

Regulation of the building industry in New South Wales

Key issues for the 58th Parliament

Damian Gilyana, BCityPlan (Hons)

Research Analyst, Parliamentary Research Service

Daniel Montoya, BEnvSc (Hons), PhD

Research Team Leader, Parliamentary Research Service

May 2023



Key points

- There has been significant change in the building industry in the last 30 years. This has been most notable in the increase in construction activity – particularly for multi-unit residential development; and the process of de-regulation, including allowing certification of buildings by the private sector.
- There is evidence of problems in the industry that go beyond de-regulation, including a lack of accountability, appropriate standards and adequate insurance protections.
- High-profile building failures in NSW in 2018 and 2019 were a catalyst for two parliamentary inquiries into building regulation.
- Positive changes made since these inquiries include the appointment of the NSW Building Commissioner, and subsequent adoption of a workplan to 2025 in 6 areas of industry reform: regulation, ratings, education, contracts and standards, digital tools, and data and research.
- Reforms to NSW building legislation have also been made, including to the *Building and Development Certifiers Act 2018*, the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and *Design and Building Practitioners Act 2020*.
- Other positive changes include increased insurance availability, a continuing program of flammable cladding removal for some buildings, and improved strata scheme adaptability and responsiveness to building defects.
- Key recommendations from the inquiries that were not supported by the previous government include the appointment of a building commission and building minister, and ongoing reform processes such as the expansion of the building regulation reform program to cover houses, villas and townhouses.
- Other recommendations that appear not to have been progressed by the previous government include the extension of the statutory warranty period, the appointment of a strata commissioner, and a significant funding package to remove cladding similar to that which is in place in Victoria.

Contents

Key points	1
1. Introduction.....	4
2. Regulation and initiatives by government	7
2.1 The regulatory framework.....	7
2.2 Government initiatives	12
3. Recent NSW inquiries and reforms	15
3.1 Inquiry into the regulation of building standards, building quality and building disputes – first report.....	16
3.2 Inquiry into the regulation of building standards, building quality and building disputes – final report	18
3.3 Further inquiry into the regulation of building standards	19
3.4 Future inquiries	22
4. Private certification	23
4.1 Role and profile of private certifiers.....	23
4.2 Issues raised about private certifiers.....	24
4.3 Recent reforms and outstanding matters.....	25
5. Insurance	28
5.1 Statutory warranties available under the <i>Home Building Act 1989</i>	28
5.2 Options under the Strata Schemes Management Act 2015.....	29
5.3 The Home Building Compensation Scheme.....	30
5.4 Professional indemnity insurance.....	31
6. Flammable cladding and fire safety	32

6.1 Flammable cladding	32
6.2 NSW Government responses and outstanding matters	33
7. Strata schemes	37
7.1 Strata concerns.....	37
7.2 NSW Government responses and outstanding matters	37

1. Introduction

The construction industry accounted for 8% (or \$48.7 billion) of the gross state product of NSW in 2021–22,¹ and employed 393,400 people as at November 2022.² Based on the value of building approvals, the NSW residential building industry is worth approximately \$24.5 billion dollars per year.³ Over the last 30 years an average of 43,600 dwellings per year have been completed. Approximately 53,300 dwelling completions were recorded in 2020, before dropping to 49,200 completions in 2021, and 34,000 in 2022 (Figure 1).⁴ As at June 2022, there were 3.4 million dwellings in NSW.⁵

The construction industry in NSW has experienced a number of challenges in recent years. A drop in dwelling completions and approvals in NSW from 2019 (Figure 1) has coincided with rising housing unaffordability, increasing costs of building, and an increased rate of building companies going into liquidation.⁶ In April 2023, the National Housing Finance and Investment Corporation forecast that Australia faces a dwellings shortage of up to 175,000 over the next five years due to the gap between new household formation and new supply. Sydney is expected to experience strong population growth in this period.⁷

¹ Australian Bureau of Statistics, [Australian National Accounts: State Accounts: Table 2 – NSW \(Gross Value Added\)](#), Australian Government, November 2022, accessed 9 March 2023.

² Australian Bureau of Statistics, [Labour Force, Australia, Detailed: Table 05 \(Industry, Occupation and Sector\)](#), Australian Government, November 2022, accessed 9 March 2023.

³ Australian Bureau of Statistics, [Building Approvals, Australia: Table 30. Value of building approved – New South Wales](#), Australian Government, 2023, accessed 9 March 2023.

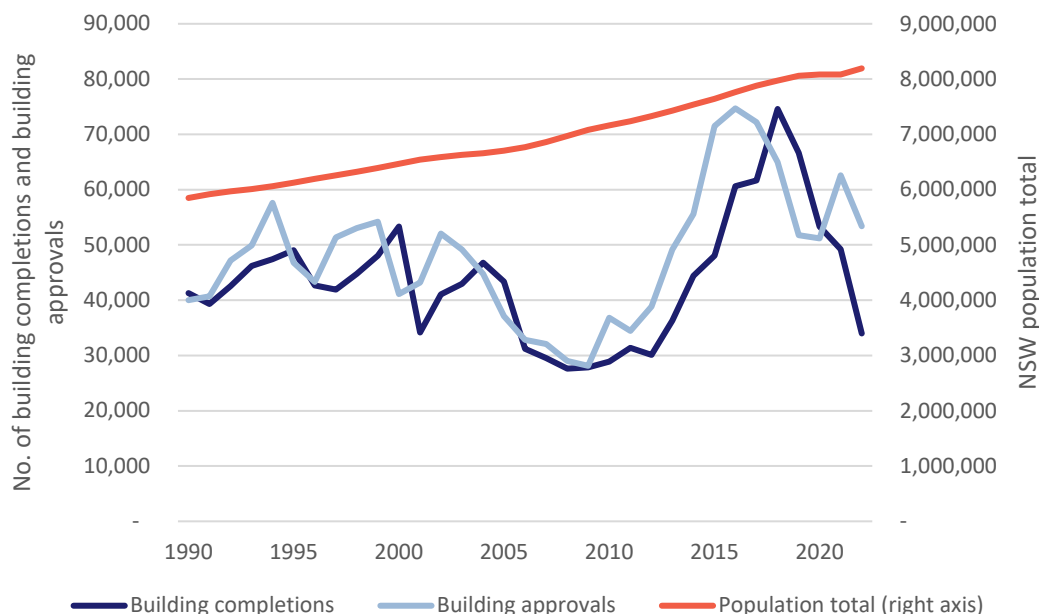
⁴ Department of Planning, Industry and Environment, [Housing Monitor Reports \(archived\): NSW Gross Dwelling Completions by Financial Year](#), NSW Government, 2021, accessed 9 March 2023; Department of Planning and Environment, [Trends in housing supply](#), 2022, accessed 9 March 2023.

⁵ Australian Bureau of Statistics, [Estimated dwelling stock: as at June 2022 \(NSW\)](#), Australian Government, October 2022, accessed 9 March 2023.

⁶ P Cummins, [Housing, rental crisis: Construction companies are failing at nearly double the pace of last year](#), *The Australian*, 2 April 2023, accessed 5 April 2023.

⁷ S Wright and R Clun, [Stop digging: Australia's housing policies are in a deepening hole](#), *The Sydney Morning Herald*, 28 April 2023, accessed 28 April 2023; National Housing Finance and Investment Corporation, [State of the Nation's Housing 2022-23](#), Australian Government, 3 April 2023, accessed 17 April 2023.

Figure 1: NSW building work and population growth 1990–2022



Source: Australian Bureau of Statistics 2022 (Building [activity](#); Building [approvals](#); [Population](#))

The last 30 years has also seen changes in the composition of dwellings in NSW: the total number of dwellings has grown by 59% over the 1991–2021 period, compared with a growth rate of 127% for medium and high density housing over the same period.⁸ In the last 30 years there has also been a partial deregulation of the NSW building industry, with moves away from local governments having responsibility for all aspects of construction to privatisation of parts of building regulation, most notably of certification.⁹

While there is limited data to quantify the extent and scale of issues in the building industry and defects in NSW buildings, it is clear that quality and regulatory issues exist. These issues may have become more obvious with the changes that have occurred in the building industry and the changing profile of dwellings in NSW. Recent available data about these issues indicates that:

- 39% of a sample of recently completed strata buildings of 4 or more storeys had experienced serious defects in common property¹⁰

⁸ .id consulting, [Dwelling structure: NSW](#), 2022, accessed 17 April 2023.

⁹ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019.

¹⁰ Construct NSW, [Research report on serious defects in recently completed strata buildings across New South Wales](#), NSW Government, September 2021.

- The average cost expended by strata owners' corporations dealing with serious defects was \$332,000 per building¹¹
- 26% of 635 reviewed strata schemes in NSW had experienced at least one defect¹²
- Insurance premiums have increased, which may partly be due to a loss of confidence in the building sector¹³
- There are issues with flammable cladding in NSW.¹⁴

Factors identified by recent reviews and parliamentary inquiries as contributing to some of these problems include a lack of accountability and oversight in the construction process, and weak certification and compliance processes. Significant problems with multi-residential developments (class 2 buildings)¹⁵ and their regulation have come under particular scrutiny in the recent years.

A substantial reform program for the regulation of class 2 buildings commenced in 2019 and is still being implemented. Initial steps to improve the regulatory framework for other important building classes (such as class 1a buildings which include detached houses, villas and townhouses) began in 2022 with the development of draft building bills by the Department of Customer Service.¹⁶

This paper provides an overview of the current regulatory framework for the building industry in NSW, and identifies initiatives introduced over the past few years. It also describes the key issues in the system, drawing on findings and recommendations from 2 NSW parliamentary inquiries undertaken between 2019 and 2022, as well as recent statutory reviews and independent reports. Five topics are covered in some depth: committee recommendations to establish a building commission, building minister and building Act; private certification; insurance; flammable cladding and fire safety; and strata schemes.

¹¹ Construct NSW, [Research report on serious defects in recently completed strata buildings across New South Wales](#), NSW Government, September 2021.

¹² UNSW City Futures Research Centre, [Cracks in the Compact City: Tackling defects in multi-unit strata housing](#), October 2021.

¹³ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022.

¹⁴ NSW Government, [NSW Cladding Taskforce](#), NSW Government, 8 February 2023, accessed 24 March 2023.

¹⁵ Multi-unit residential developments are more formally referred to as class 2 buildings. See the full residential building class definitions in section [2.1](#).

¹⁶ NSW Government, [Reforming building laws in NSW](#), NSW Government, 2022, accessed 24 March 2023.

2. Regulation and initiatives by government

2.1 The regulatory framework

The building industry in NSW is primarily regulated by a complex framework of NSW legislation and policy that covers the planning, design, approval, construction and occupation of all 10 building classes.¹⁷ The main classes with residential components are:

- **Class 1 buildings:** Single dwellings such as detached houses, villas and townhouses (class 1a) and boarding houses, guest houses or hostels with a floor area less than 300m² (class 1b)
- **Class 2 buildings:** Apartment buildings, including single storey attached dwellings where there is a common space below, such as a carpark
- **Class 3 buildings:** A common place of long term or transient living for a number of unrelated people. Examples include boarding houses and hostels (greater than 300m² and ordinarily with more than 12 residents), and 'care-type' facilities like accommodation buildings for children, the elderly or people with a disability, which are not class 9 buildings
- **Class 9c buildings:** Class 9c buildings are residential care buildings where 10% or more of the residents need physical assistance in conducting their daily activities and to evacuate the building during an emergency, such as residential aged care facilities.¹⁸

As a whole, this legislation and policy framework seeks to enable construction practices that produce buildings of quality and integrity which meet safety, health, amenity and sustainability standards.¹⁹

This paper focuses on class 2 buildings²⁰ because they have been the subject of significant scrutiny and regulatory reform. Expansion of these regulatory reforms to other building classes is underway, with consultation on draft building bills closing in November 2022.²¹

¹⁷ NSW Government, [NSW Government submission, No. 132: Inquiry into regulation of building standards, building quality and building disputes](#), NSW Government, July 2019.

¹⁸ Australian Building Codes Board, [National Construction Code: Building classifications](#), 2022.

¹⁹ M Lambert, [Independent Review of the Building Professionals Act 2005 – Final report](#), October 2015, p 11.

²⁰ Mixed-use buildings, such as shopping centres or office blocks, can have class 2 components. These buildings have also been the subject of the regulatory reforms discussed in this paper.

²¹ NSW Fair Trading, [Reforming building laws in NSW: Have Your Say](#), NSW Government, November 2022, accessed 23 February 2023.

Figure 2 illustrates the 4 key elements of the NSW building industry, identifying important organisations and legislation.²² Two of these elements relate to all parts of the building industry (standards, and licencing and insurance), and 2 relate to specific stages of the regulatory process (approvals, and certification and compliance). The 4 elements are:

- 1. Standards:** These include the Building Code of Australia-National Construction Code (BCA-NCC) and Australian Standards. These standards include national minimum requirements for building performance matters such as fire safety and access.
- 2. Approvals:** Developments are subject to assessment and approval by local councils or the NSW Government. The *Environmental Planning and Assessment Act 1979* (EP&A Act) and environmental planning instruments made under the EP&A Act, such as local environmental plans, regulate the approval process.
- 3. Licencing and insurance:** Builders and some related trades are licenced if they possess appropriate qualifications and expertise, and insurance protection is required in case of harm or economic loss. Licencing for residential building work in NSW is regulated by the *Home Building Act 1989*. Various forms of insurance are available under the *Home Building Act 1989* and the *Strata Schemes Management Act 2015*, apart from professional indemnity insurance for practitioners and certifiers.
- 4. Certification and compliance:** Building plans and construction work are checked and certified in accordance with standards and controls. This is carried out by registered building and design practitioners, private certifiers, and local councils.

²² Based on the characterisation of the building industry by Michael Lambert in the [Independent Review of the Building Professionals Act 2005 – Final report](#), October 2015, p 11.

Figure 2: Key elements of building industry regulation in NSW

Standards a system pillar	State and local council approvals towards consent
<p>Description</p> <ul style="list-style-type: none"> National minimum performance standards, such as for fire safety, sanitation, and access Includes the Building Code of Australia-National Construction Code (BCA-NCC) and the Plumbing Code of Australia (PCA) <p>Organisations</p> <ul style="list-style-type: none"> The Australian Building Codes Board (ABCB) develops the national standards <p>Legislation</p> <ul style="list-style-type: none"> State or territory legislation give the ABCB's building codes legal effect In NSW various building industry Acts refer to the BCA-NCC as a standard Other NSW legislation that regulates safety standards includes the <i>Building Products (Safety) Act 2017</i>, <i>Gas and Electricity (Consumer Safety) Act 2017</i>, and the <i>Swimming Pools Act 1992</i> 	<p>Description</p> <ul style="list-style-type: none"> An assessment process is undertaken for applications against state planning legislation and local development plans A combined planning and construction approval is possible under the complying development pathway for straightforward development <p>Organisations</p> <ul style="list-style-type: none"> Local councils (majority of developments) Local and regional planning panels Private certifiers, particularly for complying development certificates <p>Legislation</p> <ul style="list-style-type: none"> <i>Building and Development Certifiers Act 2018</i> <i>Environmental Planning and Assessment Act 1979</i> State Environmental Planning Policies (SEPPs), including the Exempt and Complying Codes SEPP for 'straightforward' development Local environmental plans
Licensing and insurance a system pillar	Certifications and compliance after consent
<p>Description</p> <ul style="list-style-type: none"> Licensing is required for builders and related trades professions in the residential building sector This includes plumbers, electricians, and fire safety practitioners Home building compensation insurance is available as a last resort for homeowners of buildings 3 storeys and under Building bonds or decennial liability insurance are available to developers of buildings over 3 storeys <p>Organisations</p> <ul style="list-style-type: none"> NSW Fair Trading manages the licensing and qualifications for various building trades and practitioners NSW Fair Trading is also the plumbing regulator The State Insurance Regulatory Authority (SIRA) regulates NSW insurance products such as the Home Building Compensation Scheme and alternative indemnity products Insurance providers <p>Legislation</p> <ul style="list-style-type: none"> <i>Home Building Act 1989</i> <i>Plumbing and Drainage Act 2011</i> <i>Strata Schemes Management Act 2015</i> 	<p>Description</p> <ul style="list-style-type: none"> A range of 'EP&A certificates' are issued, such as for construction and occupation 'Regulated designs' (designs prepared for important building elements and performance solutions) and compliance declarations are also required Powers are available to stop work and order rectifications if there is non-compliance The NSW Civil and Administrative Tribunal (NCAT) is available to resolve building disputes in the court process, particularly where mediation with NSW Fair Trading has failed <p>Organisations</p> <ul style="list-style-type: none"> Principal certifier – typically local councils or a private certifier appointed to issue the EP&A certificates NSW Fair Trading Office of the NSW Building Commissioner Referral/advisory agencies such as Fire and Rescue NSW for fire safety certification NSW Civil and Administrative Tribunal (NCAT) <p>Legislation</p> <ul style="list-style-type: none"> <i>Environmental Planning and Assessment Act 1979</i> and regulations <i>Design and Building Practitioners Act 2020</i> <i>Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020</i> Local environmental plans

Source: NSW Parliamentary Research Service using available evidence and reports into the NSW building industry.

2.1.1 Key legislation

The Minister for Better Regulation and Fair Trading, jointly with the Minister for Building, is responsible for regulation of the NSW building industry.²³ This arrangement, and the establishment of a Minister for Building, was made as part of the appointment of the full ministry of the Minns Government on 5 April 2023.²⁴

Key building industry legislation includes the:

- **[Home Building Act 1989](#)**: Regulates residential building work including consumer protections, licencing of builders and certain trades, contracts, and insurance.
- **[Building and Development Certifiers Act 2018 \(BDC Act\)](#)**: Regulates the functions, accountabilities and responsibilities of persons doing certifying work. Certifiers are required to be both registered with the NSW Government and accredited in the appropriate class by an association, such as the Association of Australian Certifiers²⁵ and the Australian Institute of Building Surveyors.²⁶ This Act also provides for other related matters such as conflicts of interest, insurance, a code of conduct, and requirements for continuing professional development.
- **[Design and Building Practitioners Act 2020 \(DBP Act\)](#)**: Regulates the work of design and building practitioners with regards to class 2 buildings,²⁷ including requiring them to be registered. From 3 July 2023, the Act will also apply to class 3 and class 9c buildings, and will regulate a new class of design practitioner – ‘building design’.²⁸ Registered practitioners must submit ‘regulated designs’²⁹ and compliance declarations (with reference to the Building Code of Australia). The Act also provides for the registration and regulation of professional engineering work. The Act establishes a duty of care for all registered practitioners that applies to every building class.³⁰ While the duty of care provision came into effect in June

²³ [Administrative Arrangements \(Minns Ministry–Administration of Acts\) Order 2023 \[NSW\]](#), accessed 17 April 2023.

²⁴ Department of Premier and Cabinet: The Premier, [Minns Labor Government full ministry](#), [media release], NSW Government, 5 April 2023, accessed 17 April 2023.

²⁵ Association of Australian Certifiers, [Classes of Registration](#), 2022, accessed 21 February 2023.

²⁶ Australian Institute of Building Surveyors, [AIBS Professional Standards Scheme](#), n.d., accessed 20 March 2023.

²⁷ [Part 2, Division 3](#) of the [Design and Building Practitioners Regulation 2021](#) currently places a general limit on the application of the Act to class 2 buildings.

²⁸ Relevant clauses of the [Building Legislation Amendment \(Building Classes\) Regulation 2023](#) come into effect on 3 July 2023

²⁹ Regulated designs refer to designs of building elements or performance solutions of buildings (that is, fire safety; waterproofing load-bearing components; mechanical and plumbing and electrical services). [See Sections 5 and 6](#) of the [Design and Building Practitioners Act 2020](#) for more detail [accessed 30 March 2023].

³⁰ F Bannon et al., [NSW Court of Appeal confirms the broad application of the statutory duty of care under the NSW DBP Act](#), Clayton Utz, 8 March 2023, accessed 13 March 2023

2020, it applies to work carried out beforehand if the economic loss caused by a duty of care breach became apparent after June 2010.

- [**Residential Apartment Buildings \(Compliance and Enforcement Powers\) Act 2020 \(RAB Act\)**](#): Currently focuses on class 2 buildings, with its powers to be expanded to class 3 and class 9c buildings from 3 July 2023.³¹ It gives powers for authorised persons (such as NSW Fair Trading and the NSW Building Commissioner) to inspect work at critical stages, issue stop work orders, issue building rectification orders, and prohibit an occupation certificate being issued if necessary. A building work levy (to fund NSW Fair Trading’s compliance efforts) also exists under this Act.
- [**Part 6 \(‘Building and subdivision certification’\) of the Environmental Planning and Assessment Act 1979**](#): Is jointly administered by the Minister for Better Regulation and Fair Trading, Minister for Building, and the Minister for Planning. Part 6 of the Act regulates ‘EP&A certificate’ activities, which are key certificates in the building industry compliance and certification process. They include certifier inspections and the issuing of certificates for subdivision, construction, compliance, and occupation.

2.1.2 Key bodies

The Building Ministers’ Meeting brings together the Australian, state and territory ministers responsible for building and construction to oversee relevant policy issues. It focuses on addressing systemic problems across the industry, considers national priority reforms for the state and territories to implement, and sets the strategic direction for the Australian Building Codes Board (ABCB).³² The ABCB is responsible for developing national standards such as the National Construction Code and the Plumbing Code of Australia.

NSW Fair Trading³³ and the NSW Building Commissioner³⁴ (within the Department of Customer Service) are regulators of the building industry in NSW, with the powers of the NSW Building Commissioner restricted to class 2 buildings.³⁵ Responsibilities held by both bodies include issuing stop work and building rectification orders, undertaking compliance inspections, and providing resources and guidance for the building industry. NSW Fair Trading has remit over licensing, registration of professionals including private certifiers,

³¹ Relevant clauses of the [Building Legislation Amendment \(Building Classes\) Regulation 2023](#) come into effect on 3 July 2023. See also: NSW Fair Trading, [Changes coming for class 3 and 9c buildings in 2023](#), n.d., accessed 3 March 2023.

³² Australian Department of Industry, Science and Resources, [Building and construction](#), n.d., accessed 28 February 2023.

³³ NSW Fair Trading, [Construction and trade essentials](#), n.d., accessed 2 March 2023

³⁴ NSW Government, [The Office of the NSW Building Commissioner](#), 2023, accessed 2 March 2023

³⁵ NSW Department of Customer Service, [Regulatory Impact Statement: Building Bill 2022, Part 1 – Who can do the work](#), August 2022; Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 22.

and building product bans. The NSW Building Commissioner is also responsible for delivering the Construct NSW transformation strategy (see section 2.2.1).³⁶

Development consents are issued by local councils, or a delegated consent authority (such as a planning panel) in certain circumstances.³⁷ Private certifiers and local councils can be appointed as a principal certifier for multi-unit residential developments by the owner. Principal certifiers are responsible for managing certification activities following the issue of development consent. This can include subdivision, construction, compliance, or occupation certificates for intensive residential proposals, amongst other development types.

The State Insurance Regulatory Authority (SIRA) is responsible for regulating insurance, such as the Home Building Compensation Scheme,³⁸ and alternative indemnity products (building cover contracts) under the *Home Building Act 1989*.³⁹

Fire and Rescue NSW (FRNSW) has an advisory role in the certification of buildings in NSW.⁴⁰ 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 must consider FRNSW's comments or recommendations but are not required to adopt them.⁴¹ FRNSW also has enforcement powers in relation to fire safety matters in buildings. These include conducting inspections, issuing orders and issuing fines. Additionally, the Commissioner of FRNSW can compel local councils to inspect buildings or require attendance of local councils at joint inspections of a building with FRNSW.⁴²

2.2 Government initiatives

The establishment of the NSW Building Commissioner in August 2019 was one of 4 key reforms delivered by the NSW Government in response to the Shergold Weir report (see section 3 for more details of this report).⁴³ The Commissioner's workplan introduced a

³⁶ NSW Office of the Building Commissioner, [Construct NSW](#), Department of Customer Service, September 2021, accessed 20 February 2023.

³⁷ [Part 4](#) 'Development assessment and consent' of the *Environmental Planning and Assessment Act 1979* sets out when development consent is required. Development consent is required for the majority of developments, such as the approval for the use of land, change of use of land, subdivision of land, erection and/or demolition of a building or structures.

³⁸ SIRA, [Home building compensation cover](#), n.d., accessed 2 March 2023.

³⁹ NSW Government, [NSW Government submission, No. 132: Inquiry into regulation of building standards, building quality and building disputes](#), August 2019.

⁴⁰ NSW Government, [NSW Government submission, No. 132: Inquiry into regulation of building standards, building quality and building disputes](#), August 2019.

⁴¹ NSW Government, [NSW Government submission, No. 132: Inquiry into regulation of building standards, building quality and building disputes](#), August 2019.

⁴² NSW Government, [NSW Government submission, No. 132: Inquiry into regulation of building standards, building quality and building disputes](#), August 2019.

⁴³ NSW Government, [Building Stronger Foundations Discussion Paper: Implementing the NSW Government response to the Shergold Weir Building Confidence Report](#), June 2019.

range of levers, projects, and initiatives intended to improve the performance of the class 2 residential building sector.⁴⁴

2.2.1 Construct NSW

Construct NSW is a transformation strategy for the NSW building industry to 2025. It is led by the NSW Building Commissioner and focuses on 6 areas of industry reform: regulation, ratings, education, contracts and standards, digital tools, and data and research.⁴⁵

The first phase of implementing a new regulatory framework commenced with the introduction of the [Residential Apartment Buildings \(Compliance and Enforcement Powers\) Act 2020](#) and the [Design and Building Practitioners Act 2020](#).⁴⁶

In 2022, NSW Fair Trading exhibited 3 draft bills intended to improve and consolidate building industry legislation (the '2022 building bills').⁴⁷ The proposed reform areas of the 2022 building bills include strengthening consumer protections and enforcement powers, ensuring trade practitioners are suitably skilled to carry out their work, holding relevant persons accountable for the supply of safe building products and building work, and ensuring fair and prompt payment.⁴⁸ The 2022 building bills comprised the Building Bill 2022,⁴⁹ the Building Compliance and Enforcement Bill 2022,⁵⁰ the Building and Construction Legislation Amendment Bill,⁵¹ and Building and Construction Legislation Amendment Regulation 2022.⁵² Consultation on the 2022 building bills closed in November 2022. As at April 2023, no information about the status of these bills could be located, other than that submissions were under review at the end of 2022.

Launched in December 2021, the Independent Construction Industry Rating Tool (iCIRT) Build Star-rating service⁵³ is an initiative driven by the NSW Building Commissioner and delivered by private provider Equifax.⁵⁴ The rating tool evaluates the risk of a developer's business and practice by looking at factors such as their track record, capital, risk

⁴⁴ NSW Building Commissioner, [Construct NSW](#), Department of Customer Service, September 2021, accessed 20 February 2023.

⁴⁵ NSW Building Commissioner, [Construct NSW](#), Department of Customer Service, September 2021, accessed 20 February 2023.

⁴⁶ NSW Department of Customer Service, [Annual Report 2020/2021](#), 2021, p 51; NSW Department of Customer Service, [Annual Report 2021-2022](#), 2022, p 60.

⁴⁷ NSW Fair Trading, [Reforming building laws in NSW: Have Your Say](#), November 2022, NSW Government, accessed 23 February 2023.

⁴⁸ NSW Department of Customer Service, [Regulatory Impact Statement: Building Bill 2022, Part 1 – Who can do the work](#), August 2022, p 4.

⁴⁹ NSW Fair Trading, [draft Building Bill 2022](#), NSW Government, 2022.

⁵⁰ NSW Fair Trading, [draft Building Compliance and Enforcement Bill 2022](#), NSW Government, 2022.

⁵¹ NSW Fair Trading, [draft Building and Construction Legislation Amendment Bill 2022](#), NSW Government, 2022.

⁵² NSW Fair Trading, [draft Building and Construction Legislation Amendment Regulation 2022](#), NSW Government, 2022.

⁵³ Equifax, [iCIRT from Equifax](#), 2021, accessed 20 February 2023.

⁵⁴ NSW Department of Customer Service, [Annual Report 2021-2022](#), 2022, p 60.

management, and ownership structure. Developers are scored out of 5 stars, with those who score 3 or more stars being placed on the Trusted Builders Registry.⁵⁵ It appears that this tool is already having an impact, as the NSW Building Commissioner reported in July 2022 that some apartment hunters had already pulled deposits from builders and developers not rated favourably by iCIRT.⁵⁶

The NSW Building Commissioner is working with educators and industry professionals to upskill the construction workforce. Hosted with TAFE NSW, the Construct NSW Digital Learning Platform⁵⁷ has recorded over 30,000 enrolments since its launch in late 2020.⁵⁸ In 2022, the NSW Building Commissioner also launched a 'world-first' construction industry doctorate program.⁵⁹

The NSW Building Commissioner has released a range of industry guides and sample construction contracts to help the industry adapt to the reform program and ensure trustworthy building work.⁶⁰ The NSW Building Commissioner has also commissioned research on a number of key issues including fire safety and consumer confidence in class 2 buildings.⁶¹

In July 2021, the NSW Government announced plans to develop a Building Assurance Solution (BAS) in partnership with KPMG.⁶² The BAS will utilise multiple data points to help NSW Fair Trading and the insurance industry assess a residential apartment building's quality and compliance with construction standards. Two digital products have been developed in the BAS: a building trustworthiness indicator, and an embodied carbon indicator.⁶³

⁵⁵ Equifax, [Trusted Builders Registry](#), 2022, accessed 13 April 2023.

⁵⁶ J Power, [Show me your stars: Apartment buyers start pulling deposits after new rating system](#), *Sydney Morning Herald*, 3 July 2022, accessed 3 March 2023.

⁵⁷ NSW Government, [Construct NSW Building strong foundations: Digital Learning Platform](#), 2022, accessed 3 March 2023

⁵⁸ NSW Department of Customer Service, [Annual Report 2021-2022](#), 2022, p 60.

⁵⁹ NSW Building Commissioner, [Construction industry doctorate research program](#), 2023, accessed 3 March 2023.

⁶⁰ NSW Building Commissioner, [Building and construction resources](#), 2023, accessed 3 March 2023.

⁶¹ NSW Building Commissioner, [Building and construction resources](#), 2023, accessed 3 March 2023.

⁶² NSW Government, [New tool to determine quality and trustworthiness of NSW residential buildings](#), [media release], NSW Government, 9 July 2021, accessed 21 February 2023.

⁶³ NSW Department of Customer Service, [Annual Report 2021-2022](#), 2022, p 60.

3. Recent NSW inquiries and reforms

The building industry in NSW has been subject to many reviews and parliamentary inquiries since 2002.⁶⁴

One of the first that contributed to the most recent round of reforms was the 2015 review of the *Building Professionals Act 2005*. The review was led by Michael Lambert and the report (the Lambert report) identified key problems with the building regulation and certification system in NSW at that time including that:

- The legislation was complex, hard to understand, prescriptive and inflexible
- The administration of building regulation was fragmented and under-resourced
- There was a lack of objectives for the system and hence no framework for assessing performance against those objectives
- There was a lack of clarity about the roles, responsibilities, functions and accountability of private certifiers
- The building certification system had well-documented deficiencies.⁶⁵

At the national level, the Building Ministers' Meeting commissioned a review of the effectiveness of compliance and enforcement systems for the building and construction industry in Australia in 2017.⁶⁶ The review was led by Peter Shergold and Bronwyn Weir and the report (the Shergold Weir report) concluded that:

...the nature and extent of the problems put to us are significant and concerning. They are likely to undermine public trust in the health and safety of buildings if they are not addressed in a comprehensive manner.⁶⁷

In response, the NSW Government announced a reform program in February 2019 that included the appointment of the NSW Building Commissioner.⁶⁸

Concerns related to the adequacy of building industry regulation in NSW increased substantially following the structural cracking and evacuation of the Opal and Mascot

⁶⁴ M Lambert, *Independent Review of the Building Professionals Act 2005*, October 2015, p 52; NSW Legislative Council Public Accountability Committee, *Regulation of building standards, building quality and building disputes: First report*, November 2019, p 6

⁶⁵ M Lambert, *Independent Review of the Building Professionals Act 2005*, October 2015, p 14.

⁶⁶ Peter Shergold and Bronwyn Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018.

⁶⁷ Peter Shergold and Bronwyn Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, p 1.

⁶⁸ NSW Government, *Building Stronger Foundations Discussion Paper: Implementing the NSW Government response to the Shergold Weir Building Confidence Report*, June 2019.

Towers in Sydney (in December 2018 and June 2019 respectively). Prior to these events in Sydney, the world had also witnessed the tragedy of the London Grenfell Tower Fire in June 2017, which resulted in the deaths of 72 people. Flammable cladding on the exterior of the tower was determined to be the principal cause of the spread of the fire.⁶⁹

In this context, the NSW Parliament's Legislative Council Public Accountability Committee initiated an inquiry into the adequacy of the NSW building industry in July 2019. It focused on:

- The role of private certification in protecting building standards
- The adequacy of consumer protections, liability for defects, and insurance
- The role of strata committees in responding to building defects
- Flammable cladding on NSW buildings
- The degree to which the NSW Government had implemented the recommendations of past independent investigations of the building industry.⁷⁰

The Public Accountability Committee's first inquiry handed down two reports (in 2019 and 2020) and conducted a second inquiry into the regulation of building standards in 2022.

This section outlines the key findings and status of the recommendations of each of these 3 reports, with a focus on those related to the regulatory framework.

3.1 Inquiry into the regulation of building standards, building quality and building disputes – first report

The first inquiry into the regulation of building standards, building quality and building disputes handed down two reports: a first report with 19 recommendations in November 2019,⁷¹ and a final report with 22 recommendations in April 2020.⁷²

The first report made similar findings to the Shergold Weir report: that there were deep structural failings in the NSW construction industry, with no transparency or visibility over what was being built or who was doing the building.⁷³ Further, due to the lack of standards in the industry, there was 'no functioning insurance market willing to take on the risk of

⁶⁹ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020.

⁷⁰ Legislative Council Public Accountability Committee, [Terms of reference: Inquiry into the regulation of building standards, building quality and building disputes](#), Parliament of NSW, February 2020.

⁷¹ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019.

⁷² Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020.

⁷³ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019, p ix.

residential building and construction.⁷⁴ The first report was released to inform parliamentary debate of the *Design and Building Practitioners Bill 2019*, which had been introduced during the course of the inquiry. Recommendations were made about this bill, as well as topics including the regulatory framework more broadly, flammable cladding, insurance, and the current licensing system for building trades.⁷⁵

3.1.1 Recommendations progressed

Recommendations which have been progressed or completed by the NSW Government from the first report include:

- Amendment of the statutory definition of ‘defect’ in the RAB Act to make reference to required compliance with the Building Code of Australia and relevant approved plans⁷⁶
- Actions to address flammable cladding on buildings (see section 6)
- Use of the NSW Planning Portal for contemporaneous lodgement of relevant documentation.⁷⁷

The draft 2022 building bills represented a significant step towards consolidating building legislation into a standalone building Act that is principles-based and written in plain English. They contain provisions designed to improve the current licencing system for building trades (Recommendation 10). Proposed changes include expanding the licensing framework to cover commercial building work, introducing graduated licence classes for builders based on the complexity of the work they are carrying out, and improving supervision practices and standards for less experienced tradespersons.⁷⁸

3.1.2 Recommendations not progressed

The draft Design and Building Practitioners Bill 2019 reviewed by the Legislative Council Public Accountability Committee was considered to be illustrative of the ‘fragmented way in which the government is addressing the crisis in the building and construction industry.’⁷⁹ The committee expressed disappointment that the government had responded to the Shergold Weir report by establishing only the NSW Building Commissioner and not a fully

⁷⁴ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019, p ix.

⁷⁵ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019, pp xi-xiii.

⁷⁶ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*, [section 3](#).

⁷⁷ NSW Government, [NSW Planning Portal](#), n.d., accessed 10 March 2023; NSW Fair Trading, [Declaration and lodgement process](#), n.d., accessed 10 March 2023

⁷⁸ NSW Department of Customer Service, [Regulatory Impact Statement: Building Bill 2022, Part 1 – Who can do the work](#), August 2022, p 27.

⁷⁹ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019, p 116.

resourced commission (noting the examples of the Victorian Building Authority⁸⁰ and Queensland Building and Construction Commission⁸¹). It also found that NSW Fair Trading was not the most appropriate agency to oversee building reforms.⁸² To consolidate fragmented building regulation and policy functions, it recommended the:

- Establishment of a building commission as an independent statutory body led by a building commissioner with broad powers and sufficient resourcing and funding to oversee and regulate the building and construction industry in NSW (Recommendation 5)
- Establishment of a single, senior building minister with responsibility for building regulation in NSW, including administering a new stand-alone building Act, and responsibility for a building commission and its building commissioner (Recommendation 12).⁸³

These recommendations were not supported by the NSW Government and were reiterated by the committee in the report of the 2022 further inquiry. In its response to the 2022 inquiry the government noted both recommendations and expressed the view that the NSW Building Commissioner was adequately resourced.⁸⁴

A 'clerk of works' (that is, a full-time inspector) for significant projects was also recommended in the first report. In its response to the final report of the first inquiry, the NSW Government noted that it had moved away from a 'clerk of works' system to focus on strengthening the planning and approvals system and establishing complementary requirements on design and building practitioners.⁸⁵

3.2 Inquiry into the regulation of building standards, building quality and building disputes – final report

The final report of the first inquiry contained 22 recommendations and was handed down in April 2020. It focussed on three issues: flammable cladding, private certification and the role of strata committees in dealing with defective buildings. The final report reiterated several findings of the first report, highlighting the 'systemic issues plaguing the building and construction industry and the lack of regulation and oversight by the NSW Government' and noting the impact of the collapse of the professional indemnity market on the ability of

⁸⁰ Victorian Building Authority, [About us](#), 2023, accessed 20 March 2023.

⁸¹ Queensland Building and Construction Commission, [What we do](#), 2022, accessed 20 March 2023.

⁸² Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019, p 36.

⁸³ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019, p xii.

⁸⁴ NSW Government, [Regulation of Building Standards, Building Quality and Building Disputes Final Report: NSW Government Response](#), October 2020

⁸⁵ NSW Government, [Regulation of Building Standards, Building Quality and Building Disputes Final Report: NSW Government Response](#), October 2020, p 19.

homeowners to rectify buildings as the pool of available professionals has been restricted.⁸⁶ The report also made further recommendations regarding the establishment of a building commission, including that:

- The commission should be empowered to oversee all licencing inspections, and should hire additional inspectors to create a more robust inspection regime for building, electrical and plumbing work
- The commission should take a lead role on flammable cladding rectification measures
- A strata commissioner should be appointed to sit within the commission.

Recommendations related to private certification, flammable cladding and strata committees are covered in sections 4, 6 and 7 of this paper. In response to the recommendation regarding licencing inspections, the government responded that hiring additional inspectors was unnecessary.⁸⁷ The regulatory impact statement for the 2022 building bills notes that it would expand the inspection framework for building professionals.⁸⁸ Detail about the types of specialist work covered by this inspection framework was to be prescribed by the regulations.⁸⁹

3.3 Further inquiry into the regulation of building standards

The report of the Legislative Council Public Accountability Committee further inquiry into the regulation of building standards was handed down in February 2022. During both inquiries, the committee commented on the 'devastating financial and emotional consequences that flow from building defects.'⁹⁰ Another common theme across the two inquiries was the 'light touch' regulation that had allowed poor building standards to continue. While the further inquiry focused on private certification and flammable cladding, the evidence considered by the committee further persuaded it of the importance of broader systemic reform, including the urgent extension of the new class 2 building protections to all homeowners.

The further inquiry's report made 20 recommendations, bringing the total number of recommendations across the 3 reports to 61. Eight of the 20 recommendations related to the remediation of flammable cladding and fire safety. Some recommendations dealt with

⁸⁶ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020, p viii.

⁸⁷ NSW Government, [Regulation of Building Standards, Building Quality and Building Disputes Final Report: NSW Government Response](#), October 2020, p 11.

⁸⁸ NSW Department of Customer Service, [Regulatory Impact Statement: Building Bill 2022, Part 1 – Who can do the work](#), August 2022, p 18

⁸⁹ [Building Bill 2022, clause 9](#).

⁹⁰ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p viii.

new matters (such as better statutory controls of phoenixing activity⁹¹) while others reiterated previous recommendations made to implement systemic change by establishing a building commission and stand-alone building Act and appointing a building minister.

3.3.1 Recommendations progressed

Most of the recommendations related to flammable cladding are being progressed by Project Remediate, or the work of the NSW Cladding Taskforce and Cladding Product Safety Panel (see section 6). The 2022 building bills include provisions that address several other recommendations, including that the NSW Government:

- Strengthen legislation to ensure that building purchasers are protected from changes to prohibition orders preventing them from triggering sunset clauses to rescind their contracts prior to a property under a prohibition order being deemed suitable for occupation (Recommendation 7)
- Adopt a nationally consistent approach to the use of building manuals (Recommendation 12).

3.3.2 Recommendations not progressed

The NSW Government's response to the further inquiry provides detailed individual responses to most recommendations, including those that were not supported.⁹² An important recommendation that was supported, but where it is unclear whether any action has been taken at this point (as at April 2023), was the recommendation to place additional statutory controls on phoenixing and phoenixing activity in the building and construction industry (Recommendation 5). In response, the NSW Government noted that it is a member of the Commonwealth Phoenix Taskforce⁹³ that operates to detect, deter and disrupt illegal phoenixing and had introduced related steps, such as improved data sharing with other regulators including the Australian Tax Office and consulting on amendments to legislative frameworks to make it easier for the regulator to track companies and directors who have participated in phoenixing.⁹⁴

The committee also made a set of recommendations related to a building commission that were generally not supported by the government at that time. These included:

- Establish a senior building minister with responsibility for building regulation including administering a new stand-alone building Act and responsibility for a new building commission and its building commissioner (Recommendation 1)

⁹¹ Illegal phoenix activity is when a company is liquidated, wound up or abandoned to avoid paying its debts. Australian Tax Office (ATO), *Illegal phoenix activity*, Australian Government, 2022, accessed 28 April 2023.

⁹² NSW Government, *NSW Government response to the further inquiry into building standards*, August 2022.

⁹³ Australian Tax Office, *Phoenix Taskforce*, 7 February 2023, accessed 17 March 2023

⁹⁴ NSW Government, *NSW Government response to the further inquiry into building standards*, August 2022, p 4

- Provide the building commission with broad powers and sufficient resourcing, and extend the powers to class 1 buildings and other related classes where people sleep at night (Recommendation 2)
- Move regulatory responsibility from NSW Fair Trading to the building commission, and by so doing establish a fundamentally different culture of enforcement and compliance (Recommendation 3)
- Empower and resource the building commission to accredit private certifiers (Recommendation 13; see section 4 of this paper)
- Ensure that any regulated rating system for corporate entities responsible for class 2 buildings is overseen by a government agency, ideally the building commission (Recommendation 15).

The committee recognised that there had been a partial re-regulation of the sector and acknowledged the progress made by the NSW Building Commissioner. However, it still concluded that, without wholesale reform along the lines outlined above:

Further additions to a patchwork of legislation, continued division of responsibilities between multiple agencies, and lasting artificial demarcations between ministers' portfolios will only continue to undermine the government's own effectiveness [in] improving building standards and protecting consumers.⁹⁵

In response, the NSW Government stated that 'the regulation of the construction industry is being effectively oversighted by the Department of Customer Service',⁹⁶ and that it was not aware of any evidence showing that a commission structure had achieved superior building regulation outcomes in other Australian jurisdictions. It also made the argument that more time was needed to fully realise the benefits of recent reforms such as the iCIRT rating system, decennial liability insurance, and RAB Act powers. The response stated that the 2022 building bills demonstrated the government's support for the expansion of class 2 reforms to other building classes.

The NSW Government did also not support the recommendation to undertake an independent review of the adequacies of Clause 1 in Schedule 1 of the [Environmental Planning and Assessment Amendment \(Compliance Fees\) Regulation 2021](#) (the Schedule 1 amendment). Since July 2021, the Schedule 1 amendment has prohibited a council from charging a fee for the exercise of council's compliance and enforcement functions related to development applications under the EP&A Act. The government's response indicated that it considered compliance activities to be a core part of council's general functions, and therefore funded by revenue such as rates and fees for development applications, rather

⁹⁵ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 30.

⁹⁶ NSW Government, [NSW Government response to the further inquiry into building standards](#), August 2022, p 2.

than through a dedicated funding stream. It also noted that compliance levies that some councils had established (prior to the Schedule 1 amendment) were often not well thought out and overburdened developers with additional costs, and were potentially illegal under the *Local Government Act 1993*.

3.4 Future inquiries

Section 69 of the RAB Act⁹⁷ and section 109 of the DBP Act⁹⁸ both require the Legislative Council Public Accountability Committee to review each Act to:

- Consider functions exercised or delegated by the Secretary of the Department of Customer Service
- Determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain effective for securing those objectives
- Consider the desirability of establishing an independent building commission to exercise the regulatory and oversight functions under this Act and other Acts relating to the construction of buildings.

Each provision requires the committee to undertake the review as soon as possible after 30 March 2022, with the outcome of the review to be tabled by 30 June 2022 or a later day as determined by the committee. As at April 2023, these reviews had not been undertaken. The Legislative Council Public Accountability Committee of the 58th Parliament is expected to consider the timeline and process for commencement of these reviews.

⁹⁷ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*, [section 69](#).

⁹⁸ *Design and Building Practitioners Act 2020*, [section 109](#).

4. Private certification

4.1 Role and profile of private certifiers

Since the late 1990s, the involvement of private certifiers in the NSW planning and approvals system has increased, particularly regarding the processes of independently assessing and verifying developments.⁹⁹ Private certifiers can be involved with developments in two ways: issuing complying development certificates (CDCs) as part of the consent process, and as the principal certifier following consent.

Complying development is one of 9 planning approval pathways in NSW.¹⁰⁰ It covers both residential developments, such as one or 2 storey residential buildings, and a range of commercial and industrial developments including community facilities, warehouses and commercial premises.¹⁰¹ A CDC is a combined planning and construction approval for a complying development that may be issued by a private certifier or local council. Private certifiers were the determining authority for 92% of CDCs issued in 2020–21. CDCs accounted for over 39% of total applications determined (25,561 of 65,267) in 2020–21, not including modifications. This is an increase from 23% in 2011–12.¹⁰²

The certification and compliance roles of private certifiers following consent relate to more intensive developments, such as development applications for residential apartment proposals requiring development consent.¹⁰³

To undertake post-consent roles, the private certifier must be appointed as the principal certifier by the owner or developer.¹⁰⁴ The role includes inspecting a development to confirm whether it has been built in accordance with the terms of development consent and determining if a completed building is suitable for occupation and use in accordance with

⁹⁹ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes](#), Parliament of NSW, November 2019, p 3.

¹⁰⁰ NSW Department of Planning and Environment, [Planning approval pathways](#), 1 March 2023, accessed 23 March 2023

¹⁰¹ Complying development is defined by the [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#). For residential development, this is generally limited to 1 or 2 storey buildings (see Parts 3 to 3D). [Clause 5A.2\(1\)](#) lists commercial and industrial development classified as complying development.

¹⁰² Department of Planning and Environment, [Local Development Performance Monitoring \(LDPM\): for FY2021 for all councils](#), NSW Government, accessed 20 March 2023.

¹⁰³ [Part 4 \('Development assessment and consent'\)](#) of the *Environmental Planning and Assessment Act 1979* sets out when development consent is required.

¹⁰⁴ Under [Part 6 \('Building and subdivision certification'\)](#) of the *Environmental Planning and Assessment Act 1979*. Local councils can also be appointed as principal certifiers.

its classification under the Building Code of Australia.¹⁰⁵ This is formalised by the issuing of various certificates¹⁰⁶ for subdivision, construction, compliance, and occupation.

Where a breach of the EP&A Act becomes apparent, principal certifiers are also required to issue non-compliance notices to the owner or developer and direct remedies.¹⁰⁷ This includes forwarding a copy of the notice to the consent authority (such as local council) if the direction issued to the owner or developer is not complied with.

Private certifiers are classified as public officials under the [Independent Commission Against Corruption Act 1988](#) and [Public Interest Disclosures Act 1994](#), and as a public authority under the [Ombudsman Act 1974](#). This means that private certifiers are required to act in the public interest, avoid conflicts of interest, report corrupt behaviour and adhere to the code of conduct for certifiers.¹⁰⁸

Under the BDC Act, private certifiers are required to be both registered with NSW Fair Trading, and accredited in the appropriate class by an association, such as the Association of Australian Certifiers (AAC) and Australian Institute of Building Surveyors (AIBS). AIBS has developed a professional standards scheme for monitoring, enforcing and improving the professional standards of their members,¹⁰⁹ and AAC is in the process of doing the same.¹¹⁰ The BDC Act also regulates other relevant matters like conflicts of interest, insurance, a code of conduct, and requirements for continuing professional development. The work of private certifiers is also regulated by relevant parts of the DBP and RAB Acts.

In summary, private certifiers remain independent regulators simultaneously acting as public officials. Recent changes to the private certification system have sought to maintain the independence of private certifiers while increasing their accountability and oversight by the NSW Government and local councils.

4.2 Issues raised about private certifiers

The role of private certifiers and the private certification system were reviewed in the Lambert report and by the two Legislative Council Public Accountability Committee inquiries. A number of issues in relation to private certifiers were raised, particularly regarding conflicts of interest, flaws with the self-accreditation system, less-than-ideal

¹⁰⁵ Department of Customer Service, [Practice standard for registered certifiers: 1 – new residential apartment buildings](#), NSW Government, September 2020.

¹⁰⁶ Under [Part 6 \('Building and subdivision certification'\)](#) of the *Environmental Planning and Assessment Act 1979*.

¹⁰⁷ *Environmental Planning and Assessment Act 1979*, [section 6.31](#).

¹⁰⁸ Department of Customer Service, [Practice Standard for registered certifiers: Volume One – new residential apartment buildings](#), October 2022, p 13.

¹⁰⁹ Australian Institute of Building Surveyors (AIBS), [AIBS Professional Standards Scheme](#), n.d., accessed 20 March 2023

¹¹⁰ Association of Australian Certifiers, [AAC Professional Standards Scheme](#), 2022, accessed 20 March 2023

working relationships between certifiers and councils, and inadequate oversight by NSW Fair Trading.

A private certifier's legal responsibility as a public officer and potential commercial interests has been identified as a major flaw of the certification system historically, and conducive to conflicts of interest for certifiers.¹¹¹

The committee also cited mismatches between the many 'stories of purchaser misery in the media [that is, buyers of NSW units]' and the very short list of certifiers who lose their accreditation as evidence that the self-accreditation of private certifiers by the professional bodies was failing.¹¹²

In evidence presented to the committee, Waverley, Woollahra and Randwick councils noted that their regulatory burdens increase when private-sector certification fails, arguing that private certifiers exploit the legislative provisions of the environmental planning legislation that governs them, such as the limited requirement for critical stage inspections. Additionally, councils have little to no prior knowledge of development sites that are being certified by private certifiers, and do not have ready access to various professional reports during the construction phase if they are not appointed as the principal certifier by the owner.¹¹³

4.3 Recent reforms and outstanding matters

Both reports of the first committee inquiry called for implementation of all recommendations of the Lambert report. Recommendation 18 of the final report identified 8 specific recommendations of the Lambert report for implementation, and called for all recommendations to be implemented, where practical, no later than by April 2022.¹¹⁴ The government noted this recommendation and outlined relevant reforms that had been introduced,¹¹⁵ occurring largely as a result of repealing the previous *Building Professionals Act 2005* and introducing the *Building and Development Certifiers Act 2018*.

In her take note debate on the report on 29 March 2022, then Shadow Minister for Better Regulation and Innovation, Courtney Houssos MP, observed that the Lambert report

¹¹¹ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes](#), Parliament of NSW, November 2019, p 5.

¹¹² Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 61

¹¹³ Waverley, Woollahra & Randwick Councils, [Submission: Inquiry into regulation of building standards, building quality and building disputes](#), 26 July 2019, p 8.

¹¹⁴ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020.

¹¹⁵ NSW Government, [Regulation of Building Standards, Building Quality and Building Disputes Final Report: NSW Government Response](#), October 2020, p 19.

recommendations had 'largely ... still not been implemented'.¹¹⁶ Of the reforms identified in Recommendation 18, 6 have been implemented as at April 2023:

- Practice guides for building certifiers to clarify roles and responsibilities. NSW Fair Trading also plans to expand practice guides to cover other certification work such as for fire safety¹¹⁷
- Regular audits of building certifiers as part of a program¹¹⁸
- Strengthening conflict of interest provisions¹¹⁹
- Enhanced supervisory powers and mandatory reporting obligations with respect to building non-compliance¹²⁰
- A program of continuing professional development for all building certifiers¹²¹
- Requiring building certifiers to be members of an approved professional association, which is subject to a full professionalisation process overseen by the Professional Standards Authority¹²²

The 2 reforms of Recommendation 18 which appear not to have been addressed are:

- Establishment of a help desk or panel of experts which private certifiers can draw from for advice, and a reference panel for mandatory reviews of select designated complex and higher risk developments
- A requirement for councils to act on non-compliance notices forwarded to them by building certifiers, and to keep the building certifier informed of developments.¹²³

Neither the Lambert report nor the Legislative Council Public Accountability Committee inquiries recommended a return of certification powers to local councils, despite arguments for this move from some stakeholders. In commenting on this, the chair's foreword to the first inquiry's final report stated that:

¹¹⁶ C Houssos, [Public Accountability Committee: Report and Government response](#), *NSW Hansard*, 29 March 2022.

¹¹⁷ NSW Fair Trading, [Practice standard for registered certifiers](#), NSW Government, 2022, accessed 11 April 2023.

¹¹⁸ NSW Fair Trading, [Our strategy for auditing building certifiers](#), NSW Government, 2022, accessed 11 April 2023; NSW Government, [NSW Government Response: Further inquiry into the regulation of building standards](#), August 2022, p 7.

¹¹⁹ *Building and Development Certifiers Act 2018*, [sections 28–30](#).

¹²⁰ *Environmental Planning and Assessment Act 1979*, [section 6.31](#).

¹²¹ NSW Fair Trading, [Continuing professional development](#), NSW Government, 2022, accessed 12 April 2023.

¹²² Association of Australian Certifiers (AAC), [AAC Professional Standards Scheme](#), 2022, accessed 12 April 2023; Australian Institute of Building Surveyors (AIBS), [AIBS Professional Standards Scheme](#), 2021, accessed 12 April 2023.

¹²³ While there is no statutory requirement for councils to act on these matters, at least some councils do have compliance and enforcement policies that include assessment of whether follow-up by council is required in the circumstances. See examples from [Northern Beaches](#) and [Port Macquarie](#) local councils.

...although many blame private certification for the collapse of confidence in the industry, it is important to note that the problems in the industry are much deeper and more fundamental and lie in a widespread lack of accountability or regulation.¹²⁴

Other outstanding matters regarding private certification reform as recommended by the committee inquiries are that the NSW Government:

- Consider amending the EP&A Act to expand the number and scope of mandatory critical stage inspections, including a mandatory inspection 2 years after development consent¹²⁵
- Abandon self-accreditation by building certifiers, and resource a building commission in consultation with local councils to fulfil the role of accrediting certifiers.¹²⁶

The first recommendation was made in light of concerns raised with the first inquiry that private certifiers only conduct mandatory inspections and that this is insufficient to ensure building quality. Reform progress regarding the number and scope of inspections by private certifiers under the EP&A Act is unclear. Currently, the EP&A Act prescribes several mandatory critical stage inspections that must be undertaken by the private certifier. In its response to the inquiry report, the government observed that it is working with the ABCB to improve the mandatory critical stage inspection regime.¹²⁷ The government has also released a practice standard for certifiers which provides advice on non-mandatory inspections. The practice standard encourages certifiers to adopt a risk-based approach to using non-mandatory inspections, considering matters such as the proposed construction methods (established or innovative) and design complexity.¹²⁸

The second recommendation to abandon the system of self-accreditation for private certifiers was not supported by the government. The government argued that NSW Fair Trading undertakes risk-based audits and investigation of certifiers where appropriate.¹²⁹

¹²⁴ Legislative Council Public Accountability Committee, *Regulation of building standards, building quality and building disputes: Final report*, Parliament of NSW, pg. ix, April 2020.

¹²⁵ NSW Government, *Regulation of building standards, building quality and building disputes final report: NSW Government response*, October 2020, p 5.

¹²⁶ NSW Government, *Further inquiry into the regulation of building standards: NSW Government response*, August 2022, p 7.

¹²⁷ NSW Government, *Regulation of Building Standards, Building Quality and Building Disputes Final Report: NSW Government Response*, October 2020, p 19.

¹²⁸ Department of Customer Service, *Practice Standard for registered certifiers: Volume One – new residential apartment buildings*, October 2022, p 60.

¹²⁹ NSW Government, *NSW Government response to the further inquiry into building standards*, August 2022, p 7. See also: NSW Fair Trading, *Our strategy for auditing building certifiers*, n.d., accessed 20 March 2023

5. Insurance

Insurance protections are a vexed issue in the building industry. Both Legislative Council Public Accountability Committee inquiries examined the insurance protections available to consumers and made recommendations on this issue. The first inquiry heard arguments from stakeholders such as the UNSW City Future Research Centre and the Strata Community Association of NSW that building insurance is insufficient for protecting consumers, particularly when defects become apparent long after a building is first occupied. In its first report, the committee found that at the time there was 'no functioning insurance market willing to take on the risk of residential building and construction' due to 'a fundamental failure of building standards and the failure of successive governments to effectively regulate the industry'.¹³⁰ The final report of the first inquiry examined the 'collapse of the professional indemnity market' for building professionals that had recently occurred.¹³¹

Reforms introduced since the inquiries have addressed some of the recommendations made by the committee. Those reforms, and some of the outstanding recommendations, are outlined where relevant in the following description of the four building industry insurance products. It should be noted that insurance products do not preclude legal action taking place, such as the dispute resolution process available with the NSW Civil and Administrative Tribunal (NCAT) under the *Home Building Act 1989*.

5.1 Statutory warranties available under the *Home Building Act 1989*

Since February 2012, statutory warranty periods for all residential building work have been 6 years for major defects and 2 years for any other breach. A major defect is classified as a defect in a major element of the building that results in, or is likely to result in, the inability to inhabit the building, the destruction or threat of collapse of the building, or in the case of external cladding on a building, a threat to the safety of the building occupants in the event of a fire.¹³² The statutory warranty period commences upon the completion of building work, typically the occupation certificate stage.¹³³

The committee considered that the warranty periods were 'grossly inadequate' and recommended that the NSW Government extend the timeframe to 7 years for both major

¹³⁰ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019, p ix.

¹³¹ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020, p viii.

¹³² NSW Government, [Submission: Inquiry into regulation of building standards, building quality and building disputes](#), 2 August 2019, p 23; *Home Building Act 1989*, [section 18E](#).

¹³³ *Home Building Act 1989*, sections [3C\(2\)](#) and [18E](#).

and minor defects.¹³⁴ The Government's response only noted the recommendation, outlining instead reforms it had introduced to deal with building defects, including:

- The RAB Act that empowers the NSW Building Commissioner to inspect building work at critical stages, issue rectification orders for defective building work, and if necessary issue a prohibition order preventing an occupation certificate being released¹³⁵
- A duty of care that covers every building class, which came into effect in June 2020 and applies to work carried out beforehand if the economic loss caused by a duty of care breach became apparent after June 2010.¹³⁶

5.2 Options under the Strata Schemes Management Act 2015

The *Strata Schemes Management Act 2015* includes two options for dealing with defective work in buildings over 3 storeys: the Strata Building Bond and Inspections Scheme and decennial liability insurance.

The choice between paying a building bond (2 years) or taking up decennial liability insurance (10 years) is made by the developer of a new high-rise strata building. First introduced in January 2018, the Strata Building Bond and Inspections Scheme requires the developer to lodge a bond equivalent to 2% of the contract price of building work.¹³⁷ The scheme does not replace the rights of owners' corporations, developers or builders to pursue legal action under any other law. The bond is held in a trust until building inspections have been undertaken to detect defects and commence restoration, and is returned to the developer, in whole or in part, within 2 years of building work completion.¹³⁸

Decennial liability insurance was made available to developers as an alternative option to the strata building bond in November 2022.¹³⁹ The insurance can be taken out by the developer on behalf of the strata owners' corporation against serious defects. The insurance period is 10 years.

¹³⁴ Legislative Council Public Accountability Committee, *Regulation of building standards, building quality and building disputes: First report*, Parliament of NSW, November 2019, p 62.

¹³⁵ NSW Government, *Legislative Council Public Accountability Committee Further inquiry into the regulation of building standards: NSW Government submission*, August 2021, p 2

¹³⁶ NSW Government, *Regulation of Building Standards, Building Quality and Building Disputes Final Report: NSW Government Response*, October 2020, p 20.

¹³⁷ NSW Fair Trading, *Strata Building Bond & Inspections Scheme*, n.d., accessed 23 March 2023

¹³⁸ Legislative Council Public Accountability Committee, *Regulation of building standards, building quality and building disputes: First report*, Parliament of NSW, November 2019, p 57.

¹³⁹ In August 2022, the Decennial Liability Insurance Ministerial Advisory Panel [reported](#) on its research into the feasibility of introducing a decennial liability insurance scheme. The scheme was established through amendments to the *Strata Schemes Management Act 2015* made by the [Building and Other Fair Trading Legislation Amendment Act 2022](#).

In its further inquiry report, the Legislative Council Public Accountability Committee expressed concern about introducing decennial liability insurance only as an option that could be adopted instead of a two-year bond, arguing that the goal must be ‘for all residential buildings to have adequate insurance.’¹⁴⁰ At the end of 2022, the NSW Government was in the process of preparing a regulatory impact statement on a proposal to mandate decennial liability insurance instead of the strata building bond after a transitional period.¹⁴¹

5.3 The Home Building Compensation Scheme

The Home Building Compensation Scheme is available as a last resort for homeowners of buildings 3 storeys and under who are unsuccessful in claiming against statutory warranties when faced with incomplete or defective building work. Insurance under this scheme is compulsory for certain classes of residential building work where the contract price exceeds \$20,000. The scheme is regulated by the NSW State Insurance Regulatory Authority (SIRA), with the NSW Self Insurance Corporation trading as ‘icare HBCF’ being the single insurance provider for the scheme.¹⁴² The scheme was privatised in 1997, but the NSW Government resumed management of the scheme in July 2010 as a result of private insurers withdrawing from the market.¹⁴³

In November 2020, the Independent Pricing and Regulatory Tribunal (IPART) published a report into the efficiency and effectiveness of the scheme. Key findings include that HBCF premiums are higher than premiums for similar schemes in other jurisdictions, and that there are regulatory barriers inhibiting entry by private providers.¹⁴⁴ Of the 22 recommendations made by IPART, the NSW Government supported (in full or in part) or committed to further considering 19 of them.¹⁴⁵

Two concurrent reform processes relevant to the Home Building Compensation Scheme were underway at the end of 2022, the second of which was initiated in response to the IPART report:

¹⁴⁰ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 62.

¹⁴¹ NSW Government, [Ten year defect insurance for apartment buildings](#), 20 October 2022, accessed 23 March 2023.

¹⁴² NSW Department of Customer Service, [Regulatory Impact Statement: Building Bill 2022, Part 3 – Building compliant homes](#), August 2022, p 53.

¹⁴³ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: First report](#), Parliament of NSW, November 2019, p 49.

¹⁴⁴ IPART, [Review of the efficiency and effectiveness of the NSW Home Building Compensation Fund](#), Final Report, November 2020, p 7.

¹⁴⁵ SIRA, [NSW Government Response: IPART’s Review of the efficiency and effectiveness of the NSW home building compensation fund](#), June 2022.

- Chapter 5 of the Building Bill 2022 establishes and regulates the scheme in a manner similar to the *Home Building Act 1989*. The regulatory impact statement observed that changes in other parts of the bill may affect the risks that the scheme must cover and change the scope of work for which businesses must buy insurance.¹⁴⁶
- A discussion paper released by SIRA invited consultation on 15 potential home building compensation regulatory reforms. Submissions closed on 16 August 2022.¹⁴⁷ Following the consultation process, SIRA stated that it would provide recommendations to the NSW Government regarding possible amendments to the [Home Building Regulation 2014](#) to implement some of the reforms. It also noted that other reforms would require legislative change and planned to provide advice on these reforms to the incoming government of the 58th Parliament.¹⁴⁸

5.4 Professional indemnity insurance

Private certifiers are required to hold professional indemnity insurance under the *Building and Development Certifiers Act 2018*. The *Design and Building Practitioners Act 2020* expanded mandatory insurance requirements to cover registered design and building practitioners and professional engineers. Contractors under the *Home Building Act 1989* are also required to have professional indemnity insurance.

In its further inquiry, the Legislative Council Public Accountability Committee heard that rising professional indemnity insurance premiums were a significant issue for the industry.¹⁴⁹ The affordability and availability of professional indemnity insurance was a particularly acute problem for engineers working to remove flammable cladding from buildings. In August 2022, the NSW Government stated that it was working with the insurance industry to address this issue,¹⁵⁰ as recommended by the committee.¹⁵¹

¹⁴⁶ NSW Department of Customer Service, [Regulatory Impact Statement: Building Bill 2022, Part 3 – Building compliant homes](#), August 2022, p 53.

¹⁴⁷ SIRA, [Home Building Compensation reform](#), n.d., accessed 23 March 2023

¹⁴⁸ SIRA, [Home Building Compensation reform consultation - outcomes and next steps](#), n.d., accessed 23 March 2023

¹⁴⁹ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 53.

¹⁵⁰ NSW Government, [NSW Government response to the further inquiry into building standards](#), August 2022, p 9

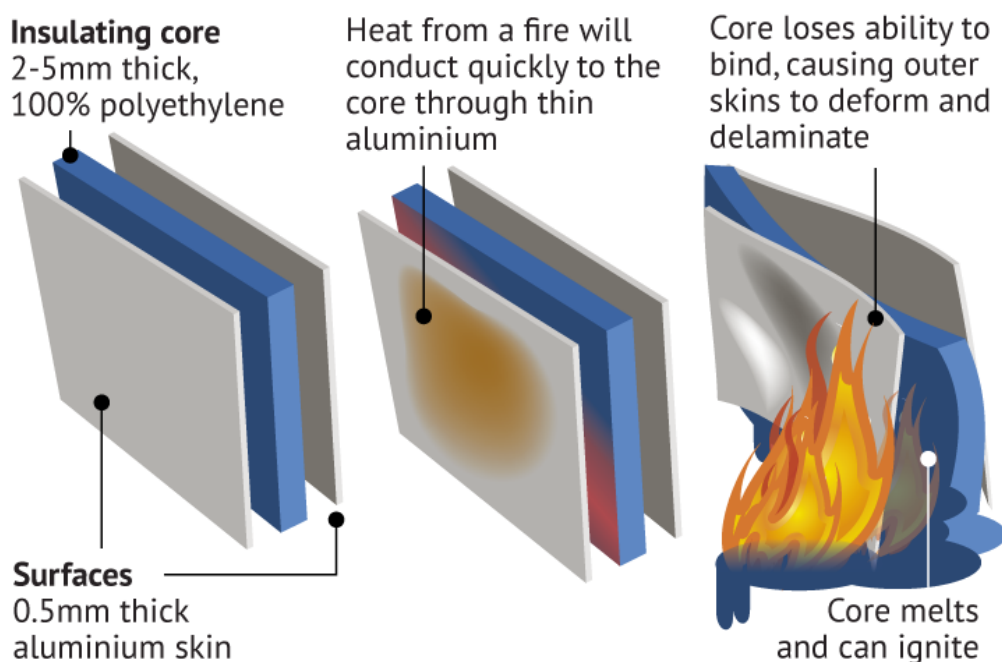
¹⁵¹ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 81.

6. Flammable cladding and fire safety

6.1 Flammable cladding

Cladding is a type of material used on the outside skin of a building for thermal insulation and weather resistance, and to improve the appearance of buildings.¹⁵² Not all cladding is dangerous. Three types of combustible cladding used in multi-storey buildings can be problematic because of the potential for rapid fire spread: aluminium composite panels, expanded polystyrene systems, and biowood.¹⁵³ These products can ignite easily and melt at relatively low temperatures.¹⁵⁴ Figure 3 shows an example of how flammable cladding can ignite.

Figure 3: Aluminium composite cladding panel with flammable core



Source: Jamie Brown, The Age (Fairfax Media) [October 2019](#)

¹⁵² Major Projects Canberra, [What is Combustible Cladding?](#), ACT Government, n.d., accessed 9 March 2023.

¹⁵³ Major Projects Canberra, [What is Combustible Cladding?](#), ACT Government, n.d., accessed 9 March 2023.

¹⁵⁴ Department of Planning and Environment, [What is combustible cladding?](#), NSW Government, n.d., accessed 9 March 2023.

6.2 NSW Government responses and outstanding matters

Flammable cladding and fire safety became a significant building industry issue in NSW following the Melbourne Lacrosse building fire in November 2014¹⁵⁵ and the tragedy of the Grenfell Tower fire in London in June 2017.¹⁵⁶ In July 2017 the NSW Government announced a 10-point plan for fire safety reforms.¹⁵⁷ The plan included calls for better identification of dangerous products, inspections and audits (by strata managers, Fire and Rescue NSW and government departments), statutory declarations of fire safety compliance, better regulation of private certifiers, and establishment of a taskforce to implement fire safety reforms.

In October 2021 the NSW Building Commissioner released a report into improving fire safety in new and existing buildings as part of the Construct NSW strategy.¹⁵⁸ The report made recommendations regarding mandatory provision of a comprehensive building manual to owners and fire practitioners, better regulation and compliance, and increasing the trustworthiness of fire safety certificates (such as fire safety schedules and annual statements). As of August 2022, the NSW Government had commenced the implementation of these recommendations, with some issues to be addressed in the 2022 building bills.¹⁵⁹

In April 2022 the Audit Office of NSW released a report into the effectiveness of the reform program led by the Department of Customer Service and the Department of Planning and Environment to address flammable cladding on residential and public buildings.¹⁶⁰ The report made 3 recommendations, to be implemented by the end of 2022:

1. Address the confusion surrounding the product use ban for aluminium composite panels with 30% polyethylene content
2. Ensure that the NSW Government Cladding Taskforce develops an action plan, taking into account an assessment of cost versus benefit and risk, to address buildings with combustible external cladding assessed by Fire and Rescue NSW as low risk

¹⁵⁵ ABC News, [Docklands fire: Melbourne high-rise apartment blaze forces evacuation of hundreds](#), ABC, November 2014, accessed 6 March 2023.

¹⁵⁶ ABC News, [London tower fire: Witnesses describe 'devastation' as Grenfell residents called for help](#), ABC, June 2017, accessed 6 March 2023.

¹⁵⁷ NSW Government, [Ten-point plan for fire safety reforms](#) [media release], 31 July 2017, accessed 6 March 2023.

¹⁵⁸ Construct NSW, [Improving fire safety: industry report on reforms to improve fire safety in new and existing buildings](#), NSW Government, October 2021.

¹⁵⁹ NSW Government, [NSW Government response to the further inquiry into building standards](#), August 2022, p 5.

¹⁶⁰ Audit Office of New South Wales, [Building regulation: combustible external cladding](#), NSW Government, 13 April 2022.

3. Improve information systems to ensure there is an accurate, timely and complete history of how buildings with combustible external cladding have been identified, assessed and (where necessary) remediated.

While the 2 departments accepted these recommendations, no information on the status of their implementation appears to be publicly available (as at April 2023).¹⁶¹

The Legislative Council Public Accountability Committee inquiries also made numerous recommendations to improve and remediate flammable cladding and address fire safety issues.¹⁶² Some of these recommendations have been completed or were being addressed by broader reform programs. For example, the 2022 building bills moved all fire safety obligations into a single regulatory framework, including an end-to-end licensing process for all practitioners working on fire safety systems.¹⁶³

Two key recommendations from these inquiries were not supported by the government:

- Both inquiries made a recommendation¹⁶⁴ to replicate a Victorian Government \$600 million financial assistance package¹⁶⁵ to remediate cladding. Half this package was funded by the Victorian Government, with the remaining \$300 million to be raised over five years by a change to the building permit levy. The NSW Government instead committed to Project Remediate led by the NSW Building Commissioner. Project Remediate offers 10-year interest free loans to owners' corporations for the remediation of cladding on an estimated 225 eligible class 2 residential apartment buildings.¹⁶⁶ Remediation works commenced in August 2022 and are expected to be completed by July 2024.¹⁶⁷
- A call for enhanced funding for local council cladding compliance activities does not appear to have been supported.¹⁶⁸ The NSW Government noted that it is

¹⁶¹ Audit Office of New South Wales, [Building regulation: combustible external cladding: Appendix one – Response from agencies](#), NSW Government, 13 April 2022.

¹⁶² Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes](#), Parliament of NSW, July 2019 and April 2020; Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022.

¹⁶³ NSW Fair Trading, [Reforming building laws in NSW: Transcript - Fire safety & building approvals](#), NSW Government, September 2022, accessed 6 March 2023.

¹⁶⁴ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020, p 72; Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 82.

¹⁶⁵ Victorian State Government, [Tackling High-Risk Cladding to Keep Victorians Safe](#) [media release], VIC Government, 16 July 2019, accessed 6 March 2023.

¹⁶⁶ NSW Building Commissioner, [Replace flammable cladding through Project Remediate](#), NSW Government, 1 March 2023, accessed 6 March 2023.

¹⁶⁷ NSW Building Commissioner, [Replace flammable cladding through Project Remediate](#), NSW Government, 1 March 2023, accessed 6 March 2023.

¹⁶⁸ NSW Government, [NSW Government response to the further inquiry into building standards](#), August 2022, p 9.

already working closely with councils on all aspects of cladding remediation through the work of the NSW Cladding Taskforce and Project Remediate.¹⁶⁹

Other actions taken by the NSW Government to address flammable cladding issues and improve fire safety include:

- **Register of affected cladding buildings:** The identification and disclosure of risky buildings on a register of affected cladding buildings has been undertaken by the NSW Cladding Taskforce¹⁷⁰ as required by the [Environmental Planning and Assessment \(Development Certification and Fire Safety\) Regulation 2021](#), with expert advice provided by the Cladding Product Safety Panel.¹⁷¹ The taskforce reports on the status of this work program. As at 8 February 2023, 4,182 buildings had been inspected, with 379 under review, assessment or remediation (including those in the Project Remediate program).¹⁷²
- **Banning dangerous materials:** Certain forms of aluminium composite panels¹⁷³ are banned under the [Building Products \(Safety\) Act 2017](#), and product testing is conducted by the NSW Cladding Product Safety Panel. Further improvements to this Act were drafted and exhibited by NSW Fair Trading in late 2022, such as increasing the responsibilities of manufacturers and suppliers regarding production and supply of safe products.¹⁷⁴
- **Improved certification:** Building practitioners must lodge a copy of the fire safety certificate when submitting a building compliance declaration under the DBP Act. Referrals to Fire and Rescue NSW must be made within seven days of a construction certificate being issued for relevant building work.¹⁷⁵ A fire safety practitioner is also now a class of registered certifier under the BDC Act.

A broad range of flammable cladding and fire safety reforms are ongoing, however questions have been raised about whether the reform program addresses the full scope of

¹⁶⁹ NSW Government, [NSW Government response to the further inquiry into building standards](#), August 2022, p 9.

¹⁷⁰ Department of Customer Service, [NSW Cladding Taskforce](#), NSW Government, 1 March 2023, accessed 6 March 2023.

¹⁷¹ Department of Customer Service, [Cladding Product Safety Panel](#), NSW Government, 2023, accessed 6 March 2023.

¹⁷² Department of Customer Service, [NSW Cladding Taskforce](#), NSW Government, 1 March 2023, accessed 26 April 2023.

¹⁷³ NSW Fair Trading, [Building products: Information on bans and safety notices for building products](#), NSW Government, n.d., accessed 6 March 2023.

¹⁷⁴ NSW Fair Trading, [Safer building products: Transcript – New building product requirements](#), NSW Government, September 2022, accessed 6 March 2023.

¹⁷⁵ [Environmental Planning and Assessment \(Development Certification and Fire Safety\) Regulation 2021](#), [clause 26](#).

the issues identified,¹⁷⁶ and the speed at which the programs are being rolled out.¹⁷⁷ In light of these questions, the Legislative Council Public Accountability Committee (in the further inquiry) reiterated its view that the NSW Building Commissioner be empowered to address the issues via establishment of an adequately resourced building commission.¹⁷⁸

¹⁷⁶ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 83.

¹⁷⁷ C Houssos, [Public Accountability Committee: Report and government response](#), *NSW Hansard*, 8 November 2022

¹⁷⁸ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 83.

7. Strata schemes

7.1 Strata concerns

Key strata-related issues include the capacity of strata schemes to adequately address building defects, insurance availability (see section 5), and the lack of suitable education for strata committees about topics such as governance.

A 2021 research report for Construct NSW found that 39% of surveyed strata buildings experienced serious defects in common property.¹⁷⁹ The majority of serious defects related to waterproofing, affecting 23% of all buildings surveyed. Other serious defects related to fire safety systems (14% of all buildings surveyed), structure (9%), enclosure (9%), key services (5%) and non-compliant cladding (5%). It was estimated that around \$332,000 per building was spent by owners' corporations to resolve serious defects.¹⁸⁰

The most common barriers to resolving defects were sourcing funds (15% of all buildings surveyed), lack of awareness about rights and responsibilities (14%) and disagreement among the owners' corporation on the approach that should be taken (10%). Strata schemes preferred not to involve NSW Fair Trading in resolving defects, only lodging a complaint in about 15% of cases.¹⁸¹

7.2 NSW Government responses and outstanding matters

A 2021 statutory review and both Legislative Council Public Accountability Committee inquiries identified a range of issues related to the way in which strata schemes respond to shortfalls in building quality and standards, and their capacity to do so.

In November 2021, the Department of Customer Services released a statutory review of the [Strata Schemes Development Act 2015](#) and [Strata Schemes Management Act 2015](#) (the Strata Acts) with 139 recommendations.¹⁸² The Strata Acts jointly provide the regulatory framework for the creation, governance and termination of strata schemes in NSW. Overall, the review found that the objectives of both Acts remained valid and that the regulatory framework for strata schemes remained appropriate. The recommendations had 4 broad aims:

1. Improve governance through enhanced accountability and transparency

¹⁷⁹ Construct NSW, [Research on serious building defects in NSW strata communities](#), NSW Government, September 2021, accessed 7 March 2023.

¹⁸⁰ Construct NSW, [Research on serious building defects in NSW strata communities](#), NSW Government, September 2021, accessed 7 March 2023.

¹⁸¹ Construct NSW, [Research on serious building defects in NSW strata communities](#), NSW Government, September 2021, accessed 7 March 2023.

¹⁸² NSW Department of Customer Service, [Help shape the future of strata in NSW: Have your say](#), NSW Government, November 2021, accessed 10 March 2023.

2. Better prevent, identify and rectify building defects
3. Support competition and minimise costs for consumers
4. Ensure flexible management and administrative arrangements.

Two particularly relevant recommendations were made relating to the second of these aims: amending the *Strata Schemes Management Act 2015* to insert 'RAB Act-like' powers to order rectification and enter into enforceable undertakings with owners' corporations; and extending the 2 year period for damages claims (related to take-up of the building bond option for new strata developments) to 6 years for building defects.

Some changes have been made to the *Strata Schemes Management Act 2015* since the release of this report, such as new mandatory reporting requirements from September 2022 of recent meetings and other matters to NSW Fair Trading; and in August 2022, the government stated that it was intending to introduce legislation to implement the reforms.¹⁸³ As at April 2023, no further information appears to be publicly available regarding which specific recommendations had been supported or acted on by the previous government.¹⁸⁴

The Legislative Council Public Accountability Committee made recommendations about several strata-related issues in both of its inquiries. The final report of the first inquiry¹⁸⁵ recommended a strata commissioner be appointed, ideally to sit within a newly created building commission. A related recommendation was made in the further inquiry regarding provision of education, training and support for strata committees, with a regulatory provision made to cover costs for strata committee members attending relevant training.¹⁸⁶

The first recommendation was made because the committee concluded that NSW Fair Trading had provided insufficient support to strata committees to assist in rectifying building defects and resolving disputes. The suggested scope of responsibilities for the strata commissioner included:¹⁸⁷

- Providing training, support and advice to strata committees, particularly on rectifying building defects and flammable cladding and dealing with strata disputes

¹⁸³ NSW Government, [NSW Government response: Further inquiry into the regulation of building standards](#), August 2022, p 5; Southern Waters Legal, [New Mandatory Reporting Requirements for Strata Schemes in NSW](#), April 2022, accessed 10 March 2023.

¹⁸⁴ C Houssos, [Public Accountability Committee: Report and government response](#), *NSW Hansard*, 8 November 2022

¹⁸⁵ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020.

¹⁸⁶ Legislative Council Public Accountability Committee, [Further inquiry into the regulation of building standards](#), Parliament of NSW, February 2022, p 59.

¹⁸⁷ Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020, p xiii.

- Monitoring and recommending any necessary changes to the policy settings that govern disputes between homeowners and builders and developers
- Appointing a building's initial strata manager to be in place until the first annual general meeting.

Rather than supporting the appointment of a strata commissioner, the government's response drew attention to the scope of work being undertaken by the NSW Building Commissioner and Department of Customer Service.¹⁸⁸ In May 2022, the NSW Government launched the Strata Hub, with the intention of providing better transparency, accountability, better regulation and more engagement with owners and residents of strata schemes to NSW.¹⁸⁹ The Strata Hub consolidates core information about NSW's strata schemes (82,000 as at June 2022) in one place, giving property purchasers insights into their potential new home while allowing regulators to monitor each building's ongoing maintenance and defect management.¹⁹⁰

In September 2022 Project Intervene was launched.¹⁹¹ Project Intervene uses the powers of NSW Fair Trading to compel developers or builders to remediate serious defects for buildings that are up to 10 years old, rather than having to engage with the costly and time-consuming court process for dispute resolution. Project Intervene seeks to negotiate an undertaking with the developer, which is voluntarily entered into by both developer and the owners' corporation, at which point it becomes legally binding.

Other relevant recommendations made by the committee inquiries called for the government to:

- Address the level of insurance available to strata homeowners under the short statutory warranty period established by the *Home Building Act 1989* (see section 5.1)
- Investigate provision of additional financial assistance to remedy major defects that become apparent after the warranty period
- Ensure appropriate expertise and streamlined processes are available at NCAT in the case of strata building disputes.

The cost of dealing with major defects falls on homeowners in cases, such as Mascot Towers, where they are unable to claim under the statutory warranties scheme or the Home Building Compensation scheme. According to the Legislative Council Public Accountability

¹⁸⁸ NSW Government, [Regulation of Building Standards, Building Quality and Building Disputes Final Report: NSW Government Response](#), October 2020, p 21.

¹⁸⁹ Strata Community Association of NSW, [Strata Hub](#), May 2022, accessed 6 March 2023.

¹⁹⁰ Strata Plus, [What you need to know about the Strata Hub](#), June 2022, accessed 31 March 2023.

¹⁹¹ NSW Building Commissioner, [Project Intervene](#), NSW Government, March 2023, accessed 6 March 2023.

Committee, the NSW Government bears some responsibility to develop financial assistance measures for these homeowners because successive governments have ‘stepped away from [their] responsibilities to ensure homes are built to an acceptable standard and are safe for occupation’.¹⁹² The government noted this recommendation in its response but made no comment on its position.¹⁹³ In February 2023, the NSW Building Commissioner was appointed to lead an expert Mascot Towers panel. This panel will examine the feasibility of remediating the building and report back on ‘all other options’ available to resolve the matter.¹⁹⁴

A recommendation for a NSW Government review of the NCAT dispute resolution process for disputes relating to strata buildings was supported.¹⁹⁵ This was undertaken¹⁹⁶ as part of the review of the Strata Acts¹⁹⁷ and the statutory review (the NCAT review) of the [Civil and Administrative Tribunal Act 2013](#) (the NCAT Act) by the Department of Communities and Justice.¹⁹⁸

The Strata Acts review found that the two-tiered dispute resolution process in place since 2015 (mediation with NSW Fair Trading first for most disputes, and then recourse to NCAT if required) was generally working effectively. It recommended that NSW Fair Trading develop additional guidance for owners’ corporations on internal resolution of disputes; that the *Strata Schemes Management Act 2015* be amended to confirm NCAT has the power to order payment of damages; and that penalties be increased for offences against the *Strata Schemes Management Act 2015*.¹⁹⁹ As at April 2023, these reforms have not been implemented.

The NCAT review did not make any recommendations in relation to the dispute resolution process for strata buildings. However, it noted a submission made by the Owners Corporation Network calling for independent auditors to be appointed to monitor compliance with NCAT orders in relation to strata disputes. In relation to this submission the reported noted that ‘it is not generally the role of a tribunal to appoint an auditor to

¹⁹² Legislative Council Public Accountability Committee, [Regulation of building standards, building quality and building disputes: Final report](#), Parliament of NSW, April 2020, p ix.

¹⁹³ NSW Government, [NSW Government Response: Regulation of building standards, building quality and building disputes final report](#), October 2020, p 20.

¹⁹⁴ Department of Customer Service, [Building Commissioner to lead expert Mascot Towers panel \[media release\]](#), 11 February 2023, accessed 6 March 2023.

¹⁹⁵ NSW Government, [NSW Government Response: Regulation of building standards, building quality and building disputes final report](#), October 2020.

¹⁹⁶ NSW Government, [NSW Government Response: Regulation of building standards, building quality and building disputes final report](#), October 2020, p 21.

¹⁹⁷ NSW Department of Customer Service, [Help shape the future of strata in NSW: Have your say](#), NSW Government, November 2021, accessed 10 March 2023.

¹⁹⁸ NSW Government, [Statutory Review: Report of the Statutory Review of the Civil and Administrative Tribunal Act 2013](#), November 2021.

¹⁹⁹ Recommendations 132–139 of the [Report on the statutory review of the Strata Schemes Development Act 2016 and Strata Schemes Management Act 2015](#), NSW Government, November 2021.

oversee compliance with its orders ... as the proposal relates to the Strata Act, it has been referred to the Department of Customer Service for consideration'.²⁰⁰ As at April 2023, no further details on this referral could be located.

²⁰⁰ NSW Government, [Statutory Review: Report of the Statutory Review of the Civil and Administrative Tribunal Act 2013](#), November 2021, p 35.

**Regulation of the building industry in
New South Wales**

Damian Gilyana and Daniel Montoya

Research Paper No. 2023-03

ISSN 2653-8318

© 2023 Except to the extent of the uses permitted under the Copyright Act 1968, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior consent from the Manager, NSW Parliamentary Research Service, other than by Members of the New South Wales Parliament in the course of their official duties.

Disclaimer: Any advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

The NSW Parliamentary Research Service provides impartial research, data and analysis services for members of the NSW Parliament.

parliament.nsw.gov.au

- @NSWParlResearch

The Parliament of New South Wales acknowledges and respects the traditional lands of all Aboriginal people and pays respects to all Elders past and present. We acknowledge the Gadigal people as the traditional custodians of the land on which the Parliament of New South Wales stands.

