisation process;
 - o Defining information to be made available to building owners / occupiers;
2. Consumer protection mechanisms including:
 - o Practitioner auditing infrastructure;
 - o A dispute resolution pathway;
 - o A body to adjudicate on technical interpretation and contractual disputes;
 - o Minimum standards of indemnity insurance;
3. Record keeping and information availability including:
 - o Repository of approvals data and records;
 - o Repository of maintenance activity records;
 - o Publisher of practice guides and audit reporting;
4. A consumer complaints resolution process including:
 - o A dedicated Court led by competent legal and industry expertise;
 - o An arbitration / mediation process
5. Post occupation infrastructure including:
 - o Definition of maintenance responsibility;
 - o Limitation on participation in maintenance activities to specific practitioners;
 - o Definition of maintenance activity recording requirements; and
 - o An authority with responsibility for public safety investigation and orders.

Most of what has been described above is currently addressed by the various Acts and Regulations that apply in NSW so that although amendment of multiple Acts will be required, these changes will not introduce new controls. Consolidation of requirements into a Building Act will allow the various legislative instruments to become more focussed.

For example, the Environmental, Planning and Assessment Act will continue but with a stronger focus on environmental and planning assessment controls. Some Acts may no longer be necessary.

Whilst a Minister with responsibility for the building control system may have other portfolio responsibilities, there should be an independent, dedicated department which supports the Minister in the development of policy, practices, and regulations, for building control. Regulatory co-ordination is an important consideration during the pre-construction phase. The legislative framework needs to codify how planning and other legislative inputs are to relate to the process.

The process of ensuring legislative inputs to the building control system must be made simple so that everyone can understand how each different requirement influences the other. This should also be consistent nationally in respect to process and the level of interaction between complementary requirements because this supports the efficiency of compliance for practitioners and organisations who operate in multiple jurisdictions.

To make this work well, AIBS supports the separation of the functions of policy formulation and regulatory administration under the proposed Building Act. Those with responsibility for formulation of policy should engage closely with, but not report to, those who must implement the policies. This will ensure effective communication of policy needs and policy intent in a process that is at the very least two-way. Ideally, key stakeholders should also be engaged in these communications so that the policy needs of the industry and consumers can also be accommodated.

It is astounding that there are different approaches to regulation of certain aspects of the industry, which, owing to the vast array of building materials, systems and equipment that is imported each year, is in fact an industry that is global in nature. AIBS supports immediate national harmonisation or alignment of the following:

- the National Construction Code (NCC) and other legislated technical standards;
- the legislative framework to deal with product substitution / variations and conformity;
- swimming pool regulations;
- practitioner registration and licensing;
- continuing Professional Development (CPD);
- mandatory inspections;
- ongoing auditing of existing buildings;
- ongoing auditing of practitioner conduct; and
- an auditing program applied to those procuring and installing building products.

Advantages of the proposed approach:

AIBS believes that eliminating the differences in administrative provisions nationally would lead to a reduction in compliance cost to industry and therefore to the consumer. A less complex compliance environment also supports higher levels of compliant conduct, and certainly makes it easier for regulators or those with regulatory responsibility to identify and address non-compliant conduct. A higher probability of detection and action in respect of non-conformity drives a culture of compliance which in turn delivers better outcomes for consumers. This in turn supports confidence in the industry and therefore investor confidence. Importantly, the insurance sector is also encouraged to engage with the sector with a more practicable view of risk.

Disadvantages of the proposed approach:

A clear and effectual regulatory system does not suit everyone. For some engaged in physical delivery, greater profit is available when accountability is difficult. The convolutions of the regulatory landscape make it more expensive or time consuming to step through the maze of legislation to demonstrate a wrong has occurred for which compensation or disciplinary actions can apply. In this environment the actions of the lowest common denominator will drive the actions of others who seek to remain as a competitive industry participant.

As a Minister or bureaucrat, there's enough complexity that any calamity can easily be deflected as an issue for the hapless parties who've done their best to navigate their way through the compliance maze, but failed. After all, there are copious layers of controls already, surely the control environment can't be the problem?

Concluding remarks:

NSW needs leadership. There is colossal waste that comes from so many departments with overlapping concerns for regulation of the industry and indeed in many instances within NSW, the same practitioners within the same industry. Recovery will depend on strong leadership driving a comprehensive reform program.

The result of reforms outlined in the AIBS Policy and indeed the anticipated output of the ABCB's BCR Implementation Taskforce will be a more efficient and focused NSW regulator that has significantly greater capacity to be effectual, resulting in better consumer protection and safe buildings.

Contrary to the impression that might arise from where legislative provision for the role of statutory building surveyors is currently located, building surveying is not a subset of planning legislation. Statutory building surveying is about delivering safer buildings via life safety compliance and consumer protection, and these considerations must surely be more important to the NSW community than local amenity or character preservation.

It is long past time for the regulatory structure to recognise the importance of safe building outcomes and set this area of regulation apart from if not ahead of planning and other regulation structures so that it can receive the attention and resourcing the community rightly deserves.

In closing

AIBS is committed to working with government, industry and key stakeholders to continually improve the building regulatory system throughout Australia.

Please contact us for any clarification or further information that may assist.

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