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NSW planning reforms: building regulation and certification

Briefing Paper No 9/2013

by Daniel Montoya

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NSW planning reforms: building regulation and certification

by

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SUMMARY

This paper examines the proposed reforms to building regulation and certification in the NSW planning system. Commentary from selected stakeholders provides some analysis of the proposed system; these comments are too complex and extensive to be encapsulated in this summary. While a broad cross-section of stakeholders was selected, this paper does not purport to represent all stakeholder positions on the White Paper and Exposure Bills. Appendices to the paper contain a summary of the proposed system, a timeline of key building regulation and certification developments and a summary of the less significant proposed reforms.

The proposed planning reforms

Proposed reforms to the NSW planning system are set out in a White Paper and two Exposure Bills – the Planning Bill and the Planning Administration Bill. The White Paper contains six areas of reform:

- (1) Delivery culture;
- (2) Community participation;
- (3) Strategic planning;
- (4) Development assessment;
- (5) Infrastructure; and
- (6) Building regulation and certification.

Building regulation and certification is a component of the planning system in which accredited public and private certifiers certify building and subdivision works throughout the building life cycle, from design through construction to ongoing compliance for the life of a building. The White Paper contains a broad suite of reforms, only some of which are included in the Exposure Bills. **[2.1]**

The NSW building industry regulatory framework

The NSW building industry regulatory framework is much broader than building regulation and certification as contained within the NSW planning system. Key statutes include the *Building Professionals Act 2005*, *Environmental Planning & Assessment Act 1979* and *Home Building Act 1989*. Several different bodies administer the legislation, including the Building Professionals Board (BPB), NSW Fair Trading and Division of Local Government. **[3.1.1]**

Professionals involved in the building industry are either licensed by one of several NSW administrative bodies or are self-regulated. The administrative bodies include the BPB, NSW Fair Trading and WorkCover.

In November 2012, the National Occupational Licensing Authority was established in accordance with the Intergovernmental Agreement for a National Licensing System for Specified Occupations. This Authority will implement the National Occupational Licensing System over the next couple of years. The System will licence a range of professionals including those involved in the building industry. **[3.1.2]**

Proposals for a NSW Building Commission

The NSW building industry has been subject to numerous reviews over the past ten years. Several reviews have concluded that the NSW building regulatory framework is fragmentary and complex. These reviews, together with several submissions to the planning reforms, have recommended establishment of a NSW Building Commission to provide a coordinated and centralised administrative system for all key building industry groups. **[3.2 & 4.6.1]**

Overview of building regulation and certification in the current and proposed planning systems

Aspects of building regulation and certification were first combined with the planning system by the *Environmental Planning & Assessment Amendment Act 1997*. Under the current system, the *Environmental Planning & Assessment Act 1979* (EP&A Act) provides for building and subdivision certificates to be issued by accredited public and private certifying authorities (or certifiers). The certificates permit works to be undertaken and/or certify compliance with regulatory requirements. Certifiers are accredited by the Building Professionals Board, which is established under the *Building Professionals Act 2005*. The White Paper reforms seek to address criticism of the system that has arisen due to issues with the quality and safety of buildings. **[4.1 & 4.2]**

The EP&A Act sets out the responsibilities for ‘certifying authorities’ and ‘principal certifying authorities’. Certifying authorities may issue complying development certificates, construction certificates and compliance certificates. Certifying authorities may also issue occupation certificates and subdivision certificates where they have been appointed as the ‘principal certifying authority’ for a building or subdivision work. Principal certifying authorities inspect building and subdivision work during the course of construction to ensure it complies with regulatory requirements. **[4.3.1]**

In order to reduce consumer confusion regarding the roles of different certifying authorities, the White Paper proposes to combine the roles of ‘certifying authority’ and ‘principal certifying authority’. In the new system, building certifiers will certify building works and subdivision certifiers will certify subdivision works. **[4.3.2]**

Four ‘Part 4A certificates’ may be issued by certifiers under the EP&A Act: construction certificates; compliance certificates; occupation certificates; and subdivision certificates. Certifying authorities are also able to issue complying development certificates under the Act. Complying development certificates constitute a development consent for complying development, a class of development that can be addressed by specified predetermined development standards. The new system retains these certificates, with some modifications, and introduces a new certificate to replace construction certificates for subdivision work – a subdivision works certificate. **[4.4 & 4.5]**

The Building Professionals Board (BPB) accredits council certifiers and private certifiers under the *Building Professionals Act 2005* (the BP Act). Key roles for the BPB include administration of an accreditation scheme, investigation of

...
complaints against certifiers, and auditing and disciplining certifiers. The BP Act and the BPB's accreditation scheme are also currently being reviewed. [4.6]

Proposed reforms contained in the Exposure Bills

The Exposure Bills only make provision for some of the White Paper reforms. The most significant of these provisions are contained in the Planning Bill. These include the following:

- The inclusion of a new legislative object relating specifically to building;
- Merger of the roles of certifying authority and principal certifying authority;
- Provision for building certifiers and subdivision certifiers;
- Planning approval will focus on planning issues, with building issues left to the construction approval stage;
- Provision for a new subdivision works certificate;
- Development subject to a complying development certificate will no longer need a construction certificate and/or subdivision works certificate;
- Occupation certificates will not be issued on an interim basis;
- Instead of an occupation certificate, a compliance certificate (completion) will be issued for completed building work that cannot be occupied (e.g. a swimming pool);
- A reduced liability period for residential building work from ten years to six years; and
- A building manual addressing safety and compliance issues will be prepared and maintained for certain buildings. [5.0, 6.0 & 7.0]

Proposed reforms only set out in the White Paper

The White Paper reforms not included in the Exposure Bills will presumably be addressed in either the regulations or the concurrent review of the *Building Professionals Act 2005*. The most significant of these include the following:

- Expansion of the Building Professionals Board's accreditation scheme to include additional occupations involved in building design and construction, including those professionals who design, install, commission and maintain critical building elements;
- Increased support for certifiers on complex building matters through peer review and enhanced decision support;
- Strengthened controls on certifiers through stronger disciplinary guidelines, increased auditing and increased obligations to report non-compliant building work;
- Improved application, assessment, determination and issue of complying development certificates and construction certificates; and
- Increased certification of building work throughout the building life cycle to ensure compliance with the development consent. [5.0, 6.0 & 7.0]

1. INTRODUCTION

The NSW planning system is multi-faceted, dealing with a range of matters including heritage, transport, infrastructure, environmental protection and building regulation and certification. Established under the *Environmental Planning & Assessment Act 1979*, the system is widely held to have become too complex and unwieldy in recent years. Following an election commitment to overhaul the NSW planning system, in July 2011 the NSW Coalition commenced the reform process with the announcement of an independent review, to be chaired by two former Members of Parliament – Tim Moore and Ron Dyer. The reform process reached the White Paper stage in April 2013, at which time two Exposure Bills were also released – the Planning Bill 2013 and the Planning Administration Bill 2013. A report setting out stakeholder feedback on the White Paper and Bills will be released by the Government prior to introduction of the Bills in Parliament.

Several general issues with the proposed reforms were identified by stakeholders in their submissions to the Government. These include drafting issues with respect to the Planning Bill 2013, discrepancies between the White Paper and the Exposure Bills and the potential for corruption arising from the proposed arrangements.¹ More recently, local councils have written directly to the Premier regarding the proposed planning legislation. On 3 September 2013, the *Sydney Morning Herald* reported that nine NSW councils have voted to ask the State Government to “start again with its reform of the planning laws”.² On 11 September, Local Government NSW issued a media statement in which the Joint Presidents strongly urge “NSW Premier the Hon. Barry O’Farrell to restore the balance back to the community in his Government’s proposed planning reforms”.³ The Presidents warn that “If Premier O’Farrell does not respond to our letter within the next fortnight as we have requested, it is highly likely that some form of direct action campaign against the legislation will be proposed at the LGNSW Annual Conference next month”.⁴

Building regulation and certification in the planning system is part of the broader NSW building industry regulatory framework. The planning system enables accredited public and private certifiers to certify building and subdivision works at all points of the building life cycle, from design through construction to ongoing compliance for the life of a building. The certificates permit works to be undertaken and/or certify compliance with regulatory requirements. Certifiers are accredited by the Building Professionals Board under the *Building Professionals Act 2005*.

¹ See further the introduction to D Montoya, [NSW planning reforms: sustainable development](#), Briefing Paper 07/2013, 2013

² *SMH*, [Push for state government to revisit planning reforms](#), 3 September 2013

³ Local Government NSW, [Media Release: Local Government NSW demands Premier restore balance back to community in proposed planning reforms](#), 11 September 2013

⁴ *Ibid.*

Proposed reforms to building regulation and certification address numerous aspects of the process with the view to improving the quality and safety of buildings. Only some of the proposed reforms are contained in the Exposure Bills, with the remainder presumably to be addressed in either the regulations or the concurrent review of the *Building Professionals Act 2005*. Key reforms include clarification of the roles and responsibilities of industry participants, an expanded accreditation scheme to cover new building professions, clarification of the purpose and application of each certificate and increased certification through all stages of the building life cycle.

This is the third of four papers being published by the Research Service on the NSW planning reforms. The first two considered sustainable development and infrastructure; the last will focus on decision-making. Commentary on aspects of the proposed planning system not covered in these papers, such as community participation and strategic planning, may be found in an earlier Research Service paper on the Planning Green Paper.⁵

Chapter 2 of this paper contains a short overview of the proposed planning system. A longer summary may be found in Appendix 1. The stakeholders selected to provide a broad cross-section of stakeholder responses to the White Paper and Exposure Bills are identified. Chapter 3 sets out the NSW building industry regulatory framework, of which building regulation and certification in the planning system is a part. It also discusses calls for the introduction of a NSW Building Commission to provide a coordinated and centralised administrative system for the NSW building industry.

Chapter 4 begins with a short history of building regulation and certification in the NSW planning system, from 1997 onwards. A more detailed timeline of key building regulation and certification developments since 1997 may be found in Appendix 2. The Chapter also outlines the current and proposed systems, briefly identifying the roles and responsibilities of certifiers, the types of certificates which may be issued, the nature of 'complying development' and the role of the Building Professionals Board. Stakeholder commentary provided at the end of the chapter concerns general issues with the proposed reforms and the reforms to complying development. Chapters 5 through 7 deal with the most significant of a broad suite of reforms. Each sub-chapter summarises a proposal, together with the problem it is intended to address, identifies whether or not provision is made for the proposal in the Exposure Bills, and finishes with stakeholder commentary. Appendix 3 lists the less significant reforms.

⁵ D Montoya, N Wales and G Griffith, [NSW planning reforms: the Green Paper and other developments](#), Briefing Paper 07/2012, 2012

2. BACKGROUND

2.1 The White Paper and Exposure Bills

On 16 April 2013, the NSW Government released the [White Paper – A New Planning System for NSW](#) and two Exposure Bills – the [Planning Bill 2013](#) and the [Planning Administration Bill 2013](#).⁶ The White Paper sets out the Government's vision for the planning system, to be enacted through the Bills and other statutory instruments. It contains six areas of reform:

- (1) Delivery culture – a new planning culture to set a sound framework for the successful implementation and operation of the new planning system;
- (2) Community participation – increased community participation in the preparation of plans and a statutory Community Participation Charter;
- (3) Strategic planning – increased focus on strategic planning through a hierarchy of evidence based strategic plans: NSW Planning Policies; Regional Growth Plans; Subregional Delivery Plans; and Local Plans;
- (4) Development assessment – a performance based system with five assessment tracks in which emphasis will be placed on code complying development and the use of independent expert decision making;
- (5) Infrastructure – integration of infrastructure planning and provision with the planning process through measures including Growth Infrastructure Plans. The system will also feature increased private sector involvement and simplified infrastructure contributions; and
- (6) Building regulation and certification – reforms to provide a more robust, consistent and transparent building regulation and certification system in order to increase confidence in the quality and safety of buildings.⁷

The proposed building regulation and certification reforms are the subject of this paper.

Building regulation and certification is a component of the planning system in which accredited public and private certifiers certify building and subdivision works, from design through construction to ongoing compliance for the life of a building.⁸ The [Environmental Planning and Assessment Act 1979](#) (EP&A Act) and [Building Professionals Act 2005](#) (BP Act) provide the statutory framework for building regulation and certification in the planning system. The EP&A Act sets out the responsibilities of 'certifying authorities' and 'principal certifying authorities'. Certifying authorities can be the local council, the Minister for Planning & Infrastructure or an accredited private certifier. Certifying authorities are permitted to issue three certificates: complying development certificates; construction certificates; and compliance certificates. A certifying authority may

⁶ See Appendix 1 for a more detailed summary of the NSW planning reforms.

⁷ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.7ff

⁸ *Ibid.*, p.181

also issue an occupation certificate or subdivision certificate where they have been appointed as the 'principal certifying authority' for a building or subdivision work.⁹ Principal certifying authorities inspect building and subdivision work during the course of construction to ensure it complies with regulatory requirements. Certifiers are accredited and regulated by the Building Professionals Board, which is established under the BP Act.

According to the White Paper:

Building regulation and certification have been subject to criticism in recent times. Instances of fire protection system failures and inadequate maintenance, common building defects including waterproofing and fire safety non compliance, and mistakes made by some accredited certifiers have reduced the quality and safety of buildings, and consequently, the community's confidence in building regulation and certification.¹⁰

The White Paper contains a broad suite of proposed reforms, only some of which are included in the Exposure Bills. Those not included in the Bills will presumably be addressed in either the forthcoming regulations or the concurrent review of the *Building Professionals Act 2005*. Key reforms contained in the Planning Bill include introduction of a legislative object specifically relating to building, merger of the roles of certifying authorities and principal certifying authorities, removal of building issues from the planning approval stage, provision for a new subdivision works certificate and improved documentation of building work for specific types of buildings in the form of a building manual.

2.1 Stakeholder comments

Each paper in this series on the NSW planning reforms canvasses stakeholder responses to the way in which the White Paper and Exposure Bills deal with the issues relevant to the paper. They do not purport to be representative of all stakeholder positions. Rather, each paper sets out responses from 17 submissions that were selected on 16 July using the following criteria (see Box 1):

- A significant subset of the proposed NSW planning reforms, if not all of them, were discussed in some detail;
- The views expressed were broadly representative of a number of stakeholders; and
- A cross-section of stakeholders was represented, across different interests and perspectives.

This paper also considers submissions from two additional stakeholders with a specific interest in building regulation and certification (see Box 2).

⁹ Private certifiers may only issue a subdivision certificate where allowed in an environmental planning instrument.

¹⁰ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.181

BOX 1: CORE STAKEHOLDERS**Community:**

- Better Planning Network
- NSW Aboriginal Land Council

Environment:

- Environmental Defender's Office NSW
- Nature Conservation Council of NSW & the Total Environment Centre

Governmental:

- Independent Commission Against Corruption
- UrbanGrowth NSW

Heritage:

- Heritage Council of NSW

Industry:

- Housing Industry Association
- NSW Business Chamber & Sydney Business Chamber
- NSW Minerals Council

Legal:

- The Law Society of NSW

Local Government:

- City of Sydney
- Local Government NSW

Planning:

- Planning Institute of Australia

Property/development:

- Property Council of Australia
- Urban Development Institute of Australia
- Urban Taskforce Australia

BOX 2: ADDITIONAL STAKEHOLDERS

- Association of Accredited Certifiers
- Master Builders Association of NSW

In respect to the current briefing paper, of the 17 stakeholders identified in Box 1, four made no comment on building regulation and certification: the NSW Aboriginal Land Council; Heritage Council of NSW; NSW Business Chamber & Sydney Business Chamber; and NSW Minerals Council. For that reason, these stakeholders are not mentioned further in this paper.

3. THE NSW BUILDING INDUSTRY REGULATORY FRAMEWORK

This chapter sets out the NSW building industry regulatory framework with reference to relevant legislation, administrative bodies and licensing bodies. The part of the NSW planning system that falls within this framework is set out in the *Environmental Planning & Assessment Act 1979* (EP&A Act) and the *Building Professionals Act 2005* (BP Act). The EP&A Act provides for building and subdivision certificates to be issued by public and private certifiers. These certifiers are accredited by the Building Professionals Board under the BP Act. Detail on the relevant parts of the current planning system is left for Chapter 4. The chapter finishes by considering recommendations for the establishment of a NSW Building Commission, made in light of findings over the past ten years that the current building industry regulatory framework is fragmentary and complex.

3.1 Regulatory framework

3.1.1 Legislation and administrative bodies

The NSW building industry is regulated by several statutes including the *Environmental Planning & Assessment Act 1979* (EP&A Act) (see Table 1). Several different bodies administer the legislation, including the Building Professionals Board (BPB), NSW Fair Trading and the Division of Local Government. Two non-statutory bodies also play a role in regulating the NSW building industry. The Building Regulations Advisory Council is a committee of industry, government and professional representatives which provides non-binding advice to the Building Systems Unit of the Department of Planning & Infrastructure. Advice relates to technical aspects of building and development including application of the National Construction Code.¹¹ The NSW Building Regulation Working Party is a cross-agency group established to review issues associated with building policy, regulation, systems and agency responsibilities. It also provides recommendations on actions to improve the efficiency and effectiveness of building regulation.¹²

Several statutes, including the Building Professionals Regulation 2007, the EP&A Act and the Home Building Regulation 2004, require building practitioners to construct buildings that comply with the Building Code of Australia. Developed by the Australian Building Codes Board on behalf of all Australian Governments, the [Building Code of Australia](#) (BCA) contains technical provisions for the design and construction of buildings and other structures. The BCA was recently incorporated into the [National Construction Code](#) together with the Plumbing Code of Australia.

¹¹ NSW Building Regulations Advisory Council, [Review of the Planning Act – Green Paper – Submission](#), 26 September 2012

¹² NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.184

Table 1: The NSW building industry regulatory framework¹³

Legislation	Administrative agency	Responsible Minister
<i>Building & Construction Industry Long Service Payments Act 1986</i>	Long Service Corporation	Minister for Finance and Services
<i>Building Professionals Act 2005</i>	Building Professionals Board	Minister for Planning and Infrastructure
<i>Consumer, Trader & Tenancy Tribunal Act 2001</i>	Consumer, Trader and Tenancy Tribunal	Minister for Fair Trading and Minister for Finance and Services
<i>Environmental Planning & Assessment Act 1979</i>	Building Professionals Board	Minister for Planning and Infrastructure
<i>Fair Trading Act 1987</i>	NSW Fair Trading	Minister for Fair Trading and Minister for Finance and Services
<i>Home Building Act 1989</i>	Fair Trading NSW (Home Building Service)	Minister for Fair Trading and Minister for Finance and Services
<i>HomeFund Commissioner Act 1993</i>	NSW Fair Trading	Minister for Fair Trading and Minister for Finance and Services
<i>Local Government Act 1993</i>	Division of Local Government	Minister for Local Government
<i>Work Health and Safety Act 2011</i>	WorkCover NSW	Minister for Finance and Services
<i>Swimming Pools Act 1992</i>	Division of Local Government	Minister for Local Government

3.1.2 Licensing bodies

Most building practitioners are licensed by one of several NSW administrative bodies (see Table 2). The BPB regulates the council and private certifiers who issue certificates under the EP&A Act. The remaining practitioners are self-regulated, including building designers, fire protection services consultants and high-rise residential builders. In contrast, several other States have a single government agency that issues licenses for most if not all building practitioners.

¹³ Adapted from: Building Professionals Board, [NSW Planning Review: Submission from the Building Professionals Board](#), 4 November 2011, p.38

Table 2: Building industry licensing in NSW¹⁴

Accreditation body	Occupation
Building Professionals Board	<ul style="list-style-type: none"> • Building surveyors, some engineers, land surveyors and hydraulics services consultants to issue a range of certificates under the EP&A Act and carry out periodic inspections of building work • Council and private certifiers
NSW Fair Trading	<ul style="list-style-type: none"> • Builders and tradespeople. Licenses include: bricklaying, carpentry, fencing, flooring, painting, structural landscaping, wall and floor tiling and waterproofing • Owner-builders
Self-regulated	<ul style="list-style-type: none"> • A range of sub-trades • Building designers • Disability access consultants • Fire protection services consultants • High-rise residential builders • Some engineers (by the National Engineering Registration Board of Engineers Australia)
WorkCover	<ul style="list-style-type: none"> • Certificate of competency issued for conducting demolition, asbestos or site safety work

In 2008, the Council of Australian Governments (COAG) agreed to develop a national trade licensing system as part of the [National Partnership Agreement to deliver a Seamless National Economy](#). In 2009, NSW signed up to the [Intergovernmental Agreement for a National Licensing System for Specified Occupations](#). In 2012, the National Occupational Licensing Authority (NOLA) commenced operations under the [Occupational Licensing National Law Act 2010](#) (National Law).¹⁵ Commencing in 2014, NOLA will implement the National Occupational Licensing Scheme (NOLS) in two waves. Wave 1 occupations are:

- property occupations (excluding conveyancers and valuers);
- electrical occupations;
- plumbing and gasfitting mechanics; and
- refrigeration and air-conditioning occupations.¹⁶

¹⁴ Adapted from: Ibid., pp 8 & 46

¹⁵ The [Occupational Licensing National Law \(NSW\)](#) is applied as a law of NSW by the NSW [Occupational Licensing \(Adoption of National Law\) Act 2010](#)

¹⁶ As of September 2013, [NSW Fair Trading](#) is in the middle of a consultation process regarding the [Decision Regulation Impact Statements](#) for the Wave 1 occupations.

Wave 2 occupations are:

- building occupations;
- conveyancers; and
- valuers.¹⁷

3.2 Proposals for a NSW Building Commission

The NSW building industry has been subject to numerous reviews, the most recent of which include the following (see further Appendix 2):

- The 2010 Fire Protection Systems Working Party [review](#);
- The ongoing [review](#) of the *Local Government Act 1993*;
- The ongoing [review](#) of local government compliance and enforcement;
- The ongoing [review](#) of the *Home Building Act 1989*;
- The ongoing [review](#) of the *Building Professionals Act 2005* and the proposed [Better Buildings Model](#);
- The ongoing [review](#) of Strata & Community Title legislation; and
- The ongoing planning [reforms](#).

Several reviews over the past ten years have concluded that the NSW building regulatory framework is complex. As a result, a number of parties have recommended establishment of a NSW Building Commission. The 2002 Joint Select Committee on the Quality of Buildings found that the NSW building industry regulatory framework was fragmentary. The Committee recommended that:

- A **Home Building Compliance Commission** (hereafter the Commission) be established forthwith to oversight home building regulation in New South Wales. The Commission is to be separate from the Department of Fair Trading and responsible directly to the Minister for Fair Trading.
- The Commission's functions are to include:
 - i) builder and other practitioner licensing, disciplining and auditing, including private certifier registration and auditing;
 - ii) industry practitioner licensing;
 - iii) establishing and maintaining industry-wide registries;
 - iv) establishing a front desk for consumer building complaints and disputes;
 - v) policy advice and development;
 - vi) liaising with industry players; and,

¹⁷ National Occupation Licensing Authority, [About us](#), no date [online – accessed 11 September 2013]

vii) maintaining high level of practitioner skills and qualifications.¹⁸

The 2007 Legislative Council inquiry into the operations of the Home Building Service made a similar recommendation:

That the NSW Government examine ways to improve co-ordination in building industry regulation, including the establishment of an independent building commission.¹⁹

In November 2011, the Building Professionals Board (BPB) made a submission to the Independent Review of the NSW planning system in which it noted that the regulation of building practitioners in NSW is fragmented. According to the BPB:

The absence of a single regulatory body has [contributed] to ongoing problems in the industry, including:

- accountability and liability of builders and other building practitioners
- quality of building outcomes
- cost and efficacy of consumer protection measures
- confidence of investors and builders
- consistency of regulation.²⁰

The BPB argued that:

A building commission would allow the NSW government to deliver:

- a 'one stop shop' for consumers and industry
- a single integrated agency to oversee and lead the industry
- greater confidence in building and investing in NSW
- consistency in building control and regulation
- improved building quality and industry outcomes
- continued professional development and training.²¹

The BPB also noted that several Australian jurisdictions have Building Commissions, including Victoria and Western Australia.²²

In September 2012, the Building Regulations Advisory Council made similar observations in its submission to the Planning Green Paper:

¹⁸ NSW Joint Select Committee on the Quality of Buildings, [Report Upon the Quality of Buildings](#), July 2002, p.viii

¹⁹ Legislative Council General Purpose Standing Committee No. 2, [Inquiry into the operations of the Home Building Service](#), December 2007, p.xv

²⁰ NSW Building Professionals Board, [NSW Planning Review: Submission from the Building Professionals Board](#), 4 November 2011, p.37

²¹ Ibid., p.37

²² Ibid., Attachment 2

It is also considered essential that a Building Commission, or similar agency, be established to administer a new building act including other associated statutes such as the Building Professionals Act, to provide a coordinated and better regulated and administered system across all key industry groups. One glaring dichotomy from a property owner or occupier's perspective is how their home is treated depending on whether they live in a house or an apartment; an issue that will only grow as a greater number of people move to higher density living.

The current disjointed system involving several government departments and agencies responsible for the regulation, licensing and accreditation of the construction sector is ineffective to achieve a sound and coordinated system of building control for the State. A Building Commission would also be effective to deal with future federal government initiatives regarding common national building regulatory systems including national licensing.²³

In November 2012, Bruce Collins QC handed down the findings from his independent inquiry into construction industry insolvency in NSW. Recommendation 1 of the inquiry was as follows:

The New South Wales Building and Construction Commission

A) That the NSW Government conduct a cost benefit analysis to establish whether to proceed with recommendation 1B.

B) If the cost benefit analysis demonstrates that the overall benefits outweigh the costs, that the NSW Government establish a separate autonomous statutory authority entitled the "NSW Building and Construction Commission" with the sole responsibility for control and regulation of all aspects of the building and construction industry.²⁴

In the commentary on the recommendation, Collins observes:

This recommendation is not driven by any reflexive approach to the setting up of a controlling body as a suggested panacea for all the problems in the industry. The justification for the recommendation is the inescapable conclusion that a Building and Construction Commission is the only way through which appropriate reforms may be instituted, implemented and monitored. The Inquiry's primary recommendations, that is those upon which the Government may confidently depend for a reduction of insolvencies in the industry, are those which are set out in recommendations two, three, four, five and six below. These recommendations are not capable of being effectively implemented unless they fall within the responsibility of a body such as the NSW Building and Construction Commission. There is no other convenient Government department, agency or authority which could assume the responsibility for these reforms, nor one which has the necessary expertise to do so. Only a fully integrated organisation will do the job properly. Other States and Territories

²³ NSW Building Regulations Advisory Council, [Review of the Planning Act – Green Paper – Submission](#), 26 September 2012, p.2

²⁴ Bruce Collins QC, [Independent Inquiry into Construction Industry Insolvency in NSW](#), Final Report, November 2012, p.351

have established similar bodies.²⁵

Recommendations 2 to 6 were as follows:

Recommendation 2: All building and construction under the one roof

Recommendation 3: A licensing system for all

Recommendation 4: Financial health checks

Recommendation 5: Discipline, complaints and standards

Recommendation 6: The Construction Trust

Recommendation 2 is particularly relevant to the matter at hand, namely recommendations for the establishment of a NSW Building Commission. With regards to recommendation 2, Bruce Collins contended that:

There is a strong case to be made to consolidate the [administrative and regulatory] functions that currently exist into the one body.²⁶

The list of agencies, departments, boards and instrumentalities identified in the Collins report for amalgamation into one commission include the BPB and NSW Planning.²⁷

Despite this and other similar recommendations, the White Paper planning reforms only focus on building regulation and certification matters as they relate to the EP&A Act and the roles and responsibilities of the BPB.

²⁵ *Ibid.*, p.351

²⁶ *Ibid.*, p.352

²⁷ *Ibid.*, p.352

4. OVERVIEW OF BUILDING REGULATION AND CERTIFICATION IN THE CURRENT AND PROPOSED PLANNING SYSTEMS

This chapter sets out the broad framework of building regulation and certification in the current and proposed planning systems. Following chapters deal with the significant number of detailed reforms in the White Paper and Exposure Bills, together with relevant stakeholder commentary.

This chapter begins with a brief history of the introduction of building regulation and certification into the NSW planning framework. Amendments in 1997 to the *Environmental Planning & Assessment Act 1979* (EP&A Act) merged building and subdivision controls with the planning regime and established a private certification scheme in which accredited certifiers may issue building and subdivision certificates. The broad framework in both the current and proposed systems is the same: building and subdivision certificates are issued by public and private certifiers who are accredited by the Building Professionals Board. These certificates include complying development certificates, which constitute a development consent for complying development under both the EP&A Act and the Planning Bill 2013. Stakeholder commentary provided at the end of the chapter deals with general issues concerning the proposed reforms and with proposed reforms to complying development.

4.1 History of reforms

Following a White Paper process, some aspects of building regulation and certification were first combined with the planning regime by the [Environmental Planning & Assessment Amendment Act 1997](#) (see Appendix 2).²⁸ Two key reforms were introduced. Building and subdivision controls were removed from the *Local Government Act 1993* and *Local Government Act 1919* and integrated into Part 4 of the EP&A Act 1979 in order to create a single legislative framework for “the control of development, building, demolition and subdivision aspects of a project”.²⁹ The purpose was to allow for applicants to:

... make a single application covering all the components of a development project, have the land-use, subdivision, building and demolition components assessed concurrently and obtain one decision, a development consent, on the project.³⁰

The second reform was the introduction of a private certification scheme in order to “generate competition and increase choice in the assessment process”.³¹ Under the Act, private certifiers were allowed to issue Part 4A certificates, which include compliance certificates, occupation certificates and

²⁸ Department of Urban Affairs and Planning, *Integrated Development Assessment: White Paper and Exposure Draft Bill – Environmental Planning and Assessment Amendment Bill 1997*, February 1997. See also: S Smith, [Integrated Development Assessment and Consent Procedures: Proposed Legislative Changes](#), Briefing Paper No 9/97, 1997

²⁹ NSW PD, [Environmental Planning and Assessment Amendment Bill](#), 15 October 1997

³⁰ Ibid.

³¹ Ibid.

subdivision certificates, and complying development certificates under section 85 of the EP&A Act.

The NSW Government and several accreditation bodies jointly implemented the private certification scheme, with the accreditation bodies responsible for registering and monitoring certifiers and handling complaints against certifiers. When the scheme was introduced it was administered by four accreditation bodies. In 2002, the Department of Planning took over administration of that part of the scheme administered by the Building Surveyors and Allied Professions Accreditation Board; this was owing to concerns about the administration and management of complaints and disciplinary duties.³²

A 2002 NSW Joint Select Committee inquiry found that the NSW building regime was “complex, messy and poorly understood by building practitioners as well as consumers”.³³ The Committee recommended increased Government regulation of building practitioners and an expanded accreditation system to include council building surveyors. In response, in 2004 the Government established the Building Professionals Branch in the Department of Infrastructure, Planning and Natural Resources.³⁴ In 2007, the Branch was replaced by the Building Professionals Board (BPB) under the *Building Professionals Act 2005* and the Building Professionals Regulation 2007. The BPB assumed regulation of all private certifiers under the Building Professionals Board Accreditation Scheme. In March 2010, the Building Professionals Amendment (Accreditation of Council Employees) Regulation 2010 expanded the scheme to accredit council certifiers.

4.2 Purpose of the planning reforms

Chapter 8 of the White Paper contains a broad suite of proposed building regulation and certification reforms. These reforms aim to improve the quality and safety of buildings. Five key changes are proposed:

- Accreditation of additional occupations involved in building design and construction such as designers, specialist engineers, fire protection system installers and inspect/test technicians, energy efficiency designers and access consultants and other relevant professions;
- Mandatory certification of specified building aspects including the design, installation and commissioning of critical building systems and elements;
- Improved levels of documentation through all stages of the building life cycle, including the requirement for a building manual which will include key building information;
- Increased support for certifiers on complex building matters through peer review and enhanced decision support; and

³² Building Professionals Board, [Accrediting certifiers in NSW](#), August 2010

³³ NSW Joint Select Committee on the Quality of Buildings, [Report Upon the Quality of Buildings](#), July 2002, p.ii

³⁴ Building Professionals Board, [Accrediting certifiers in NSW](#), August 2010

- Strengthened controls on certifiers through stronger disciplinary guidelines, increased auditing and increased obligations to report non compliant building work and other controls.³⁵

4.3 Certifiers

4.3.1 Current system

The EP&A Act sets out the responsibilities for 'certifying authorities' and 'principal certifying authorities'. Certifying authorities may issue complying development certificates, construction certificates and compliance certificates. Certifying authorities may also issue occupation certificates and subdivision certificates where they have been appointed as the 'principal certifying authority' for a building or subdivision work.

A certifying authority or principal certifying authority can be the local council, the Minister for Planning & Infrastructure or a private certifier (private practitioners accredited to act as public officials).³⁶ Private certifiers are professionals accredited by the Building Professionals Board to issue any of the five certificates identified above. They may only issue subdivision certificates where provided for under an environmental planning instrument. Private certifiers may also issue strata certificates under strata legislation.³⁷

Principal certifying authorities (PCA) must be appointed prior to the commencement of building or subdivision work (ss 81A & 86). PCAs inspect building and subdivision work during the course of construction to ensure it complies with regulatory requirements. More specifically, the PCA is required to be satisfied that:

- a construction certificate or complying development certificate has been issued for the building or subdivision work over which they have control; and
- the builder is the holder of the appropriate licence and covered by the appropriate insurance where required by the [Home Building Act 1989](#) (s109E).

Prior to issuing occupation and subdivision certificates, the PCA must be satisfied that:

- the critical stage inspections of the building or subdivision work have been conducted; and
- any preconditions required by a development consent or complying development certificate to be met before the issue of an occupation or subdivision certificate have been met (s109E).

³⁵ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.180

³⁶ Building Professionals Board, [Choosing a certifying authority](#), January 2008

³⁷ The [Strata Schemes \(Freehold Development\) Act 1973](#) and the [Strata Schemes \(Leasehold Development\) Act 1986](#).

4.3.2 Proposed system

According to the White Paper, the current distinction between certifying authorities and principal certifying authorities has long been a source of confusion for consumers.³⁸ The Planning Bill merges both sets of responsibilities under the one role of *certifier*.³⁹ The Bill also distinguishes between *building certifiers* and *subdivision certifiers* (cl 8.3). Together, these changes mean that:

- a building certifier will issue the construction approval, in the form of a complying development certificate or construction certificate, inspect the work and issue the relevant occupation or compliance (completion) certificate at the end of the work; and
- a subdivision certifier will issue a subdivision works certificate (a new type of certificate), inspect the work as needed and issue the relevant subdivision certificate at the end of the work.⁴⁰

Both building and subdivision certifiers will be permitted to issue complying development certificates and compliance certificates. See Chapters 5.3.2 and 6.1 of this paper for further discussion of these and related changes, together with stakeholder commentary.

4.4 Certification

Table 3 provides a comparison of certificates in the current and proposed systems. Under the current system, construction, compliance, occupation and subdivision certificates are collectively known as Part 4A certificates, as they are issued under Part 4A of the EP&A Act. Provision for complying development certificates is made in Part 4 Division 3 of the EP&A Act. The certificates permit works to be undertaken and/or certify compliance with regulatory requirements.

Amendments are proposed to each type of certificate. A new type of certificate is also proposed: a subdivision works certificate. Discussion of the proposed changes to certificates, together with stakeholder commentary, may be found in Chapters 5.2, 5.3.1, 5.3.3, 5.3.4, 5.5, 6.2 and 6.5 of this paper.

³⁸ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.187

³⁹ Responsibilities specific to PCAs as provided for in ss 81A, 86 and 109D of the EP&A Act are transferred to certifiers in the new system under clauses 8.4, 8.10 and 8.3 respectively. PCA responsibilities under s109E(3) of the EP&A Act will be conferred on building certifiers in the new system under the regulations (see note under clause 3.1).

⁴⁰ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.187

Table 3: Certificates in the current and proposed planning systems

Certificates	Current system	Proposed system
Complying development certificate	<ul style="list-style-type: none"> Development consent for complying development Specifies conditions of consent 	<ul style="list-style-type: none"> A construction certificate will no longer be required where a complying development certificate applies
Construction certificate	<ul style="list-style-type: none"> Certifies that specific building or subdivision work yet to be commenced will comply with regulatory requirements 	<ul style="list-style-type: none"> No longer applies to subdivision work No longer required where a complying development certificate applies
Compliance certificate	<ul style="list-style-type: none"> Certifies that a specified aspect of a development complies with regulatory requirements, either before work commences or after the work is complete 	<ul style="list-style-type: none"> May be issued in place of an occupation certificate to certify the completion of building work that cannot be occupied (e.g. a swimming pool)
Occupation certificate	<ul style="list-style-type: none"> May be issued for whole or part of building Permits occupation of new building or change in building use May be issued as an interim or final certificate 	<ul style="list-style-type: none"> No longer issued on an interim basis No longer issued for building work that cannot be occupied – such work will be certified by a compliance certificate instead Will certify that building work is consistent with the development consent
Subdivision certificate	<ul style="list-style-type: none"> Authorises the registration of a plan of subdivision under the <i>Conveyancing Act 1919</i> 	<ul style="list-style-type: none"> No limitation on when a private certifier may issue a subdivision certificate
Subdivision works certificate	<ul style="list-style-type: none"> n/a 	<ul style="list-style-type: none"> New certificate – replaces construction certificate for subdivision work Not required where a complying development certificate applies

4.5 Complying development

4.5.1 Current system

Complying development is defined as a class of development that can be addressed by specified predetermined development standards (s76A). Issued under Part 4 Division 3 of the EP&A Act, a complying development certificate constitutes a development consent for complying development. The certificate states that the proposed building will comply with all relevant development standards and regulatory requirements. It may also constitute development consent for subdivision work.

Together with the EP&A Act and Regulation, regulatory requirements for complying development certificates are set out in four State Environmental Planning Policies (SEPPs). Of these, the most significant is the [State](#)

[Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) (the Codes SEPP).⁴¹ The Codes SEPP was introduced to streamline assessment processes by providing exempt and complying development codes that have State-wide application. It contains seven complying development codes, including a General Housing Code, Housing Alterations Code, General Commercial and Industrial Code, General Development Code and Subdivision Code.

4.5.2 Proposed system

The White Paper proposes to increase the amount of development classified as complying development. It sets a target of classifying eighty per cent of all development as either complying development or code assessable development within the next five years, where code assessable development is development of higher impact than complying development. Under the Planning Bill 2013, a certifier is the consent authority for complying development (cl 4.5). A complying development certificate *must* be issued where the proposed development complies with the standards in the development guide provisions of the local plan and any other applicable requirements of the planning control provisions of the local plan or the regulations (cl 4.9).

The most significant legislative change to complying development is the introduction of a variation certificate. Under clause 4.8, the council may issue a variation certificate to allow for variation from a standard or requirement in the development guide provisions of the local plan where the council is satisfied that no significant additional adverse impact on a neighbour will result.⁴²

Three changes to complying development are proposed for which no provision is made in the Planning Bill 2013:

- (1) An expansion of the types of development classified as complying development to include most new dwelling houses and alterations and additions to dwelling houses on land zoned residential, some additions to existing industrial and commercial buildings and some new industrial buildings on land already zoned industrial;⁴³
- (2) Department of Planning and Infrastructure to explore possibility of having councils and accredited planning professionals provide verification upon request that a particular development is complying development;⁴⁴ and
- (3) Complying development will include strata subdivision.⁴⁵

⁴¹ According to Lyster et al 2012, [SEPP No 4 – Development Without Consent and Miscellaneous Exempt and Complying Development](#) and [SEPP No 60 – Exempt and Complying Development](#) have limited application since the introduction of the Codes SEPP. The fourth relevant SEPP is [SEPP \(Temporary Structures\) 2007](#). Lyster et al., *Environmental & Planning Law in New South Wales*, 3rd Ed., 2012. Sydney: The Federation Press.

⁴² NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.128

⁴³ *Ibid.*, p.127

⁴⁴ *Ibid.*, p.128

⁴⁵ *Ibid.*, p.197

4.6 The Building Professionals Board

4.6.1 Current system

The Building Professionals Board (BPB) accredits council certifiers and private certifiers under the [Building Professionals Act 2005](#) (the BP Act). Under the BP Act, the BPB has the following key roles:

- administration of an accreditation scheme, under which it accredits certifiers to issue construction, occupation, subdivision, strata, compliance and complying development certificates;
- promotion and maintenance of standards of building and subdivision certification and design in NSW;
- facilitation of education and training for accredited certifiers;
- investigation of complaints against accredited certifiers;
- discipline and/or prosecution of accredited certifiers;
- audit of accredited certifiers and councils in their certification role to help improve the system and assist the efficiency of certifiers' processes; and
- provision of advice to the Minister of Planning & Infrastructure on policy development and review matters relating to the *Building Professionals Act 2005*.⁴⁶

4.6.2 Proposed system

Reforms are proposed to the support systems and governance of building regulation and certification.⁴⁷ The reforms, none of which are contained in the Exposure Bills, are as follows:

- a [review](#) of the *Building Professionals Act 2005*;
- a review of the Building Professionals Board's [Accreditation Scheme](#);
- improved auditing of accredited certifiers;
- improved education and training for accredited certifiers; and
- the systematic capture of information on the building regulation and certification system.⁴⁸

Further discussion of these reforms may be found in Chapter 8 of this paper.

⁴⁶ Building Professionals Board, [Building Professionals Board](#), May 2010

⁴⁷ These draw upon a 2012 BPB [model](#) for improving building certification in NSW.

⁴⁸ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.201

4.7 Stakeholder comments

4.7.1 General comments

Commentary on the proposed reforms dealt with the general tenor of the proposals as well as with specific issues. Some general commentary is included here, together with commentary related to building regulation and certification issues not covered in the White Paper. Commentary on specific reforms is left for Chapter 5 to 7 of this paper.

All of the stakeholders that commented extensively on the proposed reforms supported them in principle. In the opinion of Urban Taskforce Australia:

Community confidence and building quality will be improved through the implementation of the reforms suggested in the White Paper.⁴⁹

Support for the proposed reforms was often juxtaposed against problems with the current system. For example, the Property Council of Australia stated that:

The existing building regulation and certification system is complex, fragmented and often criticised for poor performance – it needs an overhaul.

We support the general approach the White Paper has taken to improve building regulation and certification in NSW and its emphasis on getting buildings right from the start.⁵⁰

A number of general criticisms were submitted by stakeholders. The Law Society of NSW expressed concern that:

... while clarification is necessary and desirable, the additional requirements and paperwork may threaten the achievement of a simpler, streamlined process.⁵¹

The Housing Industry Association argued that the proposed reforms lack clarity:

Whilst it is acknowledged that the operation of private certification since its introduction in 1999 has not been without problems, it is concerning to see the persistence to further complicate and redefine terms and processes in an attempt to improve the system, rather than focusing on supporting the role that certifiers play as a 'delegate' of the local council. The paper makes no reference to local government's role in undertaking certification processes and there is no clarity around whether the proposals to introduce new accredited persons, new certification process and documentation requirements will apply consistently across both private and local government certifiers.⁵²

⁴⁹ Urban Taskforce Australia, [Delivering a better planning system for NSW: White Paper](#), 28 June 2013, p.11

⁵⁰ Property Council of Australia, [Delivering on the promise: Submission to the NSW Government's White Paper – A New Planning System for NSW](#), June 2013, p.57

⁵¹ Law Society of NSW, [Environmental Planning & Development Committee submission on A New Planning System for New South Wales – White Paper](#), 28 June 2013, p.10

⁵² Housing Industry Association, [Submission by the Housing Industry Association to the White](#)

The Property Council of Australia made a similar argument, contending that “the majority of these proposals are not yet fully developed and lack essential details”.⁵³ It identified three particular areas in need of clarification:

Recommendation Work with industry – including developers and building owners – to:

- **develop definitions for ‘complex buildings’ and ‘critical building systems and elements’**
- **determine how the Chapter 8 proposals should apply to different types of building work i.e. small-scale office fit outs vs. construction of new buildings**
- **determine how the Chapter 8 proposals should apply to different asset types i.e. residential vs. commercial [emphasis in original].**⁵⁴

The Property Council also submitted that, due to the White Paper’s lack of detail:

... the regulations should be publically exhibited and subject to a full Regulatory Impact Statement before they are adopted as part of the new planning system.⁵⁵

Several observations were made concerning the impact of the proposed reforms on particular stakeholders. With regards to the involvement of certifiers and other professionals in the new planning system, the Housing Industry Association explained that:

It is important to recognise that many of the suggested amendments to add more people and more certification into the process are reliant on there being willing and able professionals to take on these roles. Unless these changes are mandated, and other certification pathways under the Local Government Act removed, such as those that continue to allow engineers to operate outside the Part 4A certification system, there is likely to be a reluctance from building professionals to participate in the new system. Their involvement also relies on cost effective insurance being available to cover the types of certificates that are being proposed, in some cases for professions with no formal qualifications in place.⁵⁶

Local Government NSW argued that the proposed reforms may involve substantial additional regulatory costs for councils:

An issue that councils have had with the complying development provisions is that the resultant increase in privately certified work may significantly increase councils’ regulatory role, to ensure that the community is not disadvantaged by

[Paper: A New Planning System for NSW](#), 28 June 2013, p.8

⁵³ Property Council of Australia, op. cit., p.12

⁵⁴ Ibid., p.59

⁵⁵ Ibid., p.57

⁵⁶ Housing Industry Association, op. cit., p.9

some private certifiers failing to address their concerns and legitimate expectations. There appear to be no mechanisms for councils to fund this impost on their regulatory role and these costs may not be able to be adequately funded from councils' current revenue sources. Where enforcement action is necessary (e.g. orders, fines, court action and physical rectification), councils expend significant resources resolving regulatory planning issues without resorting to 'formal' regulatory action. Councils need to be able to recover costs of enforcement action, and suitable cost recovery mechanisms should be made available (either from the landholder, proponent, private certifier or other appropriate source (e.g. state fund)) to compensate councils in circumstances where a matter is resolved informally. LGNSW notes that Section 47 of the Planning Administration Bill makes provision for councils to recover the costs of entry and inspection of premises by an investigation officer. We submit that Section 47 be amended to provide for councils to recover costs in respect to the carrying out of *all* regulatory functions.⁵⁷

Some stakeholders identified building regulation and certification issues not addressed in the White Paper. The Nature Conservation Council of NSW & the Total Environment Centre argued that the financial nexus between developers and certifiers must be broken because of the "risk of bias, undue influence and unethical practices".⁵⁸ The Better Planning Network agreed with this position. They also argued that "no private certification should be permitted in Heritage Conservation Areas or in relation to developments that would impact on State or locally listed heritage items".⁵⁹

A number of additional building regulation and certification reforms were put forward by stakeholders. The Planning Institute of Australia argued for the expansion of certification in the planning system:

PIA has suggested in previous submissions that certification should be expanded to any quantitative and objective criteria in any of the assessment tracks. Certifiers should hold Certified Practising Planner (CPP) accreditation (for quantitative and objective development criteria) or Building Practitioners Board (BPB) accreditation (for quantitative and building/BCA criteria).

In the case of the complying and code assessment tracks certification would enable construction to proceed. Quantitative and objective components of the merit assessment track could be certified as part of the first element of the assessment (the other being the merit assessment by the consent authority). Those elements that may be certified are zoning and numerical guidelines such as building height, setbacks, floor area etc. Once certified, the consent authority must accept the certified information.⁶⁰

⁵⁷ Local Government NSW, [Submission to the Planning White Paper and Exposure Bills](#), June 2013, p.47

⁵⁸ Nature Conservation Council of NSW & the Total Environment Centre, [Charting a New Course: Delivering a Planning System that Protects the Environment and Empowers Local Communities](#), Submission on the White Paper – A New Planning System for NSW, June 2013, p.34

⁵⁹ Better Planning Network, [Submission on the White Paper: A New Planning System for NSW and Associated Planning Bills](#), 27 June 2013, p.12

⁶⁰ Planning Institute of Australia, [A New Planning System for NSW: White Paper](#), Submission by

The Urban Development Institute of Australia also argued for an expansion of certification in the planning system, although in a direction different to that proposed by the Planning Institute of Australia:

While in essence the delivery of a development can be categorised into either building or subdivision, there are many building projects which rely on the construction of significant civil engineering works. It is these works that are not adequately covered in the proposed reforms.

Currently, the development industry is experiencing difficulties in the delivery of civil works as a result of certification requirements.

As a solution, the NSW Government should consider the introduction of an Infrastructure Certifier. The position would sit alongside the role contemplated in the New Planning System of Building Certifier, and would merge with the role of Subdivision Certifier.

The role of the Infrastructure Certifier would be to:

- Issue Subdivision and Infrastructure Works Certificates associated with building developments
- Inspect the works as required by Inspection and Test Plans suited to the works being undertaken
- Issue Infrastructure Compliance Certificates (ICC) at the satisfactory completion of the infrastructure works associated with Building Works
- Issue Subdivision Certificates (SC) for works arising from approved subdivision developments

UDIA NSW contends that this would significantly improve efficiencies in the delivery of civil works and result in reducing the time delays that currently occur.⁶¹

The Master Builders Association of NSW discussed the relationship between building regulation and certification in the planning system and other aspects of the NSW building regulatory framework. With regards to the role of architects, the Association stated that:

The MBA recognises the role of architects in better buildings and suggests that the NSW Architects Registration Board is amalgamated with the Building Professionals Board in order to avoid fragmentation of industry at the administrative level and in order to ensure a cohesive process. Other practitioners such as engineers and fire system designers should also be accredited under a uniform organisation. A regulatory impact process is suggested to assess potential cost increases for the accreditation body, take up by specialist practitioners and availability of insurance cover.⁶²

Planning Institute of Australia (NSW Division), June 2013, p.20

⁶¹ Urban Development Institute of Australia, [The Next Act: UDIA NSW Response to the Planning White Paper](#), June 2013, p.14

⁶² Master Builders Association of NSW, [Submission in response to the Department of Planning White Paper: A new planning system for NSW](#), June 2013, p.16

When discussing compliance issues, the Association also advocated amalgamation of existing regulatory and administrative functions:

If a robust licensing/accreditation structure is in place, then inappropriate behaviour would be more easily investigated and remedied. Accredited certifiers and builders are currently under the jurisdiction of separate agencies. Communication, auditing, data collection, enforcement and compliance could be better achieved under a united co-ordinating authority.⁶³

Local Government NSW made a similar recommendation when commenting on the administration of building regulation and certification:

The Building Professionals Board has been unable to effectively deal with the issues associated with private certification, and there may be value in considering the merits of a building commission model for the NSW planning system.⁶⁴

4.7.2 Complying development

The proposed increase in the amount of development classified as complying development will effectively increase certification in the planning system. Contrasting opinions were expressed with regards to the target of classifying eighty per cent of all development as either complying development or code assessable development within five years. On the one hand, several stakeholders argued that there is no evidentiary basis for the claim that eighty per cent of developments may be assessed as either complying development or code assessable development. For example, the Nature Conservation Council of NSW & the Total Environment Centre submission stated:

... the assumption that 80% of development in NSW is low impact development everywhere, has no evidentiary base. The types of development listed in the White Paper as examples of complying development and code development include industrial and commercial buildings, residential apartments, townhouses and villas, and subdivision of land (pages 126-130, White Paper). These types of development cannot be said to be genuinely low impact development.⁶⁵

In addition to this argument, the Better Planning Network also contended that:

Complying and code assessable development must be prevented in 'environmentally sensitive areas' (this term needs to be defined in the Planning Bill), within Heritage Conservation Areas, in the immediate vicinity of any heritage item, or within places in respect to which Councils or the Minister have placed Interim Heritage Orders under Section 25 of the Heritage Act, to allow for proper identification and assessment of heritage impacts [emphasis in original].⁶⁶

⁶³ Master Builders Association of NSW, op. cit., p.17. The Association made the same recommendation when discussing mandatory building inspections (p.22).

⁶⁴ Local Government NSW, op. cit., p.50

⁶⁵ Nature Conservation Council of NSW & the Total Environment Centre, op. cit., p.27

⁶⁶ Better Planning Network, op. cit., p.10

On the other hand, several stakeholders supported the eighty per cent target. The Master Builders Association of NSW submission says:

Setting a target to achieve 80% of complying or code assessment approvals is important. There needs to be commitment and accountability to achieve the target.⁶⁷

Opinions were divided about the introduction of a variation certificate for complying development to allow for variation from a standard or requirement in the development guide provisions of a local plan. The stakeholders who supported the proposal raised queries as to how it would work in practice. The Planning Institute of Australia observed that:

There seems to be a potential overlap between complying development with a variation certificate granted under section 4.8 and code assessment development. For example if the complying development guidelines and the development assessment code both contain provisions for dwelling houses, with the former being more onerous or prescriptive than the later, then a variation to a complying development standard could potentially transform a dwelling that is complying development into a dwelling that is otherwise identified as code assessment development. This would result in a development being approved as complying development that has the same shape and form as the code assessable form of development.⁶⁸

The Housing Industry Association made suggestions for refining the process of issuing variation certificates:

Section 4.8 (4) indicates that councils who receive applications for complying development certificates will be able to issue a variation certificate without an application being made. It is considered that this variation could create a disincentive to applicants to choose between a private certifier and a council when lodging an application.

The process to prepare a complying development application should be consistent regardless of the intended consent authority. The process should focus on stimulating the applicant to identify a non-compliance in design [so that they may] ... lodge an application with a full understanding that a variation certificate is required. The process should not promote the applicant preparing plans without consideration of the code, and then placing the consent authority in the position of having to check the plans and advise an applicant that there is a non-compliance. Of course this may happen from time to time, but it should not be promoted as the preferred model.

A simple amendment to require the applicant to identify that an application requires a variation certificate on the application form would address this issue.

It is also considered appropriate that where the consent authority is a council, they must be required to issue a variation certificate in the same form as a private certifier and this information should be captured in the performance

⁶⁷ Master Builders Association of NSW, op. cit., p.12

⁶⁸ Planning Institute of Australia, op. cit., p.20

monitoring.⁶⁹

The Property Council of Australia said that they were concerned:

... to see that such variations require councils to agree that the variation will '*not have any significant additional adverse impacts on development on the surrounding land*' (Section 4.8(2)).

We are encouraged by the proposed test to be applied for a variation certificate particularly as it relates to commercial and industrial development – as well as the deemed issue of a certificate if not granted within the time period specified.

However, ultimately this is a matter at the sole discretion of the consent authority – and will require strict performance monitoring to test if the system is working as proposed.⁷⁰

In contrast, the City of Sydney, Environmental Defenders' Office of NSW and Independent Commission Against Corruption all disagreed with the idea of variation certificates, arguing that it is incompatible with the logic of complying development. As articulated by the City of Sydney:

Allowing non compliances with complying development is likely to actually encourage applications under the complying development track that do not comply. If non compliances are to be allowed to be considered, clear guidance needs to be provided to all involved, particularly private certifiers, as to what constitutes a minor variation to a standard.

The City's recommendation is that development that fails to comply with complying development standards should be dealt with as code assessable development in order to ensure that certainty and transparency in the system is maintained as much as possible for all stakeholders.⁷¹

The Independent Commission Against Corruption argued that the proposal reduces clarity in the proposed system:

Some aspects of the proposed planning system are not clear or simple. The new system creates complexity and confusion by allowing developments to be approved that do not comply with the stated requirements ...

The proposed system provides for the issuing of variation certificates for complying development if a non-compliance "is not likely to cause any significant additional adverse impact on development on the surrounding land." The idea that non-compliant proposals can still be approved within the complying development stream undermines the purpose and stated meaning of this assessment pathway.⁷²

⁶⁹ Housing Industry Association, op. cit., p.9

⁷⁰ Property Council of Australia, op. cit., p.44

⁷¹ City of Sydney, [NSW Planning System White Paper and Draft Exposure Bills: Submission to the Department of Planning and Infrastructure](#), 28 June 2013, p.102

⁷² Independent Commission Against Corruption, [Submission Regarding a New Planning System for NSW \(White Paper and Accompanying Bills\)](#), June 2013, p.3

The Commission also considered that the proposal did not contain objective and measurable outcomes, an administrative feature required to limit the potential for corrupt conduct in the planning system:

The quantification of the assessment criteria contained in the draft legislation also requires further consideration. The criterion for the issuing of variation certificates for complying development is vague and consequently dependent upon the perspective of the assessor.⁷³

⁷³ *Ibid.*, p.2

5. PROPOSED REFORMS: IMPROVING BUILDING REGULATION AND CERTIFICATION

The matters considered in this chapter generally relate to the regulation and certification of the *design* and *approval* stages of building and subdivision work. The chapter begins with consideration of a proposed building-specific legislative object. Each following sub-chapter summarises a significant proposal from Chapter 8.1 of the White Paper, identifies whether or not provision is made for the proposal in the Exposure Bills, and finishes with stakeholder commentary. Appendix 3 summarises the other proposals of Chapter 8.1.

5.1 A new building-specific legislative object

A key legislative proposal is the inclusion of a building-related object in the Planning Bill, specifically the promotion of:

- (g) health, safety and amenity in the planning, design, construction and performance of individual buildings and the built environment (cl 1.3).

In contrast, the current EP&A Act does not include a building-related object.

No stakeholders commented directly on this object. However, two made suggestions for additional building-related objects. The Better Planning Network recommended that:

The Objects of the new Act must include the promotion of quality of life, residential amenity, local character and a high quality built environment [emphasis in original].⁷⁴

The Planning Institute of Australia submitted that:

... an Object on design quality is required, such as:

- *Promote well designed, high quality places and buildings* [italics in original].⁷⁵

5.2 Better quality building design and an expanded Building Professionals Board Accreditation Scheme

<p>Problem:</p> <ul style="list-style-type: none"> • There are no requirements about who can prepare building design plans, apart from residential flat buildings under SEPP 65. There are also no requirements as to who can design building services, such as air handling systems and fire protection systems 	<p>Proposals:</p> <ul style="list-style-type: none"> • Plans will be prepared and certified by appropriately qualified persons for complex buildings, and critical building services and elements • Accredited building designers, along with registered architects, will be responsible for preparing plans for more complex building types and will have to sign off their designs
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⁷⁴ Better Planning Network, op. cit., p.4

⁷⁵ Planning Institute of Australia, op. cit., p.7

	<ul style="list-style-type: none"> • With regard to critical building services and elements, accredited professionals will issue a compliance certificate to certify compliance with relevant requirements of the Building Code of Australia (BCA) and other standards • The Building Professionals Board will expand its accreditation scheme to include new professional occupations
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The Exposure Bills make no provision for these proposals.

In principle support for an expanded certification scheme was offered by many stakeholders. When expressing its support, the Master Builders Association of NSW also identified problems particular to builders that the proposed reforms would address:

Builders commonly become de facto designers, having to fill in 'gaps' in detail which are left off plans. Then builders have to absorb additional costs created by tricky designs or bring a design back to the budget a client is willing to pay. Consequently, the MBA has consistently supported the Building Designers Association move to require licensing or accreditation for building designers. Greater critical detail on plans and accreditation would improve confidence for consent authorities to approve development in a timely manner and has the potential to avoid problems during construction, compliance and final/defects stages. The ability of practitioners to obtain Professional Indemnity Insurance to cover the design and certification will be a key factor in the success of this proposal.⁷⁶

The City of Sydney supported the proposal and called for retention of the provisions of SEPP 65:

Since their introduction, *State Environmental Planning Policy No. 65 - Design Quality of Residential Flat Development* (SEPP 65) and the Residential Flat Design Code (RFDC) have made a significant contribution to the improved design quality of apartment buildings and their acceptance as a housing choice in a more compact city. SEPP 65 must continue in the new planning system as a NSW Planning Policy to ensure that processes facilitating good design practices are maintained. This includes the requirement that the design quality is certified by a registered architect at various stages through the approvals and construction process. Penalties for undertaking these design certification steps diligently should be introduced.⁷⁷

Some criticisms were made of the proposal. The Housing Industry Association explained that the proposal underestimates the complexity of the building process:

The Paper suggests that changes will be introduced to mandate appropriately qualified persons to design certain building types. The bold statement that this

⁷⁶ Master Builders Association of NSW, op. cit., p.16

⁷⁷ City of Sydney, op. cit., p.72

will ensure all matters under the BCA, planning approvals and the like will be considered is not a true reflection of the building process. Arguably large building projects already engage such competent persons, and yet, a large numbers of the concerns targeted in these reforms relate to large building projects.

There is no single, simple answer to resolving the complexity of the certification process for large projects.⁷⁸

Several stakeholders noted that increased construction costs would be a likely outcome of the proposal. For example, the Law Society of NSW stated:

It is not clear how this will work in practice. If a further compliance certification is to be introduced, the level of detail, in plan form, required for practitioners to sign off on their designs will create additional costs and further slow or delay the approval process. Consideration needs to be given the relevant standard(s) and the development of guidelines to assist designers.

The Committee also notes that plans have to be certified and submitted before work starts on critical aspects such as structural, mechanical, electrical and fire systems through prescribed standard conditions. It is suggested that standard conditions will need to be developed and consideration given to consistency between the form, the type and number of conditions a certifier can impose.

Given the extent of proposed compliance certificate certification, a flow on effect will no doubt be increased insurance premiums and increased construction costs (passed on to the builder/owner).⁷⁹

The Property Council of Australia suggested one means by which costs could be minimised under the proposal:

This certification should also sign off that the plans are not inconsistent with the development consent. This would remove the need to engage an additional accredited consultant to certify that the construction plans comply with the development consent (see White Paper proposal 12 below). Combining these certifications would reduce red tape and create a more streamlined and cost effective construction approval process.⁸⁰

Expansion of the BPB's accreditation scheme to include other building professionals was strongly supported. As articulated by the Property Council of Australia:

Improvements to certification must also be supported by the accreditation of additional professionals involved in the design, construction and ongoing maintenance of buildings.

One of the major problems with the current certification system is that building

⁷⁸ Housing Industry Association, *op. cit.*, p.9

⁷⁹ Law Society of NSW, *op. cit.*, p.10

⁸⁰ Property Council of Australia, *op. cit.*, p.64. See section 5.5 of this paper for discussion of White Paper proposal 12.

certifiers cannot rely on the integrity of certificates provided by unregulated professionals. Certifiers often receive certificates from installers of building systems that declare the system has been installed correctly, when it has not.

Improving the integrity and enforceability of these certificates – along with the liability of the professionals who provide them – is the key to better building quality and safety.⁸¹

Some stakeholders supported the proposal because it will improve accountability in building regulation and certification. The Association of Accredited Certifiers said:

The AAC believes that accreditation of other professionals, along with clarifying the role of the Certifier, will improve the quality of buildings and return the accountability to where it belongs.⁸²

A few recommendations were made for ensuring an effective expansion of the accreditation scheme. The City of Sydney highlighted the importance of ‘significant penalties’ for breaches of the scheme.⁸³ The Association of Accredited Certifiers said with regard to insurance:

The AAC supports the accreditation of additional professionals for the installation and commissioning of certain building systems and elements, and for some matters, by licensed builders/tradespersons, as long as ... these individuals are appropriately insured. Without proper insurance, court cases will follow the insurance and this will lead back to the Accredited Certifier. Therefore, mandatory insurance for anyone providing certificates is an absolute essential requirement.⁸⁴

5.3 Better approval of development

5.3.1 Planning approvals

<p>Problem:</p> <ul style="list-style-type: none"> • Consent authorities sometimes require too much building detail at the planning approval stage, potentially delaying development and adding to costs 	<p>Proposals:</p> <ul style="list-style-type: none"> • Planning approvals will be refocussed on planning matters. • Building certifiers will address building requirements when issuing construction certificates or complying development certificates, and may accommodate minor changes
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The White Paper argues that planning approval should be refocussed on planning matters, leaving building matters to be addressed by a construction

⁸¹ Property Council of Australia, op. cit., p.61

⁸² Association of Accredited Certifiers, *Submission by the Association of Accredited Certifiers to the White Paper – A new planning system for NSW*, 28 June 2013, p.11

⁸³ City of Sydney, op. cit., p.143

⁸⁴ Association of Accredited Certifiers, op. cit., p.6

approval.⁸⁵ Under the current and proposed systems, construction certificates function as a construction approval. The Planning Bill provides that complying development certificates will also function as a construction approval. It therefore appears that, while the White Paper proposes establishment of a separation between planning approval and construction approval in general, this will not apply to complying development as complying development certificates will function as both a planning approval (cl 1.8(a)) and a construction approval (note on cl 4.1(2)).⁸⁶

This proposal was generally supported. As explained by the Planning Institute of Australia:

There needs to be a statutory constraint on consent authorities from requesting detailed design and construction specifications at the development assessment stage. This is an unnecessary expense for applicants that may prefer to test the waters first and delay applying for a construction certificate until, or if, development consent is granted. Although this is an intention under the current Act, PIA members report that some consent authorities continue to require upfront construction stage details.⁸⁷

The Property Council of Australia agreed that this proposal would reduce delays in the development assessment process but warned that:

... care must be taken in the implementation of this proposal to ensure that delays currently experienced at the development approval stage are not simply shifted to the construction approval stage.⁸⁸

While in principle support for the proposal was expressed by the City of Sydney, it drew attention to problems that may be encountered if it were applied to development involving *existing* buildings:

The general aim of this section (i.e., to limit the amount of technical building-related details required for development applications) is supported for entirely new development where compliance with the Building Code of Australia (BCA) is relatively straightforward, however development involving alterations to existing buildings and/or change of building use (change in BCA classification) can often be complex in terms of the extent of impact on buildings and compliance with today's standards, including fire safety.

It will therefore be necessary for the new Act and/or regulations to address the special complexities and needs of existing building stock undergoing change.

⁸⁵ These matters will be addressed under clauses 4.7, 4.10, 4.12 & 8.6, as well as the regulations as provided for in Schedules 4 & 8.

⁸⁶ The note on clause 4.1(2) states: A complying development certificate for the erection of a building or the subdivision of land also authorises building work or subdivision work without the need for a construction certificate or subdivision works certificate under Part 8. Any other development consent for the erection of a building or the subdivision of land generally does require such a certificate.

⁸⁷ Planning Institute of Australia, *op. cit.*, p.20

⁸⁸ Property Council of Australia, *op. cit.*, p.58

This may include a requirement for some technical details such as BCA reports to be lodged with the development applications for existing buildings to allow consent authorities to determine the extent of any building upgrade that may be required (currently dealt with under clauses 93 and 94 of the EP&A Regulation).

The City is of the view that if BCA matters are not dealt with at the building design and development application stages (including aspects relating to changes to existing buildings) there is a risk that approved development may require formal amendments (at a later stage) if changes are required to comply with the BCA and any conditions of development consent.⁸⁹

The Association of Accredited Certifiers and the Planning Institute of Australia expressed support for the proposal that building certifiers will be able to assess building plans and accommodate minor changes when issuing construction certificates or complying development certificates without the need for related development consent modifications. In contrast, the City of Sydney held some reservations regarding this aspect of the proposal:

Lack of suitable details at the DA [development assessment] stage may result in inconsistencies between the approved consent drawings and construction certificate drawings. This will lead to uncertainty for building certifiers when determining that a CC [construction certificate] is generally in accordance with a concept approval and could lead to delays in issuing applications for CCs within the expected 10 day approval period.⁹⁰

5.3.2 Construction approvals – clarifying the roles of certifiers

<p>Problem:</p> <ul style="list-style-type: none"> • Consumers find the separation of roles between certifying authorities and principal certifying authorities confusing 	<p>Proposals:</p> <ul style="list-style-type: none"> • The role of principal certifying authority will be abolished • A single building certifier or subdivision certifier will oversee a development
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Under the Planning Bill, building and subdivision certifiers are able to issue complying development certificates and compliance certificates (clauses 4.9 and 8.15).⁹¹ Clause 8.3 sets out functions specific to each. Building certifiers will:

- Issue construction certificates for building work;
- Carry out inspections of building work;
- Issue occupation certificates;
- Prepare and provide building manuals to building owners; and
- Carry out any other function conferred on the certifier under this or any

⁸⁹ City of Sydney, op. cit., p.137-38

⁹⁰ Ibid., p.138

⁹¹ See section 4.3 of this paper for an overview of certifiers in the current and proposed planning systems.

other Act.

Subdivision certifiers will:

- Issue subdivision works certificates for subdivision work;
- Carry out inspections of subdivision work;
- Issue subdivision certificates; and
- Carry out any other function conferred on the certifier under this or any other Act.

The Planning Bill also transfers the roles of the principal certifying authority to the building certifier (cl 8.4) and the subdivision certifier (cl 8.10). These two clauses set out the requirements to be implemented prior to the commencement of building work and subdivision work respectively. These include requirements that the certifier:

- Notify the consent authority and the council of his or her appointment; and
- Notify the person having the benefit of the development consent of any inspections that are required to be carried out in respect of the work.

These proposals were generally supported. For example, the Association of Accredited Certifiers stated that it:

... agrees with the clarification of the role of the principal certifying authority. It is confusing to the community and the process should be streamlined.⁹²

With regard to the role of the subdivision certifier, the Association stated:

The AAC **does not agree** that the role of the Subdivision Certifier engagement must be for the whole of the process.

At present, a Certifier may be engaged for three separate components, CC [construction certificate] issue, civil works compliance verification, subdivision certificate issue. With the exclusion of privately issued subdivision certificates due to EPI restriction, the proposed combination of roles would effectively rule out any opportunity for the use of a private Subdivision Certifier.

Additionally, the current ability to separate roles provides flexibility to the process. Presently, a CC can be issued privately where local government resources are limited or budgetary constraints dictate a timely approval for works to commence. A number of major developers and others already use the separation of roles, engaging private certifiers for CC issue and works compliance verification, and then the local council (as PCA) for the subdivision certificate [emphasis in original].⁹³

⁹² Association of Accredited Certifiers, op. cit., p.3

⁹³ Ibid., p.5

While agreeing with the proposals, the City of Sydney also submitted that:

The single term of ‘building certifier’ is appropriate, however other certifiers such as practitioners involved in component certification should have a specific and distinctive title to differentiate them from the principal ‘building certifier’.⁹⁴

5.3.3 Certification to enable construction

<p>Problem:</p> <ul style="list-style-type: none"> • Lack of confidence in the approval of building work 	<p>Proposals:</p> <ul style="list-style-type: none"> • Construction approvals to be accompanied by clearer information, including information on alternative solutions and building services and systems • The minimum information required to demonstrate compliance with regulatory requirements will be specified • Requirements applying to construction approval application, assessment, determination and issuance will be improved • Plans will have to be certified before work starts on critical building systems • Location surveys will be required through prescribed conditions of consent • Building certifiers will be able to impose limited conditions on construction approvals • The building certifier’s role in assessing proposed alternative solutions and other matters will be specified • Requirements will be clearer for dealing with buildings of doubtful BCA classification • Construction approvals will include additional information such as a brief description of approved alternative solutions
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The Planning Bill provides for two types of construction approval: construction certificates and complying development certificates. Of the proposed changes to construction certification listed above, only the sixth is included in the Planning Bill. Clause 4.12 allows building certifiers to impose additional conditions on complying development certificates in accordance with the regulations. The remaining proposals will presumably be addressed in the regulations.

Many stakeholders provided in principle, if qualified, support for all of the proposals. For example, the Association of Accredited Certifiers stated:

Essentially the proposed changes are supported by the AAC, but are to be carefully assessed to ensure that the requirements are not too specific and are

⁹⁴ City of Sydney, op. cit., p.138

tailored to the size and types of development.⁹⁵

Qualified support was also offered for particular proposals. The City of Sydney supported the proposal that construction approvals will be accompanied by clearer information while drawing attention to the potential for increased costs:

The suggested enhancements to the level and quality of detail to be lodged with CC [construction certificate] and CDC [complying development certificate] applications through the new Act and regulations should produce better quality buildings through improvements in the assessment process. There will however be a financial cost associated with the proposed changes. The regulations should therefore include appropriate schedules setting out the extent of information to be provided based on the size and type of building.⁹⁶

The Property Council of Australia made several recommendations on this point:

- develop pro forma construction and complying development certificate application forms
- develop a checklist detailing information to be shown on plans and included in building specifications for compliance with the BCA, development standards and the development consent.⁹⁷

The City of Sydney supported the proposal that plans for critical building systems will have to be certified prior to the commencement of work:

The proposal to specify the type of information (drawings and specifications) to be lodged prior to work commencing is also supported, however consideration needs to be given to systems and processes for building certifiers to receive and approve amended details during construction as construction issues arise.⁹⁸

Several stakeholders supported the proposal for certifiers to impose limited conditions on construction approvals. While expressing their support, the City of Sydney also put forward a suggestion to further streamline the construction approval process:

The ability for certifiers to impose prescribed or limited conditions with CC and CDC approvals is supported. Consideration should also be given to allow building certifiers to make limited annotations on approved construction drawings to clarify aspects relating to conditions of consent and/or BCA matters. This will assist in streamlining the approval process.⁹⁹

⁹⁵ Association of Accredited Certifiers, op. cit., p.3

⁹⁶ City of Sydney, op. cit., p.138

⁹⁷ Property Council of Australia, op. cit., p.64

⁹⁸ City of Sydney, op. cit., p.138

⁹⁹ Ibid., p.139

5.3.4 Compliance with the Building Code of Australia

<p>Problem:</p> <ul style="list-style-type: none"> • Lack of confidence in building compliance with the Building Code of Australia (BCA) 	<p>Proposals:</p> <ul style="list-style-type: none"> • Building certifiers will prepare a compliance report to demonstrate compliance with the BCA • Introduction of NSW-specific technical codes for unique and unusual buildings, structures and related development • Building work will not have to achieve performance criteria additional to the BCA • Compliance with the BCA will be able to be set aside for certain prescribed matters
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The Exposure Bills make no provision for these proposals.

While opinions were mixed, these proposals were generally not supported. The first proposal, namely the requirement that building certifiers will have to prepare a compliance report to demonstrate compliance with the BCA, received tentative support from the City of Sydney and the Property Council of Australia. The Property Council drew attention to several issues with the proposal:

- This proposal appears to overlap with the new requirement to certify plans for complex buildings and critical building services and elements, which will certify that the plans comply with the BCA (see White Paper proposal 1 above). Any duplication of certification must be avoided as it will add unnecessary red tape and cost to development.¹⁰⁰
- Preparation of a BCA compliance report must not be an onerous obligation that delays the issuing of a construction approval. Nor should it require the engagement of an additional consultant, resulting in extra cost to the developer or building owner.
- Many building certifiers currently use a standard BCA checklist to identify the relevant BCA provisions that a development must comply with. A BCA compliance report should not require more than this.
- It is unclear whether a BCA compliance report could be used to trigger a building upgrade or how buildings that cannot by design comply with the BCA will be dealt with. This must be clarified.¹⁰¹

The Master Builders Association of NSW opposed the proposal, stating that:

This has the potential to cause more complexities and delays. It is preferable to reduce the levels and costs of documentation.¹⁰²

The proposal to introduce NSW-specific technical codes for unique and unusual buildings was not supported by the Association of Accredited Certifiers:

¹⁰⁰ See section 5.2 of this paper for discussion of White Paper proposal 1.

¹⁰¹ Property Council of Australia, op. cit., p.65

¹⁰² Master Builders Association of NSW, op. cit., p.18

The AAC is concerned about the introduction of an ability to make NSW specific technical codes for matters not addressed by the Building Code of Australia, the BCA and COAG for that matter are attempting to create a standard set of codes and standards nationally, the NSW variations to the BCA are quite extensive as they stand, and the risk is that this will further extend the variations.

Also if this is undertaken then these codes must be legislated as legal documentation to ensure that they can be relied upon as part of the regulations.¹⁰³

The proposal that building work will not have to achieve performance criteria additional to the BCA attracted opposing views. The Property Council of Australia supported the proposal:

Prescribing construction conditions that limit the ability of consent authorities to impose overly onerous requirements on developers and building owners – for example, requiring compliance with standards that are more stringent than the BCA and other technical standards – is a good first step.¹⁰⁴

On the other hand, the City of Sydney opposed the proposal:

The proposal to limit a consent authority's ability to require a standard of building design and construction which exceeds the BCA is not supported. As an example, the BCA requires a minimum balustrade height of 1.2 m which may need to be higher in some licensed venues such as nightclubs to reduce the risk of death or injury from falls. Allowing higher standards above the BCA when supported by an appropriate cost to benefit analysis may allow rapid responses to issues that could otherwise take years to resolve.¹⁰⁵

The proposal that compliance with the BCA may be set aside for certain prescribed matters was opposed by the Housing Industry Association:

This is not consistent with the NSW government's commitment under the Intergovernmental Agreement for the Australian Building Codes Board and the Building Code of Australia. The Paper does not make it clear whether this approach would be in lieu of no controls for certain aspects or for additional conflicting controls, but it presumed to be the later (sic). Again this is not [consistent] with the IGA and should be managed through the process for state variations to the BCA.¹⁰⁶

¹⁰³ Association of Accredited Certifiers, op. cit., p.12

¹⁰⁴ Property Council of Australia, op. cit., p.58

¹⁰⁵ City of Sydney, op. cit., p.139

¹⁰⁶ Housing Industry Association, op. cit., p.9

5.4 Relying on specialist advice

<p>Problem:</p> <ul style="list-style-type: none"> Limited assistance is available for certifiers on complex and potentially high risk technical matters 	<p>Proposals:</p> <ul style="list-style-type: none"> Peer review, by specialist panels and qualified individuals, and referee services will be established for certain complex building matters The role and input of fire engineers in approvals will be enhanced, and other experts will be able to provide certification on complex and technical matters Improved guidance and advice for practitioners
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The Exposure Bills make no provision for these proposals.

Opinions were divided on these proposals. The Master Builders Association of NSW supported the first and third proposals:

A strong protocol and training for certifiers and on-going support would benefit the new scheme. The ability for certifiers to seek technical advice on disputed technical matters would be helpful. As recognised in the White Paper, certifiers need to rely on certification from other specialists and cannot be expert in all fields. Shared responsibility is required.¹⁰⁷

The City of Sydney also commented on the topic of responsibility when expressing support for the first proposal:

The use of peer review panels for complex building design matters is supported however such a system must be appropriately supported and funded to ensure an effective system is sustained. The certification process associated with peer reviewed projects must also address potential liability issues for panellists.¹⁰⁸

In contrast, the Association of Accredited Certifiers and the Property Council of Australia did not support mandatory peer review for certain complex building matters. They did however support *optional* peer view. The Association stated:

The AAC does not agree with mandatory peer review, however we do agree with having a support network when needed. At present, those Certifiers who need assistance do already seek assistance from their peers. If a formal panel is created it must be available only when needed.¹⁰⁹

With regard to the proposal that other experts will be able to provide certification on complex and technical matters, the Association noted that:

Any requirement for Accredited Certifiers to pay for specialist services is a

¹⁰⁷ Master Builders Association of NSW, op. cit., p.17

¹⁰⁸ City of Sydney, op. cit., p.141

¹⁰⁹ Association of Accredited Certifiers, op. cit., p.2

conflict of interest. All payments must be made by the applicant only.¹¹⁰

5.5 Compliance with the development approval

<p>Problem:</p> <ul style="list-style-type: none"> • Lack of confidence that what is approved for construction is consistent with the development consent 	<p>Proposal:</p> <ul style="list-style-type: none"> • Building certifiers will be able to call on the expertise of relevant professionals to certify construction plans are consistent with the development consent. This will be mandatory for complex building types and non-mandatory for small, low scale developments
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The White Paper states that template compliance reports will be developed and tested with stakeholders before they are finalised. The Exposure Bills make no provision for this proposal.

In principle support was offered for this proposal. The City of Sydney observed that it would be “particularly beneficial for large and complex development”.¹¹¹ Together with the Law Society of NSW, the City of Sydney also noted that this proposal would add to the costs of development:

... this will add costs to the CC [construction certificate] and CDC [complying development certificate] assessment processes which will be passed on to the building owner/developer. It is expected that this requirement, if imposed by a building certifier to determine if construction is not inconsistent with the development consent (due to lack of detail at the DA stage), will add to the cost of an application.¹¹²

Several other issues with the proposal were identified. The Property Council of Australia warned of the possibility of duplication with other White Paper proposals:

This certification should form part of the proposed certification of plans for complex buildings and critical building services and elements (see White Paper proposal 1 above). Engaging an additional consultant to provide this certification will increase development costs and red tape, without adding any measurable benefit to the system.¹¹³

The Law Society of NSW drew attention to the need for clarification of the process involved in ascertaining consistency with the development consent, asserting that:

The test as it presently stands is subjective. It may be appropriate for the Building Professionals Board ("**BPB**") to provide a checklist for accredited

¹¹⁰ Ibid., p.4

¹¹¹ City of Sydney, op. cit., p.140

¹¹² Ibid., p.140

¹¹³ Property Council of Australia, op. cit., p.66. See section 5.2 of this paper for discussion of White Paper proposal 1.

certifiers. Case law on this particular issue is complex and evolving. Recent amendments to the current Act have not adequately addressed this problem.¹¹⁴

The Society also identified an issue with the current system that will need to be addressed in the new system:

... owners and builders will continue to "amend" building design and construction after an approval is given, more often than not, without the knowledge of the Principal Certifying Authority ("PCA"). It is not until the PCA conducts a mandatory inspection (assuming one is booked) that the PCA becomes aware of all or any variations. Owners and builders need to take greater responsibility and be held liable for variations.¹¹⁵

When making a similar observation, the Association of Accredited Certifiers also offered a recommendation:

Builders or anyone participating in building structures without approval must have higher penalties as currently unauthorised works is common industry practice. A strong deterrent must be made to ensure all participants [in] the building cycle ... follow rule[s] and regulations.¹¹⁶

¹¹⁴ Law Society of NSW, op. cit., p.10

¹¹⁵ Ibid., p.10

¹¹⁶ Association of Accredited Certifiers, op. cit., p.4

6. PROPOSED REFORMS: BETTER CONSTRUCTION COMPLIANCE

The matters considered in this chapter generally relate to the regulation and certification of the *construction*, *completion* and *occupation* stages of building and subdivision work. Each sub-chapter summarises a significant proposal from Chapter 8.2 of the White Paper, identifies whether or not provision is made for the proposal in the Exposure Bills, and finishes with stakeholder commentary. Appendix 3 summarises the other proposals of Chapter 8.1.

6.1 Clear roles and responsibilities

<p>Problem:</p> <ul style="list-style-type: none"> • Roles and responsibilities of certifiers, consent authorities, councils and builders are not always clear to members of the community and other practitioners 	<p>Proposals:</p> <ul style="list-style-type: none"> • The roles and responsibilities of building certifiers, consent authorities, councils and builders will be clearly defined • Building certifiers will be required to report unauthorised building work to councils and to assist councils in undertaking relevant investigative work
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In addition to the distinction made between building and subdivision certifiers (see section 5.3.2 of this paper), several other parts of the Planning Bill attribute roles and responsibilities to certifiers, consent authorities, councils and builders. Clause 4.5 identifies the consent authority for each development assessment track. Clause 8.4 requires the appointment of a principal contractor for a building work by the person having the benefit of the development consent. Where any residential building work is involved, the principal contractor must be the holder of a contractor licence.

Clause 8.24 provides for directions to be issued by certifiers for:

- non-compliance with a condition of a development consent, construction certificate or subdivision works certificate; or
- any matter that would prevent the issuing of an occupation certificate or a subdivision certificate (cl 8.24(1)).

A private certifier *must* issue a notice to the person responsible for carrying out the relevant aspect of the development if they become aware of any non-compliance. Where the certifier is a council, they *may* issue a notice if they become aware of any non-compliance (cl 8.24(2)). If a direction issued by a private certifier is not complied with within the time specified in the notice, the certifier is to alert the relevant consent authority to the fact (cl 8.24(3)).

Clause 8.24 limits the proposal in the White Paper that building certifiers will be required to report unauthorised building work to councils to the situation where a direction is not complied with within the time specified in the notice. No provision is made for building certifiers to assist councils in investigating unauthorised building work.

Aside from the Housing Industry Association, strong in principle support was

offered for the proposal to clarify the roles and responsibilities of certifiers, councils, consent authorities and builders. In contrast, the Association argued that the reforms may prolong confusion over roles:

The Department and Building Professionals Board have sought to achieve this outcome on many occasions in the past and yet confusion appears to continue. It is suggested that the adhoc amendments to these roles over the last decade have actually been part of the problem and avoiding further changes to the process could indeed allow all parties to better understand their current roles and improve the level of cooperation.¹¹⁷

The Housing Industry Association also noted that the White Paper does not acknowledge the current problems in the working relationship between councils and certifiers:

Building certification is not specifically referred to in the Paper as part of the discussion on culture change. Yet, the history of disharmony between local government and private certifiers has been a significant reason for the ongoing uncertainty around the defined roles. Recent evidence suggests this disharmony has reduced, however the damage done in the intervening period to both community and industry sentiment and the reluctance of many private certifiers to make decisions based on the risk of complaints, audits and disciplinary actions, thereby opting out of the system, or referring applicants back to local councils, will be difficult to undo.¹¹⁸

Several stakeholders observed that further clarification of roles and responsibilities was needed in the draft legislation. Local Government NSW stated that:

... while some roles and responsibilities have been defined in the *Planning Bill*, LGNSW does not consider that the dual roles that councils play in the area of building certification have been addressed [namely, certifier and regulator].¹¹⁹

The Property Council of Australia argued that:

The draft legislation and regulations should clearly state that when a private accredited certifier is used, the council should only act as a record keeper and not review or oversee the work of the building certifier.¹²⁰

The Association of Accredited Certifiers also commented on clarification of the roles of certifiers and councils:

Accredited Certifiers employed in the private sector have restricted powers and it is important that this is acknowledged in the legislation and that councils clearly understand their role in the enforcement of legislation.¹²¹

¹¹⁷ Housing Industry Association, op. cit., p.9

¹¹⁸ Ibid., p.10

¹¹⁹ Local Government NSW, op. cit., p.48

¹²⁰ Property Council of Australia, op. cit., p.67

¹²¹ Association of Accredited Certifiers, op. cit., p.5

The Law Society of NSW supported the proposal that building certifiers will be required to report unauthorised building work, stating:

It should be mandatory that an accredited certifier or PCA issue a Notice of Intention if unauthorised building works are observed. Given this is currently a discretionary power, accredited certifiers and PCAs generally notify the council or consent authority of the anomalies and it is for the council or consent authority to investigate and issue Notices/Orders.¹²²

6.2 Certifying the installation and commissioning of critical building systems

<p>Problem:</p> <ul style="list-style-type: none"> • Lack of confidence in the certification of the installation and commissioning of critical building systems 	<p>Proposals:</p> <ul style="list-style-type: none"> • Installation and commissioning of certain building systems and elements will have to be certified for compliance • Certifiers will accredit fire safety measures • Completed building work will be certified for compliance with the development consent • Expansion of types of professionals accredited to issue certificates, including builders
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According to the White Paper, the purpose of these proposals is to establish a stronger connection between:

... the preparation of building design plans and specifications and the correct installation and commissioning of critical building systems and elements¹²³

The Exposure Bills make no provision for these proposals.

The proposals were generally supported by stakeholders. With regard to the proposed certification of fire safety measures by certifiers, the Master Builders Association of NSW stated that the proposal:

... has merit and is supported. The fire services sector comprises a number specialist services (e.g. design, hydrant, sprinkler, detection systems) which are mostly unregulated, with the exception of fire service plumbing which is a component of a plumber licence through NSW Fair Trading.¹²⁴

Local Government NSW supported certification of the compliance of completed building work with the development consent, noting that it will address the ongoing problem with:

... the liberal interpretation adopted by many certifiers ... in relation to the

¹²² Law Society of NSW, op. cit., p.10

¹²³ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.193

¹²⁴ Master Builders Association of NSW, op. cit., p.19

definition of 'not inconsistent with consent'.¹²⁵

Stakeholders supported expansion of the accreditation scheme to include other professionals such as builders. While doing so, the Association of Accredited Certifiers emphasised the importance of adequate insurance for building professionals:

The AAC supports the accreditation of additional professionals for the installation and commissioning of certain building systems and elements, and for some matters, by licensed builders/tradespersons, as long as for any of these individuals are appropriately insured. Without proper insurance, court cases will follow the insurance and this will lead back to the Accredited Certifier. Therefore, mandatory insurance for anyone providing certificates is an absolute essential requirement.¹²⁶

Several stakeholders commented on the proposal to accredit builders to issue certificates. The Housing Industry Association said:

The Paper refers to 'accredited builders' for certifying the installation and commissioning of critical building systems. However no definition of accredited builders is provided in the Paper. Clarification is sought as to whether this reference and the suggested requirements for critical building systems will apply to residential building work, and if so, which types.¹²⁷

The City of Sydney supported certification by builders, stating:

It is also agreed that builders should play a greater role in certifying various elements and aspects of building work. Persons (builders) certifying work must however be appropriately accredited and be held accountable for their actions which currently is not the case. Greater accountability could occur through providing councils with the power to de-list certifiers who do not report breaches of planning approvals, or who contribute to breaches, or who fail to supply information to an affected party.¹²⁸

With regards to the accreditation of builders, the Master Builders Association of NSW warned of the potential for duplication with existing licensing schemes:

As the review focusses on reducing duplication a new accreditation process should not duplicate what is already undertaken through licensing. Procedures require review for efficiency and to ensure not too much pressure is placed on practitioners. The White Paper is unclear as to whether builders will remain 'licensed' or rather be 'accredited'. Will builders be required to undertake a further accreditation process? Which authority will be responsible? A proposal to expand accreditation could conflict with the National Occupational Licencing Agenda which seeks to reduce and consolidate the number of occupational licenses.¹²⁹

¹²⁵ Local Government NSW, op. cit., p.49

¹²⁶ Association of Accredited Certifiers, op. cit., p.6

¹²⁷ Housing Industry Association, op. cit., p.10

¹²⁸ City of Sydney, op. cit., p.143

¹²⁹ Master Builders Association of NSW, op. cit., p.18

6.3 Mandatory building inspections

<p>Problems:</p> <ul style="list-style-type: none"> • Critical stage inspections have been criticised for not including inspections of all issues critical to life safety • Certifiers sometimes only undertake the bare minimum inspections or fail to conduct inspections 	<p>Proposals:</p> <ul style="list-style-type: none"> • Mandatory inspections will be required in accordance with the risks and complexity of a building's design and construction, including inspection of building elements commonly the subject of defects • When conducting mandatory inspections, the building certifier must ensure the building work is consistent with the development consent and complies with the conditions of consent • Building certifiers will document inspections
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Clause 8.3 of the Planning Bill establishes that a function of building and subdivision certifiers will be inspections of work. Clause 8.4 requires the building certifier to notify the person having the benefit of the development consent and the principal contractor of any inspections that are required to be carried out. Clause 8.10 makes the same provision with regard to subdivision certifiers and subdivision works. The Bill does not include provisions relating to the matters that must be subject to a mandatory inspection.

Stakeholders generally supported the proposals. For example, with regard to proposed mandatory critical stage inspections, Urban Taskforce Australia stated:

We fully support the proposal that the critical stage inspection should relate to the risks and complexity of a building's design and construction and that these will include inspections of elements of building work that are commonly the subject of building defects, including fire safety, structure and sound insulation.¹³⁰

The City of Sydney supported this proposal in part, submitting that it needed to be tailored according to building type:

The proposed expansion of the critical stage inspection regime is supported in part including the need for a greater focus on high risk complex buildings. It may be appropriate to review (reduce) the current mandatory inspection regime for Class 1a buildings taking account the proposal for an expansion of the BPB accreditation scheme to capture builders, sub-contractor and component designers.¹³¹

The City of Sydney also recommended that the Government should:

Consider specifying in the regulations the types of development checks that should be carried out when critical stage inspections are undertaken, based on

¹³⁰ Urban Taskforce Australia, op. cit., p.31

¹³¹ City of Sydney, op. cit., p.143

the type and size of a building.¹³²

A related recommendation was put forward by the Master Builders Association of NSW, together with their reasoning:

The intended outcome of critical building inspections must be clearly defined. Superficial inspections cannot properly appraise how the work has been undertaken. Waterproofing is a clear example.

Unless the certifier is present during the entire waterproofing process which is entirely impractical, an inspection can only superficially identify that a waterproofing systems (sic) has been applied. For example, it would be difficult to identify how many coats of film have been applied, the thickness of the film and if bond-breakers have been installed.¹³³

The Master Builders Association also drew attention to duplication in current inspection processes that will need to be addressed in the new system:

Mandatory inspections also create an issue in relation to duplication of process due to the involvement of different agencies applying their own agenda. An example of this is the Managed Builder Program ... Home Warranty Insurance Fund (HWIF) which requires a builder in the program to have certain key areas of work inspected by agents acting on their behalf. This can cover the same work as mandatory inspections, adding to the cost of the project. Cost and duplication could be resolved in establishing a centralised administration to control regulation and compliance within the industry.¹³⁴

With regard to penalties for non-compliance, the Law Society of NSW recommended that:

An offence should be created, or penalties imposed, for any person who does not book a mandatory inspection.¹³⁵

Several stakeholders supported the proposal that building certifiers must ensure the building work is consistent with the development consent as part of the inspection process. The City of Sydney stated:

The proposal to place greater responsibility on building certifiers to ensure compliance with planning approvals during critical stage inspections is supported however the logistics of this, particularly for very large projects, may not be feasible.¹³⁶

¹³² Ibid., p.146

¹³³ Master Builders Association of NSW, op. cit., p.21

¹³⁴ Ibid., p.22

¹³⁵ Law Society of NSW, op. cit., p.11

¹³⁶ City of Sydney, op. cit., p.143

6.4 Managing missed inspections

<p>Problem:</p> <ul style="list-style-type: none"> • Missed mandatory inspections may have significant consequences, including preventing the certifier forming an opinion about whether the work is satisfactory, delaying completion of the work and delaying occupation of the building 	<p>Proposals:</p> <ul style="list-style-type: none"> • Requirements for enabling an occupation certificate to be issued where a critical stage inspection has been missed will be established • When building certifiers do not need to undertake inspections on a development, they will be required to make reasonable inquiries as to the stage the work has reached to ensure the work is on track • The principal contractor will be required to report to the building certifier on the progress reached at certain stages of construction
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The Exposure Bills make no provision for these proposals.

Several stakeholders offered in principle support. The City of Sydney drew attention to the potential costs that may arise as a result of the proposal:

The suggested enhancements to minimise the risk of critical stage inspections being missed is supported however this will add further layers to a certifier's development monitoring and recording functions. This may add costs to certification functions which will be passed on to owners and developers. This needs to be considered in the review of the mandatory inspection provisions.¹³⁷

In the context of expressing its support in principle, the Master Builders Association of NSW also offered some insightful commentary on current certification processes and the relationships between owners, builders and certifiers:

The current process of certification relies upon a great deal of communication between owners, builders and certifiers in relation to the timing of mandatory inspections which can result in missed inspections. Cooperation between the builder and certifier is critical as well as processes to manage inspections. Continuing to discourage missed inspections and unauthorised work is important. It is unclear as to how a means for 'accepting' unauthorised work to allow occupation can be achieved without sending out the wrong message on compliance with consents/conditions.

The current process technically relies upon the owner to pass on the advice of the certifier as to the inspections required on the project. Placing the responsibility and obligation on a layperson creates numerous issues, particularly the possibility of missed inspections. Fortunately, most prudent certifiers also provide such advice directly to the builder. This practical co-operation between the certifier and the builder is fundamentally necessary for example, where and (sic) inspection may need to be re-scheduled due to water

¹³⁷ Ibid., p.145

in footings due to rain. In such circumstances for a builder to go back through the client in such circumstances is totally impractical, however technically should occur.

Despite the builder having no formal engagement with the certifier, the White Paper proposes that where a certifier is not called to undertake inspections, the principal contractor will be required to report to the building certifier on the progress reached at certain stages of construction. While this proposal emphasises the need for a co-operative relationship between the principal builder and the certifier, it is contradictory to current requirements which try to maintain a separation between the builder and the certifier in order to manage suggestions of collusion by certifiers and builders to approve poor work.

It is obvious that the need for a co-operative relationship between the certifier and builder will be paramount in respect of many of the proposals in the White Paper without the need to create superficial barriers in order to create the appearance of minimising collusion between builders and certifiers over non-compliant work.¹³⁸

The Association of Accredited Certifiers opposed the proposal that certifiers will be required to make reasonable inquiries as to the stage a work has reached:

The AAC **does not** support the suggestion that an Accredited Certifier should be responsible for making enquiries on the progress of works. The role of the Accredited Certifier requires clarification, they are not project managers, builders, architects or developers and the responsibility to this issue must rest with the builder [emphasis in original].¹³⁹

6.5 Occupation certificates

Problems:	Proposals:
<ul style="list-style-type: none"> • The existing role for an occupation certificate is unclear • The application of an occupation certificate to stand alone buildings and system modifications is unclear • There is significant confusion over the use of interim occupation certificates • Consumers may incorrectly assume that a building that is subject to an occupation certificate complies with the relevant approvals and with the BCA 	<ul style="list-style-type: none"> • Occupation certificates will be required for a building or portions of a building that can be occupied • A compliance certificate (completion) will certify satisfactory completion for those building parts that cannot be occupied (e.g. a swimming pool) • Clear tests for the issue of occupation certificates and compliance certificates (completion) • Occupation certificates and compliance certificates (completion) will certify the building work is consistent with the development consent • It will be mandatory for some complex building work that the building certifier rely on certification from another accredited professional as to the consistency of the

¹³⁸ Master Builders Association of NSW, op. cit., p.23

¹³⁹ Association of Accredited Certifiers, op. cit., p.7

	<p>development with the development consent</p> <ul style="list-style-type: none"> • New requirements for staged occupation to improve confidence regarding fire safety in relation to partially occupied buildings undergoing building work • An occupation certificate cannot be issued without an application form accompanied by works as executed and schematic plans as prescribed
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The Planning Bill does not make provision for occupation certificates to be issued on an interim basis, as is currently the case in the EP&A Act. Provisions are included in the Bill for several of the reforms proposed in the White Paper:

- Occupation certificates are limited to building work that may be occupied (cl 8.7(1));
- A compliance certificate (completion) will apply to building work that cannot be occupied, such as a swimming pool (cl 8.7(2)(a)); and
- Occupation certificates (cl 8.8) and compliance certificates (completion) (cl 8.2(e)) will certify that the building work is consistent with the development consent or complying development certificate.

Opinions of the proposals were mixed. While agreeing with the intent, the Association of Accredited Certifiers requested further detail on the proposed introduction of a compliance certificate (completion) in place of an occupation certificate for building works that cannot be occupied. In contrast, the City of Sydney opposed the proposal, asserting that:

... introducing two types of certificates for completed works: 'occupation certificate' and 'completion certificate' as contemplated in the White Paper, is considered inappropriate. Introducing two types of forms for different types of buildings/structures will overly complicate matters.¹⁴⁰

The Property Council of Australia opposed the proposal that occupation certificates and compliance certificates (completion) certify that completed building work is consistent with the development consent:

- Consent authorities should be prevented from imposing conditions of development consent that must be satisfied before an occupation certificate can be issued which do not relate to whether the building is fit to occupy.
- We do not support the requirement for a building certifier/accredited person to certify that completed building work is consistent with all conditions of the development consent in addition to the specific preconditions that must be satisfied before an occupation certificate can be issued.
- The construction plans are already required to be certified for

¹⁴⁰ City of Sydney, op. cit., p.145

consistency with the development consent and the building certifier is required to check compliance throughout the construction process.

- This additional requirement is contrary to the principle of trying to establish a more efficient approval process. It will delay the issuing of occupation certificates as Section 96. modification applications are made at the end of the construction process and will increase the potential for disputes and litigation. This will lead to buildings sitting idle where it is not disputed that the building is compliant with the BCA and is safe to occupy.
- Where buildings are not built in accordance with the plans approved under a construction certificate, councils already have several existing remedies, including prosecution, Section 121B orders and injunctions.
- This additional certification of compliance with the development consent is unnecessary red tape.¹⁴¹

With regards to the proposal that an occupation certificate cannot be issued without prior submission of works as executed and schematic plans, the City of Sydney submitted that this should be:

... restricted to larger development only or to development that has undergone significant changes to the approved drawings. This will limit cost impacts on the development sector and property owners.¹⁴²

6.6 Building/subdivision actions

<p>Problems:</p> <ul style="list-style-type: none"> • Certifiers may be legally liable for defective residential building work after a licensed builder ceases to be liable for a breach of statutory warranty under the <i>Home Building Act 1989</i> • Certifiers may be liable for defective work for up to ten years after an occupation certificate is issued, whereas liability for a breach of the statutory warranties is six years for structural defects and two years for non-structural defects under the <i>Home Building Act 1989</i> • Certifiers are increasingly being joined to building actions as a result of the compulsory insurance they hold, whether or not they are at fault 	<p>Proposal:</p> <ul style="list-style-type: none"> • The period in which a building/subdivision action can be commenced will be reduced from ten years to six years for building work covered by the <i>Home Building Act 1989</i>. For other building work, the liability period will remain ten years
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Under section 63 of the [Building Professionals Act 2005](#), accredited certifiers must be indemnified by an insurance policy against any liability to which the accredited certifier may become subject as a result of exercising the functions of a certifier. According to the White Paper:

¹⁴¹ Property Council of Australia, op. cit., p.68

¹⁴² City of Sydney, op. cit., p.145

The Building Professionals Board is currently considering options in relation to the insurance of accredited certifiers as an alternative to professional indemnity insurance.¹⁴³

For residential building work, the Planning Bill changes the period in which a building/subdivision action can be commenced from ten years to six years (cl 8.18(1)(a)). The liability period remains ten years for all other building work (cl 8.18(1)(b)). Clause 8.18 also identifies the time from which the period commences for building and subdivision works.

This proposal was widely supported. However, Local Government NSW noted that the reforms do not address a related problem with the current system:

... where the only person in the whole development process that is being held accountable and is required to hold insurance is the Accredited Certifier (including Council). LGNSW contends that a certifier cannot reasonably take on responsibilities and liabilities of the whole design and construction team and each and every contractor. It is unclear whether the new legislation will bring about any change to address this anomaly.¹⁴⁴

¹⁴³ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.197

¹⁴⁴ Local Government NSW, op. cit., p.48

7. PROPOSED REFORMS: IMPROVING LIFE CYCLE BUILDING PERFORMANCE AND COMPLIANCE

This chapter considers the two proposals contained in Chapter 8.3 of the White Paper: the introduction of a building manual and improved ongoing compliance of existing buildings. Each sub-chapter summarises the relevant proposal, identifies whether or not provision is made for the proposal in the Exposure Bills, and finishes with stakeholder commentary.

7.1 Building manual

<p>Problems:</p> <ul style="list-style-type: none"> • Need to improve the quality and accessibility of key building information for BCA Class 1b-9 buildings • The fire safety schedule has a number of shortcomings, including an inadequate level of information 	<p>Proposals:</p> <ul style="list-style-type: none"> • BCA Class 1b-9 buildings will have one building manual • The manual will reflect the current approved status of the building • Information in the compliance schedule issued with a complying development certificate or construction certificate will inform preparation of a building manual • The manual will replace the fire safety schedule currently required • The manual will include important building information such as fire protection system and alternative solution information, plans, and restrictions relating to management and use that are important to fire and structural safety • The building certifier will prepare the manual and issue it with the occupation certificate • A full copy of the manual will have to be held at the building and by the relevant council • An executive summary of the manual will have to be publicly displayed in a prominent position in the building.
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According to the White Paper, the proposed building manual will “improve the quality and accessibility of key building information for Class 1b-9 buildings (i.e. buildings other than single dwellings and associated buildings such as sheds, garages and carports)”.¹⁴⁵ Building manuals will be issued by the building certifier to a building owner together with the occupation certificate (clauses 8.3(1)(d) and 8.20). The content of the building manual, its application and the roles and responsibilities of key parties will be developed in consultation with relevant stakeholders.

These proposals were generally supported. However, as identified by the Property Council of Australia, a number of key matters still need clarification including:

¹⁴⁵ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.198

... what should be included in the building manual, how it should operate, when it will need to be updated, who should be responsible for its creation and ongoing maintenance, and what the related compliance obligations should be.¹⁴⁶

With regard to the matter of who should create the building manual, the Association for Accredited Certifiers supported the proposal that this would be done by the building certifier. On the other hand, Local Government NSW disagreed, arguing that:

The responsibility of preparing such a manual should rest with the building owner or the applicant for the construction certificate for approval by the building certifier. The provisions of the building manual should place full responsibility for compliance with the building manual upon the owner of the building.¹⁴⁷

Local Government NSW further submitted that:

The provisions must also be practical and achievable and must not place any requirements on councils in relation to the implementation, management, certification or registration of the 'building manual' and its components. The current provisions in *Environmental Planning and Assessment Regulation 2000* for the registration and follow-up of missed, incomplete, inaccurate Fire Safety Statements are unworkable and onerous for Local Government and should not be transferred or incorporated into the 'building manual' or the associated 'Annual Statement' provisions.¹⁴⁸

Clarification was sought by several stakeholders on how the proposed building manual would apply to existing buildings. The Property Council of Australia stated that:

If a building manual is required for all existing buildings, timeframes for compliance will need to be clearly stated in advance. Where certain information about existing buildings does not exist or cannot be found, building owners should not be penalised or required to create new documentation at significant cost. Instead, the building manual should only apply to new and amended works.¹⁴⁹

The Property Council of Australia and Local Government NSW both submitted that the last two proposals were impractical, namely that a hard copy of the manual be always available at the building and with the relevant council, and that an executive summary of the manual be displayed in a prominent position in the building. The Property Council contended that:

The requirement that an executive summary of the building manual be publically displayed in a prominent position in the building is too onerous. Given

¹⁴⁶ Property Council of Australia, op. cit., p.68

¹⁴⁷ Local Government NSW, op. cit., p.49

¹⁴⁸ Ibid., p.49

¹⁴⁹ Property Council of Australia, op. cit., p.69

that a building manual could contain thousands of pages this requirement is impractical and needs further work.¹⁵⁰

Instead, these two stakeholders, with several others, recommended that the building manual be lodged as an electronic document in an online database. For example, the City of Sydney made the following recommendation:

Recommendation 8.3 (b) Investigate the feasibility, effectiveness and benefits to the building certification sector in making building manuals and/or annual fire safety statements available through a centralised database. This must include its operation and upkeep being appropriately funded through standardised regulated fees commensurate with the full cost of administering the registration including the associated follow-up procedures and actions.¹⁵¹

On this point, the Association of Accredited Certifiers suggested that:

... the upload and editing of these documents should only be undertaken by the Accredited Certifier fulfilling the role of the PCA. The permissions and access to view and or request copies of the data collated needs to be carefully controlled so that critical information is not contaminated. Loading, editing and maintaining of documentation should be restricted to the Accredited Certifier who initiated the process. This will maintain transparency and the credibility of information held within the portal (including the building manual).¹⁵²

7.2 Ongoing compliance of existing buildings

<p>Problem:</p> <ul style="list-style-type: none"> • Less than 50 per cent of existing BCA Class 1b-9 buildings must submit an annual fire safety statement 	<p>Proposals include:</p> <ul style="list-style-type: none"> • All essential systems and measures must be maintained, but only prescribed systems will have to be routinely certified • The range and type of measures and features that must be routinely inspected, tested and certified will be amended • Responsibilities of building owners, building managers and tenants will be clarified • The existing fire safety certificate will be divided into two improved documents that: validate the commissioning of fire safety measures; and represent a pledge to meet ongoing compliance responsibilities • The concepts of critical fire safety measures and supplementary fire safety statements will be repealed and substituted by a strengthened compliance monitoring regime • A method for reporting and addressing critical defects will be prescribed and will provide for interim safety measures
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¹⁵⁰ Ibid., p.69

¹⁵¹ City of Sydney, op. cit., p.148

¹⁵² Association of Accredited Certifiers, op. cit., p.12

The Exposure Bills make no provision for these proposals.

In principle support for these proposals was offered by several stakeholders, with commentary focused on perceived issues. The Property Council of Australia warned that:

... measures designed to improve compliance and maintenance should not impose onerous obligations on building owners and increase unnecessary red tape.

Many building owners already have efficient processes and procedures in place to manage building maintenance and compliance.

Additional regulation should not be introduced where industry is able to self-regulate effectively.¹⁵³

More specifically, the Property Council submitted that:

The BPB should also work with building owners to clarify ongoing compliance obligations for fire safety. The proposed new requirement for building owners to pledge they will meet ongoing fire safety compliance obligations is a duplication of existing statutory obligations and is not required.¹⁵⁴

The City of Sydney drew attention to the need for consideration to be given to:

... the role of councils in collecting, registering and administering the annual fire safety statements including the additional workload and costs associated with recording buildings which are currently not registered or annually certified.¹⁵⁵

It also recommended extension of the annual certification process to include verification that:

... the approved use(s) of buildings [is] in accordance with the building manual. This would ensure existing fire safety measures remain appropriate for ... use and help identify any un-authorized use and works which may adversely affect the overall fire performance of the building.

It is further suggested that, in addition to requirements to rectify defective fire safety measures, the annual certification process requires building owners to regularise any unauthorised use or work in the building, (e.g., removal of material stored or placed in fire stairs and unauthorised partitions). This would help reduce the burden on councils to police such matters.¹⁵⁶

¹⁵³ Property Council of Australia, op. cit., p.62

¹⁵⁴ Ibid., p.70

¹⁵⁵ City of Sydney, op. cit., p.147

¹⁵⁶ Ibid., p.147

8. PROPOSED REFORMS: BETTER SUPPORT SYSTEMS AND GOVERNANCE AND TRANSITIONAL MATTERS

Chapter 8.4 of the White Paper contains proposed reforms that are not contained in the Exposure Bills, dealing primarily with the role of the Building Professionals Board (BPB) and its accreditation scheme under the *Building Professionals Act 2005* (BP Act). This chapter summarises the proposed reforms, together with information on transitional matters. This is followed by stakeholder commentary.

8.1 The proposed reforms

The proposed reforms laid out in Chapter 8.4 of the White Paper aim to improve the “governance of the system by regulators and industry”.¹⁵⁷ According to the White Paper, the proposals will be:

... supported through improvements to the accreditation of building and subdivision certifiers, and monitoring of their work and activities, so as to further ensure compliance with building regulation and certification requirements.¹⁵⁸

Six proposals have been made:

- (1) Review of the *Building Professionals Act 2005*: the BP Act is being reviewed in line with the planning legislation and will take into account White Paper proposals such as the expansion of the accreditation scheme to include professionals who will certify the design, installation, commissioning and maintenance of critical building elements;
- (2) Enhanced requirements on accredited certifiers: together with recent improvements to the disciplinary regime for certifiers, the BPB is developing guidelines to illustrate to certifiers the types of behaviour that might constitute unsatisfactory conduct;
- (3) Improved auditing of accredited certifiers: the BPB’s auditing program will be enhanced by the availability of building information in the building manual. Additional resources will also be made available for auditing key community concerns, such as the certification of high risk buildings, and auditing certifiers who have had two or more disciplinary findings against them in a 12 month period;
- (4) Review of the Building Professionals Board’s Accreditation Scheme: a cost benefit analysis of options for expanding the accreditation scheme will be undertaken. Proposals will be developed having regard to advice from the Independent Pricing and Regulatory Tribunal and national initiatives for occupational licensing. Options for professional indemnity insurance for certifiers are being developed;
- (5) Ongoing education and training: the BPB is identifying opportunities for better education and training on critical building work through the review

¹⁵⁷ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.201

¹⁵⁸ *Ibid.*, p.201

of recognised qualifications and its continuing professional development program; and

- (6) Data collection: the systematic capture of building regulation and certification information will support effective audits and review, the monitoring of the system and identifying education and training opportunities.¹⁵⁹

8.2 Transitional matters

The White Paper identifies key elements to be included in a staged implementation program:

- prioritising the changes to be introduced;
- developing clear advice about the changes for practitioners;
- identifying an appropriate transitional period and how to bring other practitioners into the accreditation system;
- preparing a targeted education program for consumers;
- developing templates for new certificates and reports; and
- supporting consent authorities and certifiers in the transition to the changes.¹⁶⁰

8.3 Stakeholder commentary

Stakeholders generally supported the proposals contained in Chapter 8.4 of the White Paper. Related commentary on these proposed reforms may be found in the following sections of this paper:

- 4.7.1 – recommendations for establishment of a NSW building commission;
- 5.2 – expansion of the BPB's accreditation scheme to include designers of buildings and critical building systems;
- 6.2 – expansion of the BPB's accreditation scheme to include professionals who oversee the installation and commissioning of critical building systems; and
- 6.6 – proposed changes in the liability period for certifiers with regard to residential building and subdivision work.

Several of the proposed reforms outlined in this chapter have not been covered to any extent earlier in this paper. The very limited stakeholder commentary on these proposals is discussed below.

With regard to the disciplinary regime for certifiers, Local Government NSW and the City of Sydney both made recommendations on the penalties that ought to apply. Local Government NSW contended that:

¹⁵⁹ Ibid., p.201-02

¹⁶⁰ Ibid., p.203

... one of the main problems with the current system is the need for higher penalties to introduce greater incentives for certifiers to do the right thing. We understand that this is a matter for the Building Professionals Board (BPB), and we urge that this issue is addressed as part of the review of the BPB Act.¹⁶¹

The City of Sydney made the following recommendation:

Recommendation 8.2 (j) As in Vancouver, councils should be able to apply to have certifiers de-listed who do not report breaches of planning approvals, who have contributed to breaches of planning approvals or who fail to supply information regarding a development to an affected party or council.¹⁶²

Local Government NSW argued for clarification of the auditing of certifiers:

There is a need for a 'checking' or 'auditing' role to monitor and regulate the work of private certifiers. Currently this function defaults to councils, because of their legal powers and in the absence of any other authority charged with this responsibility. The BPB only responds to complaints. A tougher regulator is required, with provisions to conduct random checks/audits and to issue stop work orders in certain circumstances.¹⁶³

The Association of Accredited Certifiers also commented on the auditing of certifiers:

The AAC believes that the auditing of Accredited Certifiers could be better managed and be more consistent. Certifiers are regularly given conflicting information from Board staff.¹⁶⁴

Together with the City of Sydney, the Association of Accredited Certifiers supported proposals regarding data collection "so long as there is easy access to this documentation".¹⁶⁵ The City of Sydney submitted that:

A centralised database to register all building-related approvals which allows public access to general information and more detailed unrestricted access by local councils, government agencies and building certifiers should be pursued. A centralised database could also capture the annual fire safety statement registrations which will be useful to building certifiers when determining construction certificate and complying development certificate applications.¹⁶⁶

¹⁶¹ Local Government NSW, op. cit., p.48

¹⁶² City of Sydney, op. cit., p.146

¹⁶³ Local Government NSW, op. cit., p.48

¹⁶⁴ Association of Accredited Certifiers, op. cit., p.11

¹⁶⁵ Ibid., p.2

¹⁶⁶ City of Sydney, op. cit., p.149

9. CONCLUSION

Building regulation and certification in the planning system is a highly complex regime. A large number of significant matters must be addressed throughout the building life cycle in order to ensure building quality and safety. The amalgamation of building regulation and certification with the NSW planning system in 1997 was intended to streamline the certification process and improve consumer choice by introducing private certification. Despite the benefits that have accrued from these and subsequent reforms, the current system has been criticised on a number of points, including the complexity of the regulatory requirements and a lack of trust in private certification.

The White Paper contains a broad suite of proposed reforms to building regulation and certification. The majority of reforms have received, at the least, in principle support. Key reforms supported include clarification of the roles and responsibilities of industry participants, an expanded accreditation scheme to cover new building professions, improved regulation of certifiers and increased certification through all stages of the building life cycle.

Several broad issues remain unaddressed. Of the extensive suite of reforms contained in the White Paper, a significant number are not included in the Exposure Bills. The remainder will presumably be addressed in either forthcoming regulations or the concurrent review of the *Building Professionals Act 2005*. Further, some proposals lack detail, making it difficult to judge how effective they may be in practice.

The issue of whether or not the proposed reforms go far enough has been raised by several stakeholders, including the NSW government authority responsible for accrediting certifiers – the Building Professionals Board. Submissions to the planning reform process and earlier inquiries into the NSW building industry have recommended the establishment of a single NSW Building Commission to oversee the entire industry. While the NSW Government is concurrently reviewing several aspects of the building industry regulatory framework, at this stage there is no indication that it proposes to adopt either the recommendations that have been made or any of the models currently in place in other Australian jurisdictions.

APPENDIX 1: OVERVIEW OF NSW PLANNING REFORMS

Background

The *Environmental Planning & Assessment Act 1979* (EP&A Act) has undergone many reforms (see the Research Service e-brief [NSW Planning Framework: History of Reforms](#)). Consequently, it is widely held to have become too complex, too focussed on development assessment at the expense of strategic planning, and un conducive to effective community participation. During the 2011 NSW election campaign, the NSW Coalition stated that it would reform the planning legislation and "return local planning powers to local communities".

In June 2011, the O'Farrell Government enacted the first step in reforming the planning system: the repeal of Part 3A of the EP&A Act. In July 2011, the Government announced an independent review of the planning system, to be chaired by two former Members of Parliament – Tim Moore and Ron Dyer. This review progressed through three stages: listening and scoping; an issues paper; and the final Review Report, [The Way Ahead for Planning in NSW](#).

In July 2012, the NSW Minister for Planning and Infrastructure released the Government's initial response to the review, [A New Planning System for NSW - Green Paper](#). The Green Paper also considered several other reports, including: [A Review of International Best Practice in Planning Law](#) commissioned by the Department of Planning and Infrastructure; and the 2009 NSW Legislative Council Standing Committee on State Development report on the [New South Wales Planning Framework](#). The Green Paper sets out the Government's reform agenda in broad terms, key to which is placing community participation at the centre of the new planning system in concert with increased emphasis on strategic planning. Following receipt of over 1,500 submissions, in December 2012 the NSW Government published a [Green Paper Feedback Summary](#).

On 21 November 2012, the [Environmental Planning and Assessment Amendment Act 2012](#) was assented to. While generally consistent with the direction set out in the Green Paper, these statutory amendments were pre-emptive of the reform process. The Bill made amendments to the purpose, status and content of Development Control Plans, the regulation of residential development on bush fire prone land, and the assessment of accredited certifiers.

The White Paper

On 16 April 2013, the NSW Government released the [White Paper – A New Planning System for NSW](#) and two Exposure Bills – the [Planning Bill 2013](#) and the [Planning Administration Bill 2013](#), together with [summaries](#) of the Bills. The White Paper sets out the Government's vision for the planning system, to be enacted through the Bills and other statutory instruments. According to the White Paper, the proposed planning system will be "simpler, strategic, more certain, focussed on improving outcomes, and places people and their choices

at the heart of planning decisions.”¹⁶⁷ The main purpose of the system is as follows:

... to promote economic growth and development in NSW for the benefit of the entire community, while protecting the environment and enhancing people’s way of life. To do this, the planning system has to facilitate development that is sustainable. Sustainable development requires the integration of economic, environmental and social considerations in decision making, having regard for present and future needs.¹⁶⁸

Figure: The new planning system at a glance¹⁶⁹



¹⁶⁷ NSW Government, [A New Planning System for NSW: White Paper](#), April 2013, p.5

¹⁶⁸ Ibid., p.5

¹⁶⁹ Ibid., p.18

The five fundamental reforms proposed in the Green Paper are carried through to the White Paper, in addition to proposed changes to building regulation and certification added in response to feedback and submissions. These five reforms (see Figure 1), and the proposed changes to building regulation and certification, are as follows:

Delivery culture:

- Establishment of a culture change action group to design and oversee the implementation of a range of culture change actions across the industry
- Promotion of a culture focussed on cooperation and community participation, the delivery of positive and pragmatic outcomes and a commitment to ongoing education and innovation
- Regular and mandatory performance reporting for strategic planning at all levels to support transition to greater transparency and accountability

Community participation:

- A statutory Community Participation Charter
- Planning authorities required to prepare a Community Participation Plan
- High level of participation in particular for Regional Growth Plans and Subregional Delivery Plans
- ePlanning to move paper-based development application processes and traditional methods of consultation online

Strategic planning:

- A shift to upfront evidence based strategic planning
- A hierarchy of plans, through which a clear line of sight operates as set out in the legislation:
 - NSW Planning Policies – present the Government's planning policy framework relating to land use and development for a range of sectors
 - Regional Growth Plans – provide a high level vision and objectives and policies for each region of the State
 - Subregional Delivery Plans – provide the delivery framework for Regional Growth Plans in appropriate locations with a focus on integrating infrastructure and providing a framework for rezoning areas of significance
 - Local Plans – principal legal documents that deliver the strategic vision for a local government area through zoning, development guides and infrastructure
- Integration of infrastructure with land use planning
- Whole of government requirements in strategic plans to improve planning outcomes and reduce the number of development applications that require multi-agency concurrence, referral or other planning related approvals.
- Establishment of a 'one stop shop' for all remaining concurrences and approvals

Development assessment:

- Development assessment streamed into five tracks: exempt, complying, code, merit and prohibited
- 80% of all developments to be complying development or code assessment development within the next five years
- Expanded range of residential, commercial, retail and industrial developments will be complying or code assessment
- Expanded low cost appeal rights to provide greater access to existing appeal rights for applicants
- Promotion of independent expert decision making through the Planning Assessment Commission, Regional Planning Panels and Independent Hearing and Assessment Panels
- New merit assessment processes will mean faster assessment where applications are consistent with performance outcomes
- Improved assessment of State Significant Development
- Strategic Compatibility Certificates will be an interim measure, issued prior to completion of a Subregional Delivery Plan or Local Plan, or implementation of the Subregional Delivery Plan program, for development consistent with an agreed strategy that will deliver metropolitan or regional strategic outcomes

Infrastructure:

- Growth Infrastructure Plans to integrate land use planning and infrastructure provision and involve the private sector earlier in the planning process through contestability assessments
- Local and regional infrastructure contributions will be simplified and made more consistent
- Particular infrastructure (e.g. major projects identified in the Long Term Transport Master Plan) will be declared to be Public Priority Infrastructure and the private sector will be able to contribute earlier in the design and planning process

Building regulation and certification:

- An expanded accreditation system for building professionals including building designers, a range of engineers, fire protection designers and installers, energy efficiency designers and access consultants
- Mandatory certification of specified building aspects including the design, installation and commissioning of critical building systems and elements
- Improved documentation through all stages of the building life cycle to make it easier to manage safety risks, including introduction of a building manual
- Enhanced decision support and peer review for certifiers making decisions about complex buildings
- Strengthened controls on certifiers through stronger disciplinary guidelines, increased auditing and increased reporting requirements

Resourcing the proposed planning reforms was identified as a key issue by respondents following the release of the Green Paper. According to the White Paper, the NSW Government, in consultation with local government and stakeholders, is currently working through:

... various models for funding the transformative changes proposed in the White Paper. This will include the reallocation of resources across government to deliver strategic integrated outcomes, and a review and readjusting of fees and charges applying cost recovery principles.¹⁷⁰

The White Paper includes information on transitional arrangements:

Planning and assessment processes that began before the new legislation commences will be able to be completed without interruption and under existing requirements. This means that changes to the planning system will not be retrospective and will only apply in the future.

Existing regional and subregional strategies will not be discarded and relevant aspects will transition into the new plans. Furthermore, recent initiatives like the Strategic Regional Land Use Plans and state significant development will be given full effect in the new planning system.

The Department of Planning and Infrastructure will work with key stakeholders while the White Paper is released for public comment to develop detailed transitional provisions. It will provide more detail on transitional arrangements when the new planning legislation is introduced into Parliament.¹⁷¹

The Exposure Bills

The NSW Government proposes to replace the *Environmental Planning & Assessment Act 1979* with two statutes: the [Planning Bill 2013](#) and the [Planning Administration Bill 2013](#). The Planning Bill is structured as follows:

- Part 1: Principles and definitions;
- Part 2: Community participation;
- Part 3: Strategic planning;
- Part 4: Development (other than infrastructure) assessment and consent;
- Part 5: Infrastructure and environmental impact assessment;
- Part 6: Concurrences, consultation and other legislative approvals;
- Part 7: Infrastructure and other contributions;
- Part 8: Building and subdivision;
- Part 9: Reviews and appeals; and
- Part 10: Civil and criminal enforcement provisions.

¹⁷⁰ Ibid., p.20

¹⁷¹ Ibid., p.20

The Object of the Planning Bill is set out in Clause 1.3:

(1) The object of this Act is to promote the following:

- (a) economic growth and environmental and social well-being through sustainable development,
- (b) opportunities for early and on-going community participation in strategic planning and decision-making,
- (c) the co-ordination, planning, delivery and integration of infrastructure and services in strategic planning and growth management,
- (d) the timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing),
- (e) the protection of the environment, including:
 - (i) the conservation of threatened species, populations and ecological communities, and their habitats, and
 - (ii) the conservation and sustainable use of built and cultural heritage.
- (f) the effective management of agricultural and water resources,
- (g) health, safety and amenity in the planning, design, construction and performance of individual buildings and the built environment,
- (h) efficient and timely development assessment proportionate to the likely impacts of proposed development,
- (i) the sharing of responsibility for planning and growth management between all levels of government.

(2) Sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development.

The Bill provides for regulations to be made on a large number of matters, including:

- the form and content of community participation plans, Local Plans, Environmental Impact Statements, local infrastructure plans and Growth Infrastructure Plans;
- modification of development consents under Part 4;
- applications for strategic compatibility certificates and the determination of those applications;
- the types of development to be assessed under Part 5; and
- the calculation of direct and indirect local infrastructure contributions and regional infrastructure contributions.

The Planning Administration Bill makes provision for planning administration, administrative bodies, and orders, investigations and environmental audits. The administrative bodies that may be established under the Bill include:

- the Planning Ministerial Corporation;
- the Planning Assessment Commission;
- Regional Planning Panels;
- Subregional Planning Boards; and
- Council independent hearing and assessment panels.

The Planning Ministerial Corporation, which will be managed by the Director-General, will have functions including:

- acquisition of land in accordance with the [Land Acquisition \(Just Terms Compensation\) Act 1991](#); and
- dealing with land vested in the corporation.

The Planning Assessment Commission will have functions including:

- reviewing or advising on planning and development matters, Local Plans and the administration of the legislation;
- holding public hearings into any matter the subject of review or advice, where requested by the Minister; and
- the functions of a Regional Planning Panel, Subregional Planning Board or council appointed independent hearing and assessment panel in certain circumstances.

Regional Planning Panels will have functions including:

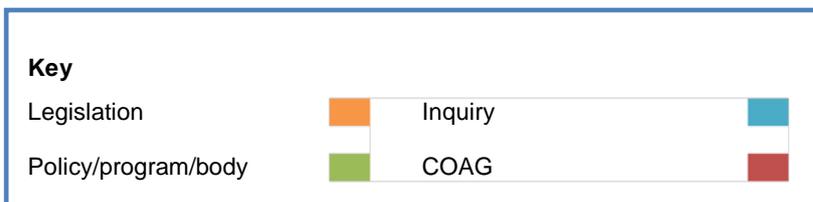
- advising on planning and development matters and Local Plans; and
- specified consent authority functions of a council for regionally significant development, in particular, the determination of applications.

Subregional Planning Boards will have functions including:

- preparation of Subregional Delivery Plans; and
- under delegation from the Minister, giving directions to a council as to how local infrastructure contributions may be used (cl 7.9 of the Planning Bill).

The Planning Administration Bill 2013 makes provisions for the constitution of independent hearing and assessment panels. It also sets out some requirements for how panels are to conduct development assessments and the reporting responsibilities councils have with regard to the operation of panels.

APPENDIX 2: TIMELINE OF KEY BUILDING REGULATION AND CERTIFICATION DEVELOPMENTS



Timeline: key building regulation and certification developments

1997 **POLICY:** Integrated Development Assessment: White Paper and Exposure Draft Bill – proposed expansion of the role of the private sector in the development assessment process through the establishment of a certification scheme

LEGISLATION: *Environmental Planning & Assessment Amendment Act 1997* [\[link\]](#) Transferred building controls from the *Local Government Act 1993* to the EP&A Act and introduced private certification of development

1998 **LEGISLATION:** Environmental Planning and Assessment Amendment Regulation 1998 [\[link\]](#)

PROGRAM: Private certification regulatory regime commenced, accreditation bodies supervised by Planning NSW

2002 **PARLIAMENTARY REPORT:** Report upon the Quality of Buildings (Joint Select Committee on the Quality of Buildings) [\[link\]](#)

2003 **ADMINISTRATIVE BODY:** Home Building Service established as a result of the recommendations of the Joint Select Committee on the Quality of Buildings, responsible for administration of the *Home Building Act 1989* and Home Building Regulation 2004

2004 **ADMINISTRATIVE BODY:** Building Professionals Branch established within the Department of Infrastructure, Planning and Natural Resources to regulate private certifiers

2005 **LEGISLATION:** *Building Professionals Act 2005* [\[link\]](#) Established Building Professionals Board as an independent statutory authority to accredit, audit and investigate complaints against private certifiers in NSW

2006 **POLICY:** Draft Building Professionals Regulation and Accreditation Scheme exhibited

INDEPENDENT REVIEW: A Review of Licensing in the New South Wales Home Building Industry (Mrs Irene Moss & Mr Kevin Rice) [[link](#)]

2007

LEGISLATION: Building Professionals Regulation 2007 [[link](#)]

ADMINISTRATIVE BODY: *Building Professionals Act 2005* commenced and first members of the Building Professionals Board appointed [[link](#)]

POLICY: Building Professionals Board Accreditation Scheme gazetted [[link](#)]

PARLIAMENTARY REPORT: Inquiry into the Operations of the Home Building Service (General Purpose Standing Committee No. 2) [[link](#)]

2008

LEGISLATION: *Building Professionals Amendment Act 2008* [[link](#)] An Act to introduce accreditation of companies, council officers and fire safety engineers and to strengthen the powers of the Building Professionals Board, part of which, relating to controls on accredited certifiers, was uncommenced as of September 2013

LEGISLATION: *Environmental Planning and Assessment Amendment Act 2008* [[link](#)] An Act to clarify the roles of councils and certifiers, strengthen council enforcement powers and strengthen the certification system, parts of which, as of July 2013, are uncommenced

POLICY: COAG agreement to develop a national trade licensing system as part of the National Partnership Agreement to Deliver a Seamless National Economy [[link](#)]

2009

POLICY: Intergovernmental Agreement for a National Licensing System for Specified Occupations [[link](#)]

PARLIAMENTARY REPORT: New South Wales Planning Framework (Standing Committee on State Development) [[link](#)]

2010

LEGISLATION: Building Professionals Amendment (Accreditation of Council Employees) Regulation 2010 [[link](#)] Expanded the Building Professionals Board Accreditation Scheme to include council accredited certifiers. Further amended by the Building Professionals Amendment Regulation 2010 [[link](#)]

GOVERNMENT REVIEW: Design, Approval, Installation, Certification & Maintenance of Fire Protection Systems: Identified Issues, Contributing Factors & Recommendations (Fire Protection Systems Working Party) [[link](#)]

2011

LEGISLATION: Environmental Planning and Assessment Amendment (Part 4A Certificates and DCPs) Regulation 2011 [\[link\]](#) Introduced several relevant amendments including provisions concerning the dispensation of certificates by certifying authorities

INDEPENDENT REVIEW: The Way Ahead for Planning in NSW? Issues Paper of the NSW Planning System Review (Tim Moore and Ron Dyer) [\[link\]](#)

2012

ADMINISTRATIVE BODY: NSW Building Regulation Working Party established

ADMINISTRATIVE BODY: National Occupational Licensing Authority established [\[link\]](#)

INDEPENDENT REVIEW: The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review (Tim Moore and Ron Dyer) [\[link\]](#)

POLICY: A New Planning System for NSW: Green Paper [\[link\]](#)

GOVERNMENT REVIEW: Reform of the Home Building Act 1989 – Issues Paper (NSW Fair Trading) [\[link\]](#)

POLICY: Better Buildings: a proposed model for improving building certification in NSW (Building Professionals Board) [\[link\]](#)

GOVERNMENT REVIEW: Making NSW No. 1 Again: Shaping Future Communities – Strata & Community Title Law Reform Discussion Paper (NSW Fair Trading) [\[link\]](#)

INDEPENDENT REVIEW: Regulation Review: Local government compliance and enforcement (IPART) [\[link\]](#)

INDEPENDENT REVIEW: Reforming licensing in NSW: Review of licence rationale and design (IPART) [\[link\]](#)

INDEPENDENT REVIEW: Independent Inquiry into Construction Industry Insolvency in NSW (Bruce Collins QC) [\[link\]](#)

LEGISLATION: *Environmental Planning & Assessment Amendment Act 2012* [\[link\]](#) An Act that included provisions to provide greater consumer protection, improve private certification and more effectively deal with complaints

LEGISLATION: Environmental Planning & Assessment Amendment (Fire Sprinkler Systems) Regulation 2012 [\[link\]](#) Required the installation of fire sprinkler systems in residential aged care facilities and deals with matters related to certificates for the installation of fire sprinkler systems in residential aged care facilities

2013

LEGISLATION: Building Professionals Amendment Regulation 2013 [\[link\]](#) Prescribed requirements relating to contracts for certification work

LEGISLATION: Environmental Planning & Assessment Amendment Regulation 2013 [\[link\]](#) Made provision on compliance matters that must be met prior to issuance of an occupation certificate

POLICY: A New Planning System for NSW: White Paper [\[link\]](#)

LEGISLATION: Planning Bill 2013 [\[link\]](#)

LEGISLATION: Planning Administration Bill 2013 [\[link\]](#)

GOVERNMENT REVIEW: Ongoing statutory review of the *Building Professionals Act 2005* (Building Professionals Board) [\[link\]](#)

2014

PROGRAM: National Occupation Licensing System to commence [\[link\]](#)

APPENDIX 3: OTHER WHITE PAPER PROPOSALS

Chapter 8.1 proposals

Certainty through conditions of development consent

<p>Problems:</p> <ul style="list-style-type: none"> • Every NSW council imposes individual conditions of consent. • Some conditions of consent are unclear, imposed in error and/or require compliance with matters that cannot be achieved 	<p>Proposal:</p> <ul style="list-style-type: none"> • Consistent State-wide development consent conditions will be introduced
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While the Planning Bill deals to some degree with development consent conditions, it does not provide for the introduction of State-wide conditions.

Many stakeholders supported this proposal. The Planning Institute of Australia noted that:

PIA has previously suggested that a state-wide standard ‘toolbox’ of conditions of consent should be formulated by the Government to reduce the necessity for each local area to develop its own. Ideally this should be a web-based resource. This would also improve consistency and reliability of development requirements for developers and certifiers (as highlighted at p. 187 of the White Paper) regardless of location. Of course the adaptation of the standard conditions to reflect specific site circumstances and council planning controls will always be necessary. However it is hoped that ad hoc ‘customised’ conditions would be the exception to the rule.¹⁷²

Fire safety schedules

<p>Problems:</p> <ul style="list-style-type: none"> • The final fire safety schedule for a building may be difficult to locate, or may be lacking in detail • The schedule requires all fire safety measures for the building to be addressed, even though the relevant work is only minor • The schedule cannot be amended 	<p>Proposal:</p> <ul style="list-style-type: none"> • The fire safety schedule will be replaced with a compliance schedule, issued with the construction certificate or complying development certificate, and a building manual issued with the occupation certificate
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The Exposure Bills make no provision for this proposal.

In principle support was given by the City of Sydney and the Property Council of Australia. The City of Sydney noted that:

... this is a very complex area which will require detailed work to produce a sound outcome, including the updating of the proposed building maintenance

¹⁷² Planning Institute of Australia, op. cit., p.24

manuals.¹⁷³

The Property Council raised two issues:

- It is unclear how the compliance schedule will operate in relation to fire safety and how it will overcome current issues with the fire safety schedule – i.e. confusion around the final fire safety schedule when multiple construction and complying development certificates have been issued.
- There are concerns that limiting the compliance schedule to fire safety measures that form part of the development only and not all existing measures servicing the building will impact on building safety. There needs to be certainty that works undertaken in one part of a building do not have a detrimental impact on the fire safety system as a whole. This proposal needs to be further developed in consultation with industry and fire safety experts.¹⁷⁴

Accounting for staged construction and multiple certificates

<p>Problem:</p> <ul style="list-style-type: none"> • Administrative issues in dealing with multiple construction and complying development certificates for the one development 	<p>Proposal:</p> <ul style="list-style-type: none"> • Changes will be introduced to provide for better management of documentation, including the requirement that all construction approvals will be linked with previous and pending approvals
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The Exposure Bills make no provision for this proposal.

This proposal was generally supported by several stakeholders. The Property Council of Australia recommended that:

Documentation could be better managed through online lodgement of construction and complying development certificates with council, with ongoing access provided to developers and building owners.¹⁷⁵

Building and system modification and change of building use approvals

<p>Problem:</p> <ul style="list-style-type: none"> • Building and system modification and change of building use may affect building performance and fire safety. These changes may not trigger the need for a reassessment of compliance with the BCA 	<p>Proposal:</p> <ul style="list-style-type: none"> • Competent building professionals will be required to assess these changes before they take place
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The Exposure Bills make no provision for this proposal.

¹⁷³ City of Sydney, op. cit., p.139

¹⁷⁴ Property Council of Australia, op. cit., p.66

¹⁷⁵ Ibid., p.66

This proposal was supported with some caveats. The Association of Accredited Certifiers stated that it:

... supports the proposed changes to allow a competent building professional to assess changes before they take place. However, the parameters and process must be clearly outlined. Time frames also need to be outlined for any referral bodies such as the FRNSW, as their current time frames have blown out to 12-18 months in some cases.¹⁷⁶

The Property Council of Australia made several recommendations with regard to improving the clarity of the proposal:

- We note that developers and building owners need to know if an upgrade will be triggered as early in the development process as possible as it will affect project feasibility.
- The exact circumstances in which an assessment will be undertaken and an upgrade triggered need to be clearly specified and prescribed in the regulations.
- The BPB should work with industry to clarify and develop this proposal and to define 'building system modification.'¹⁷⁷

Chapter 8.2 proposals

Documentation dissemination and availability

<p>Problem:</p> <ul style="list-style-type: none"> • Relevant documentation not always easily available 	<p>Proposals:</p> <ul style="list-style-type: none"> • The building certifier will have to provide specified documentation to the applicant, council, consent authority and landowner • The applicant will have to provide specified documentation to the builder • The development consent and certified plans and specifications will be held on site at all times
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The Exposure Bills make no provision for these proposals.

These proposals received in principle support from several stakeholders. The City of Sydney recommended that the regulations should "permit the transfer or issuing of documentation to various parties by electronic means".¹⁷⁸ The Property Council of Australia contended that:

- A private accredited certifier should only be required to provide information to council for record keeping purposes.
- Councils must not be permitted to review or object to information

¹⁷⁶ Association of Accredited Certifiers, op. cit., p.4

¹⁷⁷ Property Council of Australia, op. cit., p.67

¹⁷⁸ City of Sydney, op. cit., p.142

provided by the private accredited certifier, as this would result in confusion of roles and responsibilities, and duplication of work.

- The regulations to implement this proposal must be drafted carefully to ensure that councils are not given powers to review the work of private accredited certifiers.

Submission of plans as work progresses

<p>Problem:</p> <ul style="list-style-type: none"> • Lack of availability of plans for building systems 	<p>Proposal:</p> <ul style="list-style-type: none"> • Plans for critical building aspects will have to be submitted to the building certifier before work starts, together with a compliance certificate
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The Exposure Bills make no provision for this proposal.

The City of Sydney and Property Council of Australia offered in principle support for this proposal. The Property Council recommended that:

- Submission of plans and compliance certificates for critical aspects/systems should not be required before construction approval is granted.
- These plans and compliance certificates should be provided progressively as work proceeds and should not delay the commencement of construction.¹⁷⁹

Addressing waterproofing defects in high rise residential buildings

<p>Problem:</p> <ul style="list-style-type: none"> • Waterproofing defects in high rise residential buildings are a significant cause of financial and emotional concern for owners and occupiers 	<p>Proposals:</p> <ul style="list-style-type: none"> • Design details/specifications for waterproofing in certain buildings will have to demonstrate compliance with the relevant standards • The building certifier will have to obtain two certificates in relation to finished work: a certificate verifying that the product complies with the relevant standards; and a compliance certificate to certify the wet areas are waterproofed and comply with the relevant standards • The builder will need to be satisfied that the installer has an appropriate level of knowledge and experience, be assured that actions by subsequent trades have not affected the integrity of the waterproofing system and must have appropriately supervised the application of the product
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¹⁷⁹ Property Council of Australia, op. cit., p.67

The Exposure Bills make no provision for these proposals.

The Property Council of Australia, Association of Accredited Certifiers and Master Builders Association of NSW offered in principle support. For example, the Association of Accredited Certifiers stated:

The AAC supports the collection of product certificates and compliance certificates, as long as these certificates are to be provided by accredited or licenced persons with appropriate insurances.¹⁸⁰

The Master Builders Association noted that the problem is broader than described in the White Paper:

The significance of waterproofing defects is not confined to internal areas, as external balconies and decks are also problem areas and waterproofing failure is a significant problem across the industry.¹⁸¹

Inspections for fire safety and other complex matters

<p>Problem:</p> <ul style="list-style-type: none"> Limited role for Fire and Rescue NSW (FRNSW) when inspecting fire safety systems 	<p>Proposal:</p> <ul style="list-style-type: none"> Amendment of FRNSW's role to increase confidence that all fire protection systems relied upon by FRNSW operate effectively and meet its needs
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Clause 33(2) of the Planning Administration Bill 2013 enables council investigation officers to determine whether or not adequate provision for fire safety has been made in or in connection with a building at the request of the Commissioner of Fire and Rescue NSW. Clause 50 allows authorised fire officers to conduct the same inspection.¹⁸² For the authorised fire officer, the inspection may only be carried out upon request by the relevant council, the person who is the owner, lessee or occupier of the building, or when the Commissioner of Fire and Rescue NSW has received a complaint in writing that adequate provision for fire safety has not been made concerning the building.

Opinions on this proposal were mixed. The Property Council of Australia considered the proposal to be unclear, stating that:

- We support working with the BPB and fire safety experts to further develop and clarify this proposal.
- Any proposed reforms must address the issue of excessive delay when dealing with Fire and Rescue NSW.¹⁸³

The Association of Accredited Certifiers argued that FRNSW should also be

¹⁸⁰ Association of Accredited Certifiers, op. cit., p.6

¹⁸¹ Master Builders Association of NSW, op. cit., p.20

¹⁸² Authorised fire officer means a fire officer who may issue a fire safety order under Division 10.2 of Part 10 of the *Planning Act 2013*.

¹⁸³ Property Council of Australia, op. cit., p.68

involved at the certification stage as well because:

... FRNSW not being satisfied at the end of the project creates a lot of problems. Assessment at the certification stage will be required as satisfying the FRNSW's needs and complying with the relevant BCA or Australian Standards are sometime interpretive. Comment at the design stage is crucial to ensuring this inspection role focuses on operation.¹⁸⁴

Enabling variations to constructed work

<p>Problem:</p> <ul style="list-style-type: none"> • Lack of clarity regarding when an application is required in order to modify a development approval to allow for variations to construction 	<p>Proposal:</p> <ul style="list-style-type: none"> • Certain accredited professionals will be able to certify whether a modification is required
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The Exposure Bills make no provision for this proposal.

Support in principle for this proposal was offered by several stakeholders. The City of Sydney stated that:

It is agreed that changes to development during the construction phase is inevitable therefore it is appropriate for the legislation to contain appropriate provisions to deal with this aspect.

The ability to have an accredited person with appropriate skills and qualifications to assess whether a formal modification to a consent is required, has some merit. The regulations will however need to contain clear criteria on how an accredited person is to determine such matters. Standardised assessment processes will need to be developed.¹⁸⁵

In contrast, the Property Council of Australia did not support the proposal, contending that:

This additional certification is unnecessary as the building certifier should be able to determine when a modification is required.¹⁸⁶

Managing unauthorised building work

<p>Problem:</p> <ul style="list-style-type: none"> • The completion of building work is often complicated by the inability of a certifier to issue an occupation certificate at the end of the work where unauthorised work has occurred 	<p>Proposal:</p> <ul style="list-style-type: none"> • Subject to certain conditions and requirements being satisfied, development will be able to proceed where unauthorised work has occurred
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The Exposure Bills make no provision for this proposal.

¹⁸⁴ Association of Accredited Certifiers, op. cit., p.6

¹⁸⁵ City of Sydney, op. cit., p.144

¹⁸⁶ Property Council of Australia, op. cit., p.68

Stakeholders offered in principle support for this proposal, several noting that further detail was required. The City of Sydney made three recommendations:

Recommendation 8.2 (b) The regulations should allow for building certifiers to recover costs associated with taking action where unauthorised works are detected and/or where conditions of development consent are not being complied with.

Recommendation 8.2 (g) Develop appropriate systems and methods to deal effectively with unauthorised works including legislative provisions to discourage works and development being undertaken without formal approval.

Recommendation 8.2 (i) Where unauthorised works occur, greater accountability should be placed on applicants to demonstrate that unauthorised works comply. This could include supporting retrospective documentation/reports that can be provided to a building certifier verifying certain conditions and requirements of the works have been satisfied. Also, consider whether the current penalties are adequate.¹⁸⁷

Certification of subdivision and strata

<p>Problem:</p> <ul style="list-style-type: none"> • Inefficient certification of subdivision and strata 	<p>Proposals:</p> <ul style="list-style-type: none"> • Subdivision certifiers will issue subdivision works certificates, subdivision certificates in certain circumstances, strata certificates in a timely manner and inspect subdivision work • Complying development will be expanded to include strata subdivision
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The Planning Bill provides that subdivision certifiers may issue subdivision works certificates and subdivision certificates and inspect subdivision work (cl 8.3(2)). The note under clause 4.1(2) assumes that complying development certificates operate as development consent for subdivision. Clause 1.4(2) of Schedule 1 of the Bill allows for complying development to include strata subdivision by defining ‘subdivision of land’ as including a ‘strata plan of subdivision within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*’. The Exposure Bills do not include provisions related to the issuance of strata certificates by subdivision certifiers.

The City of Sydney and Property Council of Australia generally supported these proposals. While expressing general support, the Association of Accredited Certifiers opposed the creation of a new ‘subdivision works certificate’:

The development industry has spent almost 15 years coming to grips with new terminology for approvals for both building and subdivision works. Even now there are practitioners and local government officers who do not understand the certification process well, and to change the name of a certificate for no obvious

¹⁸⁷ City of Sydney, op. cit., p.145-46

reason could make the learning process start all over again.

From practical experience, there seems to be no confusion at present over use of the term Construction Certificate for subdivision works.

We recommend that the name not be changed.¹⁸⁸

¹⁸⁸ Association of Accredited Certifiers, op. cit., p.8