BUILDING CERTIFICATION AND REGULATION – SERVING A NEW PLANNING SYSTEM FOR NSW

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1.   INTRODUCTION

The NSW Government is undertaking a "root and branch" re-modelling of the planning system in the State, with the aim of promoting economic growth and development, while protecting the environment and enhancing people's way of life.

As the Government's April 2013 White Paper – "A New Planning System for NSW" points out, building regulation and certification are a significant part of the NSW planning system.

The general outcomes that regulation and certification seek to secure are two-fold. First, a level of building performance consistent with the needs of an advanced society in terms of health, safety, amenity and sustainability and second, compliance consistent with planning expectations as defined by the planning system.

The current system of certification has evolved from the introduction of private certifiers in 1998, enabled by amendments to the Environmental Planning and Assessment Act 1979 (EP&A) and Regulations.   Following the 2002 Campbell Inquiry into the quality of buildings, administrative changes were put in place within the then Department of Urban Affairs and Planning for regulatory oversight of certifiers and in 2005 the Building Professionals Act established the Building Professionals Board (BPB), which took over this function.

Subsequently, there have been numerous legislative amendments and changes to regulations relating to certification. These have been essentially accretive and so the legislative framework has become unnecessarily complex and in some cases no longer relevant.   With the establishment of a new planning system, the opportunity presents to take a fresh look at arrangements which have essentially developed as flow-ons from the last major reforms dating back to the 1979 commencement of the EP&A. Accordingly, the well established principles of developing regulatory systems that are efficient in an economic sense, as well as effective having regard to ease of administration, achievement of desired outcomes and minimizing the compliance burden, should now be applied.

This Review seeks to examine the current system of building certification to identify improvements that may be made to ensure that the new planning system is supported by a robust certification system. It examines some key aspects of the interface between certification and the system of building regulation, including the responsibilities of the various parties and the appropriate fit with proposed new planning legislation.

In addition, it examines the current functions and structure of the BPB, together with its operational processes. It has also canvassed briefly relevant practices in other jurisdictions in Australia and New Zealand.

A number of other recent reviews relevant to these issues have informed this work, which involved desk-top analysis of this material in conjunction with discussions with a range of stakeholders as outlined in **Appendix 1**.

2.   EXECUTIVE SUMMARY

The introduction of a new planning system provides an opportunity to take a fresh look at current arrangements for building regulation and certification in NSW. The present system has evolved under a legislative framework that commenced with the last major reform in this area,

which dates back to the 1994 amendments to the EP&A.   Since then there have been many amendments and regulation changes which have been essentially accretive and the framework is now unnecessarily complex and does not provide clear guidance to practitioners.

The Government's White Paper acknowledges that building regulations and certification are a significant part of the NSW planning system and this Review seeks to identify changes aimed at ensuring that the new planning system is supported by a robust certification system.

2.1 Overview of Key Issues

In 2011/12 there were an estimated 75,000 development consents issued in NSW, valued at an estimated $22 Billion. This value is expected to grow as activity in the sector picks up. Also, the White Paper aim of 80% of all developments being complying or code assessment within the next five years will pose a major challenge for the certification industry and those who regulate it alike.

It follows that improvements to building regulation must have regard to regulatory impacts such as cost and effective administration and ensure that certifier resources can cope with a higher level of activity.

However, regardless of the effectiveness of improvements that can be made to regulation, building construction risks are best managed by the builder and outcomes for consumers will depend on the clarity with which the roles and accountabilities of all the participants in the process are specified in statutes and regulations.

There are number of areas where the role of both Councils and private certifiers is unclear and this is probably the most significant issue identified in this Review. Separating the role of Council certifiers from the wider responsibilities of Councils and empowering Councils to effectively secure both compliance with consent and the environmental concerns of their local communities is a key issue to be resolved. Also, the scope of certification is unclear, ie how far does a certifier need to go to certify a reasonable level of compliance with both Council consent conditions and the Building Code of Australia?

All the relationships in the building process have some potential for conflict and therefore regulations should seek to establish the right balance between the interests of the participants. The recent changes to regulations which mandate contracts between Certifiers and owners and which widen the scope of certification at the completion stage, are controversial and there is a case for them to be withdrawn.

Insurance is another key issue because the availability and cost of public indemnity insurance is a key factor in certifiers being willing to continue to practice and participants having a remedy if things go wrong. There are gaps in current arrangements and any move to increase potential liability will have insurance consequences.

Finally, the performance of the BPB in supervising certifiers will be all important to securing public confidence in the way a new planning system is implemented. To do its job properly, it will need a clear and modern statutory framework and good data to support the exercise of its functions. Consumer outcomes, however, will depend not only on the BPB and the certification function, but the way relevant initiatives are effectively co-ordinated across Government.

2.2 White Paper Directions and Priorities

The White Paper proposes comprehensive improvements to building regulations and certification, some of which would result in a significant expansion of the certification system. Even if individual initiatives may be justified, their regulatory impact when taken together needs to be assessed and particular emphasis needs to be placed on prioritisation. Some proposals require development and detail needs to be fleshed out before they can properly be assessed.

These issues need to be addressed together with resolution of issues relating to the scope of certification and the role of Councils. Assessments of the White Paper proposals as well as scope and roles and responsibilities of certifiers and Councils should be undertaken by expert panels, supported by relevant technical reference groups.

2.3 Developments in Other Jurisdictions

The Review looked at building regulation developments in New Zealand, South Australia, Queensland and Victoria. Not surprisingly, there is much commonality in the issues being addressed by these jurisdictions, although reforms are at different stages and institutional arrangements differ. All the Australian jurisdictions utilise the services of private certifiers, while NSW is the only State to have a mixed system of public and Council certifiers. New Zealand is considering the re-introduction of private certifiers at some stage.

All the jurisdictions are responding to concerns relating to public confidence in certification, including poor consumer understanding of what certifiers do (and just as importantly, what is outside their remit).

Queensland seems to have a more comprehensive licencing and accreditation system, particularly in relation to fire protection practitioners. It also has a risk-based guide to certification which has legal status. The scope of certification seems largely settled in South Australia and Victoria, although SA is expanding this scope to include consent compliance (as is the case in NSW). The Victorian government is responding to an Auditor-General's report which was severely critical of the effectiveness of supervision of private certifiers. The Queensland Government is also responding to recent reviews of its certification function.

2.4 Previous Reviews

Three recent reviews with relevant scope were examined: the development of the Better Buildings Model by the BPB; the Fire Systems Working Party; and the NSW Building Regulation Working Party. The findings and recommendations of this review are currently unresolved and while some are being pursued in the ongoing work of relevant agencies, many issues have been taken up in the White Paper and some are addressed in the recommendations of this Review. The Building Regulation Working Party canvassed institutional or structural changes to address issues identified. This Review has sought to resolve issues within the existing framework on the basis that structural changes, even if they may be appropriate, will not of themselves provide a means to resolution.

2.5 The Role of Certifiers

The current suite of legislative obligations on certifiers is complex, confusing and not easily accessible, certainly there is no single point of reference. Equally significant is the fact that no comprehensive practice guide for certifiers is available in NSW. Against that, the task of certifiers is conceptually straight forward – ie. to apply the "not inconsistent" test to all conditions of consent and all of the provisions of the Building Code of Australia. Clearly a difficult and demanding task, which is undertaken with varying degrees of emphasis and varying

degrees of rigour by certifiers. Resolution of this central issue will require streamlining of statutory obligations and definition of the scope of certification in relation to both planning and building code compliance.

Boundaries between the responsibilities of Councils and private certifiers need to be clarified and a more cooperative framework should be established. Also certifier contracts should be replaced by re-design of the consent application process to ensure that owners understand both the role and obligation of certifiers and their limitations. This process re-design should reflect the prime obligation of certifiers being to the consent authority (mostly Councils) rather than to owners (usually the beneficiaries of consent).

2.6 The Importance of Boundaries – Empowering Councils

It is difficult to hold practitioners in the building chain accountable for their performance unless their responsibilities are clearly defined and consistently reflected in processes and relationships. There is general agreement among stakeholders that these responsibilities are currently unclear. Understandably, Councils and developers have different perspectives on this issue. Some relationships are defined through contract and are essentially commercial in nature and outcomes depend essentially on how well deliverables are specified and the competence of the contract parties. However, the key regulatory relationships are between a certifier and local Council (or other consent authority) and between the certifier and the BPB.

Local Councils have obligations to their local communities which present arrangements do not necessarily support. The White Paper proposal to mandate certifier notification to Councils of instances of non-compliance is a step in the right direction. However the Queensland proposal of "first instance" enforcement actions is worthy of consideration. In any case, Councils should be given the tools to discharge their community responsibilities within a framework that requires cooperation between private certifiers and Councils. This should allow Councils to focus on their core objectives and choose whether they should remain in the certification business.

At the same time, Councils should have confidence in the effective supervision of certifiers by the BPB. A number of regulatory, process and operational changes will be required to ensure that boundary issues are resolved to facilitate greater accountability for all the participants involved.

2.7 Building and Consent Compliance Boundaries

Achieving greater clarity regarding the role of certifiers extends beyond clarifying the Council relationship to defining what exactly it is that they are required to do to certify both building and planning code compliance. Resolving issues of scope in both codes is a challenge that will require high level technical expertise to resolve and should form part of the implementation of the White Paper.

While the White Paper proposes to simplify the task of certifiers by standardising consent conditions and addressing issues of variation in their interpretation, the task of defining exactly what areas of consent compliance a certifier should focus on will remain. Probably more difficult is the task of defining BCA compliance. Should this emphasize areas of concern such as fire protection, waterproofing and structural integrity? Or should there be a risk approach taking into account the use and complexity of buildings? Again, these issues will require the application of a high degree of technical expertise to resolve.

2.8 The Building Professionals Board

To support the implementation of the White Paper and maintain public confidence in the certification process, the BPB faces very significant challenges at both a strategic and operating level. In particular, it must plan to ensure that the necessary certifier resources, together with associated technical skills, training programs and accreditation schemes are available and deployed effectively. Then there is the urgent need to resolve the boundary issues of certification scope and local government relationships.

In addition, the compliance regime supervising certifiers needs to be strengthened and allow for both effective disciplinary procedures and professional support to ensure that an effective certifier function is maintained. This will involve both operational improvements and additional resources, which should, at least be on a relative par with Victoria and Queensland. To meet these challenges, the BPB should be restructured and given the required leadership and direction.

2.9 The Building Sector – A Consumer's View

While this Review has focussed on those aspects of building regulation which deal with certification and its role in ensuring that building work complies with building and planning codes, statutes and regulations; outcomes from a consumer's viewpoint also require effective licencing and registration of builders, appropriate training and skills, building specific regulation and consumer protection.

Other administrations within government are addressing issues such as home warranty insurance; statutory warranty periods; mandated contracts and dispute resolution. All of these initiatives contribute to the outcomes consumers want, whether they are "Mum and Dad" developers, purchasers of strata units or users of commercial buildings. From the point of view of these consumers, the way governments assign responsibilities within the framework of institutions or administrations is not particularly relevant. What matters to them is the achievement of outcomes.

The implementation of a new planning system for NSW will need to be supported by a robust building certification scheme. However, this will not of itself secure the desired outcomes. It follows that a holistic approach is required and this could be achieved by a joint program between the Administrations of Planning and Infrastructure, Fair Trading and Local Government.

2.10 Conclusion and Recommendations

The recommendations made by the Review are presented with a view to implementation processes and should be regarded as part of a wider White Paper implementation program. There will necessarily be costs involved, particularly with regard to the establishment of the recommended expert panels. However, this is unavoidable if resolution of the identified issues is to be achieved. (Many of these have been identified but remain unresolved for some time).

The key recommendation is for three expert panels to be appointed. The first to assess the regulatory impact of the proposals in Chapter 8 of the White Paper. This work should be taken in parallel with two other panels; one to deal with local Council empowerment and the second to develop streamlined regulatory obligations and a practice guide for certifiers.

The recommendations also deal with process issues including the withdrawal of recent changes to regulations relating to the issue of Occupation Certificates and mandating certifier contracts with owners, together with establishing more effective insurance arrangements.

Other recommendations propose IPART determining an appropriate range of fees for private certifiers, the restructure of the BPB and arrangements to secure coordination with related government initiatives.

3.   OVERVIEW OF KEY ISSUES

3.1 Context

According to the Department of Planning and Infrastructure (DP&I), in 2011/12 there were around 75,000 development consents issued in NSW, valued at an estimated $22 Billion. In recent years, NSW has significantly underperformed in the residential housing sector in particular and some analysts[1] have estimated that there is currently an overhang of in excess of 100,000 dwelling units, where supply has failed to meet underlying demand. No doubt there are many reasons for this, but one of the aims of the White Paper is to ensure that this gap is reduced in future years. If the policy aims of the White Paper are met, the number of consents the system must respond to will rise significantly, as will demands on private certifiers. This will be a consequence not only of a higher level of construction, but because 80% of all developments are targeted as being complying or code assessment within the next five years. The White Paper also targets reduced timeframes and documentation requirements to achieve cost savings to business and the community.

All this means that the certification process must deal with much higher volumes of work within a regime of more streamlined processes. At the same time, public confidence in outcomes demands that levels of rigour in providing certification assurance cannot be relaxed.

The key issues then, are how to focus the scarce resources of Councils, other consent authorities and the private certifiers on securing building performance and planning system outcomes most effectively. This dilemma necessarily means that better regulation cannot be equated with more regulation, even though there is always a temptation for those charged with developing improvements to plug gaps and extend scope.

Other key pressures derive from the trend for new dwelling units to increasingly be multi-storey apartments rather than stand-alone houses or other low to medium density forms. This is of course not just a certification/regulation issue, but good practice around the globe suggests that mandatory inspections, a key part of the certification process, should be stepped in line with more complex building with a greater degree of construction risk. The requirement to maintain public confidence here must mean that the number of inspections should be increased, unavoidably placing increased demands on certifier resources.

At the same time, there are concerns that the certifier workforce is ageing and anecdotally some are leaving the industry because of increasingly onerous obligations. This presents a key operational and policy challenge. Some peak bodies representing building professionals have suggested that practitioners other than building surveyors, for example "chartered builders", should be accredited as certifiers because of their experience and knowledge of the BCA.

But the key challenges for certification are to resolve concerns relating to confusion over the building certifier's role, how it fits with the wider responsibilities of Councils; definitions of certification scope with regard to both Building Code of Australia (BCA) and compliance with consent conditions (and hence liability and insurance consequences); and whether certifier compliance with "public interest" obligations is adequately supervised.

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[1] National Housing Supply Council

There are also concerns regarding process issues relating to the appointment and disengagement of certifiers and resolution of potential conflicts.

3.2 Sound Regulatory Principles

Principles that should guide good regulatory practice are well established and well documented in a number of areas, including advice for NSW public servants and a guide produced by the Business Council of Australia. They have common features as follows:

- The problem to be addressed should be well understood and the outcomes desired clearly specified. This is particularly relevant when there are significant external discontinuities (such as the new planning system proposed by the White Paper) and where existing regulatory schemes have grown in complexity through accretion over a long period of time (such as legislative provisions and regulations made under relevant parts of the EP&A). In these circumstances a fresh look at old processes might be useful.
- The regulatory scheme should be assessed having regard to costs and benefits. These include an understanding of costs imposed on the community and business as well as the likelihood of achieving benefits. There is also a cost in terms of community acceptance and confidence, particularly when regulatory promises are misunderstood. For example, when "Mum and Dad" builders confuse the role of building certifiers with the role of their builder in securing quality outcomes or building performance attributes that fall outside the scope of achievable certification outcomes.
- The objectives of regulation should be achieved at least cost. Alternatives to achieving outcomes through increased regulation should be considered, along with the compliance burden in terms of both convenience and cost. The impact on the construction sector and the ability of consent authorities to secure reasonable compliance needs to be balanced.
- Regulatory arrangements are consistent with effective and efficient administration. Complex arrangements which cannot be efficiently administered will bring the scheme into disrepute with both industry participants and consumers. Overly prescriptive provisions in regulations also have the effect of constraining the ability to secure outcomes.
- Regulations should periodically be reviewed against first principles and changed or removed if they are no longer effectively targeted against risks or problems. The outcomes targeted by the existing certification process are a case in point. Many improvements have been proposed (for example, the Building Professionals Board's "Better Buildings Model" and other proposals in the White Paper) and each one is, for the most part, eminently sensible. However, put together, they may be undeliverable, so that the purpose or objective they are targeting may need to be re-visited.

3.3 Role of Certification vs. Role of the Builder

Building construction risks are best managed by the builder. Equally, building regulation has an important role to play and when appropriately defined should be as effective as possible. However, it is important to recognise that there are clear limits to what can be achieved through regulation. The efforts of people charged with checking the actions of designers, builders and other practitioners can never substitute for responsible practitioners getting things right in the first instance. The ability to rely on commercial contracts; availability of contract remedies; well informed contract parties; effective licencing and accreditation; consent enforcement; practitioner education; and effective insurance arrangements all have a role to play.

As in other jurisdictions, responsibility for these matters in NSW is split between administrations and departments. This need not necessarily be a barrier to effective,

transparent and efficient administration. Silos and cultural incompatibility can exist in single administrations as much as those where responsibilities are split. Accordingly, measures to achieve better coordination of administration and implementation of initiatives have been identified as being important in a number of recent Reviews and this Review also underlines this requirement. In chapter 11, it is proposed that a joint program between the relevant administrations be agreed.

A key requirement for improving building regulation and certification is that the roles of all participants are well defined and consistently reflected in the relevant statutes and regulations. Indeed, clarity in specifying roles, or lack of it, was probably the most consistent theme emerging from discussions with stakeholders.

3.4 Private Certifiers and Local Councils

When the certification function was partially privatised with the legislated introduction of private certifiers, the boundaries between the functions of Councils (which of course extend beyond certification) were not clearly drawn. The policy intention was to create competition between the private sector and local Councils for the provision of certification services. Now, private certifiers are well established and their market share is estimated by DP&I to be well in excess of 50% of the building approvals market by value (estimates range as high as 70%, although there is no reliable data) and probably around 50% by number. Most Councils accept that private certifiers are here to stay, but there are tensions.

These tensions arise in a number of areas. First, there is a perception among stakeholders consulted for purpose of this Review, that private certifiers are not adequately supervised or disciplined and that complaints are not dealt with in either a timely or satisfactory fashion. Further, the highly prescriptive regulations dealing with investigations by the Building Professionals Board result in a high threshold for raising complaints (requirements for statutory declarations and extensive documentation). Complaints take too long to resolve and are sometimes dismissed on technical grounds.

This leads to the second area of concern, that Councils are left to "pick up the pieces" when things go wrong and suffer a public loss of confidence because the community looks to them to resolve these sorts of issues.

Another area of concern is that Councils have lost control of consent compliance. Some appear to stand back when a private certifier is appointed because they feel that any consequences flowing from the actions of private certifiers should be the province of the State. In addition, some stakeholders believe that private certifiers rarely report cases of non-compliance to Councils.

On the other hand, there appear to be instances where private certifiers (who for the most part are former Council employees) work cooperatively with local Council inspectors.

Whether the "level playing field" contemplated by policy-makers who thought the principles of competition policy should apply in this area, either exists or is achievable is a moot point. Certainly there are many imperfections in this "market". Council employees who undertake the provision of certification services invariably take a more holistic view of their role. They tend to be, first and foremost, employees of Council who regard the interests of their local community as their priority. So enforcement of consent conditions and local environmental issues go hand in hand with the certification function.

This appears to be the case even in Councils which have separated their certification function and sought to run it on business lines to compete with the private sector.

Then there is the issue of fees, where private certifiers charge whatever they deem appropriate whereas Council fees are published (along with other fees), set on an annual basis, and are (at least in some cases) approved by elected members.

Finally, markets depend on information and informed trading counterparties. "Mum and Dad" owners who apply for consent are hardly in this category, undertaking a transaction of this nature only a limited number of times and in an area already characterised by complex regulations. However, some Councils do provide a valuable service to "Mum and Dad" applicants by providing a help desk which assists them to navigate their way through a complex building process.

3.5 Scope of Certification

Another consistent theme coming from consultation with stakeholders is that the scope of certification is unclear. (This is acknowledged in the Government's White Paper). Exceptions to this perception tend to be high-end developers who integrate certification into their business practices to secure compliance in the context of complex buildings, high construction risk and complex and detailed consent conditions. They invariably use private certifiers and confidently specify the services they require in their contracts. Some stakeholders also take comfort from the fact that the certification role has evolved over two decades and is conceptually simple – i.e. compliance with the BCA and conditions of consent laid down by the consent authority.

However, the more common view (and certainly one expressed by the certifiers themselves through their peak organisations), is that the requirements for assessing BCA and consent compliance are far from clear.

The regulatory principles which appear to inform this issue of scope turn on the concept of a minimum level of consistency with the relevant codes. This is of course an area where experienced practitioners must exercise judgement and will focus on structural integrity, fire protection, health related issues, wet areas, building layout, conformity with the approved building envelope and the performance of mandatory building inspections. But the BCA and all its attendant standards, is highly detailed and complex. Similarly, consent conditions are sometimes unclear, internally inconsistent, and may require further conditional approval.

What sense of all this must a certifier make? Which areas of non-compliance are acceptable (if any)? The "not inconsistent" test would suggest scope for some relaxation of black letter standards and conditions, but how much?

Certifiers are concerned that no comprehensive practice guide exists in NSW and it is unclear what legal status should be applied to the ones that do exist. They are therefore concerned at the extent of their liability should things go wrong. Council certifiers are protected via the nature of their employment contract. Not so private certifiers.

3.6 Relationships

Clear and effective commercial relationships between building practitioners should reduce the burden of regulation and the degree of reliance that must be placed on regulatory checking and enforcement. Also, clear boundaries between regulation, enforcement and service provision are important. When the role of all practitioners is clearly defined and articulated through easily understood documentation, relationships between these parties can be expected to be more transparent and self regulating.

In the complex area of the construction industry, with significant layers of regulation, conflicts of interest will be inevitable and it is important that any policy response is measured and proportionate to the magnitude of the problem created by the conflict.

Concerns have frequently been raised about potential conflicts in the relationship between builders and certifiers. For this reason, NSW regulations stipulate that the Principal Certifying Authority (PCA) cannot be appointed by the builder – this must be done by the beneficiary of consent (usually, but not always, the land owner). In high end developments, the developer and builder are often the same entity and the developer is the consent beneficiary. The perceived conflict here is that a close relationship between a builder and a certifier could result in non-compliance. However, the builder (in most cases) has a reputation to protect and is both contractually and legally obliged to comply with conditions of consent. Responsible builders will work with a certifier to secure compliance and a close working relationship will assist in securing this outcome. It is natural that builders will seek to work with certifiers they know and trust.

On the other hand, there are anecdotal reports of builders "shopping" for compliant certifiers who might take a less than rigorous approach in certifying compliance in critical areas (fire protection for example). And regardless of the official regulatory position, it appears that in most cases, builders effectively "appoint" certifiers – particularly where owners are not informed buyers of certification services. (In any case, builders can arrange certifier services as an agent of the owner, so undermining the regulatory intent of proscribing the appointment of a PCA).

The relationship of an owner with a certifier is itself not without potential conflicts. Owners may not welcome consent conditions which, for example, deny them a desired view or building standards which drive up their costs.

Certifiers should work closely with local Councils, who for most developments are the consent authority and have at their disposal enforcement powers in relation to consents as well as local environment regulations. They compete with Council certifiers, but once appointed should work cooperatively to achieve outcomes demanded by local communities. Councils themselves set consent conditions and then their own officers opine on compliance where Council is appointed as the PCA rather than an independent third party. Where a private certifier is involved, does the system encourage more of an adversorial than a cooperative relationship between Councils (and their employed certifiers) and private certifiers?

Finally, the relationship of certifiers with other elements of the building control system is important. They need, in some circumstances, to obtain complying certificates in specialist areas as part of the certification process. Not least, the BPB has a key role in accreditation, education and training, professional support as well as compliance investigation, audits, discipline and monitoring.

There are both real and perceived conflicts between some of these roles. Indeed, the BPB has been criticised as being too reluctant to exercise its disciplinary powers and too slow in conducting investigations. There is a perception by some that the BPB is more focused on the support role than on supervisory elements and this could be a reflection, to some extent, of current legislative provisions.

The right balance in putting these elements together is critical not only to the effective exercise of this function, but to public confidence in the process.

3.7 Contracts with Certifiers

Concerns regarding the conflict issues outlined in the last section have contributed to changes being made to the EP&A and Regulations to mandate formal contracts (with certain prescribed features) between owners (as the beneficiaries of consent) and certifiers. These amendments took effect on 1st March 2013 and the BPB issued a template contract shortly after. Other changes required up-front payment of fees to certifiers, along with provisions for dealing with variations where services provided are expanded.

Councils objected to their employees being required to enter into contracts, when in their view, Council officers are carrying out Council functions. The template provided by the BPB was criticised by the industry for being difficult to understand and unhelpful from the point of view of certifiers as a contracting party. Their peak organisations indicated that they would not recommend its use.

However, there are more fundamental issues with the contract. Prime among these are clarity in terms of the nature and scope of services to be provided. While the template contract refers to the statutory obligations that certifiers must comply with, it does not clearly articulate what exactly a certifier will do. Perhaps because of the central difficulty of defining scope as discussed previously. Then there is the issue of whether an owner – particularly a "Mum and Dad" owner is a natural or well informed contracting party.

As will be outlined in section 7.2, the obligation of a certifier in discharging his responsibilities arguably owes more to the consent authority than the beneficiary of consent. These responsibilities lie behind the somewhat curious concept of making certifiers "public officials" through various statutes and then requiring them to contract with owners. In passing, it is worth noting that other professionals have statutory obligations but maintain client relationships without being vested with the status of a public official. For example, a barrister has obligations to the Court as well as his client.

Owners, of course, benefit from certification in that they receive assurance that their building is compliant and fit to occupy. But it is difficult to avoid the conclusion that this assurance is the product of a regulatory process rather than a service sought and paid for by an owner. In any case, there appears to be nothing to prevent a builder from executing a contract for certification services as an agent for the owner, in which case existing practices whereby builders effectively appoint certifiers are unlikely to change.

While the requirement for up-front payments provides certifiers with an added measure of independence from builders, this could be achieved by removing certifier fees from the building payment stream through redesigning the consent application process. Also, some certifiers already provide owners with a letter outlining the nature of their role and the services to be provided.

Finally, one benefit of requiring both Council and private certifiers to enter into contracts is that it provides a common specification of the certification role. However, this could be achieved in other ways, again by re-assigning the consent application process.

3.8 Occupation Certificates

Another provision which commenced on 1st March 2013, required certifiers to apply the "not inconsistent" test to compliance with BCA and consent conditions at the completion stage, with the issue of an "Occupation Certificate". At first blush this appears to be a relatively minor and logical step to "closing the loop" in the certification process. At the commencement of the process the owner is required to seek approval and, depending on whether a development consent or complying development track is followed, certifiers issue construction or complying

development certificates which apply the "not inconsistent" test to compliance with the building code and consent conditions. However, as the analysis in Section 4.4 shows, this change has significantly widened the scope of certification and increased certifier liability, with consequences for the cost and availability of Public Indemnity (PI) insurance.

3.9 Insurance Issues

One consequence of increasing the regulatory burden of the certification process is the impact on the cost and availability of professional indemnity insurance for certifiers. This in turn could have a major bearing on the willingness of practitioners to remain in the certification business or for new entrants to commence.

Building surveyors are sometimes employed by businesses which provide a range of services, including consultancies to the construction industry. Anecdotally, some have decided to withdraw from practicing as certifiers because of increased liability (or perhaps because their employer has chosen to focus on other areas). Also, some insurers have indicated that PI cover for building certifiers is for them a marginal business proposition and recent changes (as outlined in the previous section) may result in them abandoning this type of cover.

There are other insurance concerns. While continued or "run off" cover is available to certifiers who retire or leave the industry, few avail themselves of this cover (presumably because of its cost), apparently choosing to expose their personal balance sheets in the case of claims made in relation to jobs completed while they were working. Of course, this also means that parties who may wish to make claims have limited recourse.

In addition, there is the issue of continuity of cover over the life of a particular project. In the event that a certifier abandons a job for whatever reason, a subsequent appointment of a certifier results in gaps in cover. The BPB has explored the possibility of obtaining group cover to apply to these types of situations, seeking consultancy advice. However, their advice was that without relevant data, insurers would be unlikely to write this type of business.

3.10 Available Data

The insurance issue canvassed in the last section illustrates one consequence of not having data relevant to assessing professional indemnity risk. Insurance companies will not disclose claims data for commercial reasons. This therefore needs to be obtained by survey methods.

However, insurance is not the only reason that basic data should be maintained. The effectiveness of any regulatory or compliance function should be continuously monitored and assessed. And this requires data such as the number of jobs certifiers undertake; value of consents; volumes of work undertaken by private certifiers vs. Councils; fees charged; number and types of claims pursued in courts; and the implications of developing case law.

The issue has been recognised in the White Paper which flags the acquisition of relevant data through a state-wide database which is linked to an electronic system for managing all approvals and tracking all developments. This proposal is being examined by other jurisdictions in Australia and New Zealand and there may be opportunities for NSW to partner with another jurisdiction in developing an appropriate system.

Worthy as this ambition may be, it will necessarily be some time before such a system is operational. In the meantime, the acquisition of reasonably available data to support the functions of the BPB and DP&I should be achievable and is arguably overdue.

3.11 The Building Professionals Board (BPB)

The BPB was established by the Building Professionals Act 2005 (BPA). It was given responsibility for a number of key building control elements, including the accreditation of Council and private certifiers, provision of education and technical support, investigations of complaints, monitoring and auditing the activities of private certifiers and exercising disciplinary powers under the Act.

These are critical elements to fulfilling the policy directions of the White Paper, which flags a review of the Act to ensure that issues relevant to successful achievement of the White Paper objectives are effectively addressed and implemented.

The discussions with stakeholders, including BPB directors and staff have identified a number of issues relevant to the objectives of this Review. The BPB has effectively consolidated the role of private certifiers and established an effective scheme of accreditation for both private and Council certifiers. It has sought in recent years to overcome an investigations backlog with some success and begun to weed out practitioners who fail to comply with their obligations.

However, as might be expected in a complex and difficult regulatory environment, concerns remain. Some arise from the split administration in the NSW jurisdiction relating to various elements of the overall building control delivery chain (a feature common to most Australian jurisdictions). To some extent, building defects, which can more reasonably be attributed to the performance of builders, are laid at the door of certifiers. Builder registration and licencing, along with consumer protection are also key elements of the chain, arguably more directly related to addressing the problem of building defects.

None of this of course should detract from the need for the certification and compliance elements to be as effective as possible. Perhaps chief among criticisms of the BPB is a perception that, as a regulator, it has been overly protective of building certifiers. The relatively small number of certifiers (seven in the last five years) who have had their accreditation withdrawn is held to be evidence of this. The length of time investigations take and lack of response to Councils is another source of criticism. Also, audits are almost exclusively desk-top and are limited to assessing the completeness of documentation, re-enforcing perceptions that the exercise of professional judgement (key to a certifier's role) escapes scrutiny.

Against these criticisms, is the burden of perhaps overly prescriptive requirements in the BPA and Regulations regarding the conduct of investigations. Designed to protect certifiers by imposing the principles of natural justice, an overly prescriptive process also has a number of undesirable effects. First, given the resource requirements of the process, high thresholds are imposed before it is commenced (the bigger the stick, the greater the reluctance to get it out). Second, it apparently inhibits other, perhaps more effective, compliance strategies, such as risk-based auditing or the use of "demerit" schemes which are applied in other jurisdictions and which arguably are a greater influence on behaviours. The ability to conduct investigations which don't have, at least in the first instance, disciplinary consequences may be an important means of quickly establishing the facts and allowing peer review procedures to support the exercise of professional judgements.

Furthermore, it would appear that relative to other jurisdictions, the BPB has been under resourced in this area. Clearly, an effective compliance regime needs to be adequately resourced with a team possessing both investigative and relevant technical skills.

3.12 A Consumer Focus

The building supply chain is complex and for most consumers difficult and time-consuming to navigate. But in the end, building outcomes in terms of quality, sustainability, safety and amenity should serve the interests of individual consumers as well as the collective interests of communities. Much of the building control delivery chain is opaque to consumers and tends to focus on regulatory outcomes which only indirectly touch on the interests of consumers.

Defining the responsibilities and accountabilities of all parties in the building supply chain (including the control elements), is an essential step towards achieving better outcomes. However, without informing the end consumer, risks a misplaced focus on the supply chain itself.

Consumers need to be informed at all stages of the building process. Each stage of the progression from specifying requirements, to seeking consent, engaging a builder, appointing a certifier, supervising construction, to occupation should be clearly explained and understood. In particular, consumers should be able to distinguish between their contractual rights and the role and obligations of certifiers. Confusion in this area will inevitably lead to disappointment and a loss of confidence in practitioners and institutions alike.

This is recognised in the White Paper and should be a vital element in its implementation. User friendly interfaces such as easily navigable websites, as well as easy to understand documentation should outline a consistent explanation of the process, even though a number of administrations, departments, statutory bodies and suppliers will necessarily be involved.

Some jurisdictions, in undertaking substantial reforms of the building sector, have directed substantial resources to public education.

3.13 Split Administration

In NSW, as in other jurisdictions such as Victoria and Queensland, elements of the building control delivery chain reside in separate administrations. The BPB and DP&I reside within the Administration of the Minister for Planning and Infrastructure. These bodies are responsible for building policy and control, compliance, as well as the planning system. The Office of Fair Trading resides within the Administration of the Minister for Fair Trading with responsibility for builder and trades registration and licencing, as well as consumer protection. The Minister for Local Government is responsible for local Councils and hence their role in building control and planning delivery.

The need for coordination in securing desired policy outcomes is obvious and has been identified in every review of issues relating to the building and construction sector. Focus on any single element of the overall chain will not secure the desired outcomes.

Silos, differing cultures and bureaucratic "turf" conflicts will always be part of any large enterprise, not just government. But any major reform will depend on consistent, cooperative and coordinated action by the various administrations. A joint agenda agreed between the relevant administrations with responsibility allocated to appropriate bodies and individuals will be key to ensuring a holistic approach to reform.

3.14 Conclusion – Key Issues

The central issue emerging from discussions with stakeholders is the need to define clearly the role and accountabilities of certifiers. This in turn requires specification of both the content and approach relating to how a certifier should discharge his "public interest" obligations and in particular relationships with local Councils. There are also process issues relating to certification such as the purpose of the Occupation Certificate and certifier contracts, consumer information, insurance and the performance of the BPB. These are dealt with in the ensuing chapters.

4. WHITE PAPER DIRECTIONS AND PRIORITIES

4.1 Overview of White Paper Directions

Chapter 8 of the White Paper specifies many detailed proposals to improve building regulation and certification. The proposals draw from earlier reviews outlined in chapter 6 of this report and are at varying stages of development and analysis. Also, they cover a similar (but more comprehensive) range of issues as are addressed in this Review and it may be expected that feedback from both will inform the Government's approach to implementation.

Chapter 8 deals with issues extending over the whole of the life cycle of the building process from design to approval, construction and use of buildings after completion. In particular, it proposes the use of experts in specialist areas who will be accredited to provide compliance certificates (mandatory for more complex work) for critical building systems along with new accreditation procedures to ensure that these certificates are issued by competent individuals. However, an issue does arise in that it may not be appropriate to allow the use of compliance certificates for less complex buildings, so that certifiers are required to exercise judgement.

This chapter of the White Paper also proposes improvements to processes, documentation and the mandatory inspections regime as well as a building manual to ensure ongoing compliance of buildings and systems with regulations designed to maintain safe and effective operations.

4.2 Fire Protection – a Critical Example

Extending formal compliance arrangements and accreditation in specialist areas raises a number of issues relating to scope, purpose and administration. A critical building system appropriately identified as involving complex and high risk technical issues is fire safety, where expert opinion is required in the assessment of alternative fire safety solutions before a construction certificate may be issued.

This is an area where the industry is itself concerned about a number of current weaknesses, including:

- Around half of all complex building approvals involve at least some elements of engineered solutions (as opposed to "deemed to satisfy" designs which accord with BCA standards).
- The current NSW arrangements are for self certification by installers. In effect, the building owner (or developer) decides who is competent to certify design and installation.
- There is no occupational accreditation for "Fire Engineering" and licencing requirements administered by Fair Trading relating to "specialist work" under the Home Building Act are said to be ambiguous and at best contain gaps.

- There are a number of specialist areas involved including sprinklers; hydrants; mechanical air handling; structural design; and detection. It is unlikely that any professional would be competent in more than one to two of these areas.
- While there is some stability with larger installation and design providers, at the smaller end of the scale there is significant turnover (as with other parts of the construction industry).

Accordingly, a number of issues arise. Who should be accredited for compliance certification purposes? The installation and design company, or individual practitioners, or both? Which specific areas of competence should be targeted? Should accreditation be undertaken by the Government (via the BPB?) or by the industry?

These issues no doubt apply to other specialist areas, but fire protection is perhaps the most critical and serves to illustrate the complexity of specialist certification and accreditation. **Appendix 2** outlines a case study of how a scheme might be implemented.

4.3 Waterproofing – Also a Critical Example

Another area of concern is waterproofing, where defects are common and where some stakeholders have identified issues with both the certification process and the standards themselves. It is important to differentiate building types in analysing this issue. The White Paper focuses primarily on the residential sector, and this can conveniently be defined to comprise three sectors: one and two storey dwellings ("Mum and Dad" developers), three or four storey medium density (mid-size developers) and multi-storey high rise (big-end developers). Waterproofing is probably the largest source of building defects in all three sectors.

Waterproofing concerns involve both products used in the construction process as well as building techniques and practices. Some building professionals point to ambiguity in standards which arguably do not provide solutions. For this reason, some builders have developed practice guides for their own use and specify compliance with these guides by their subcontractors (where again, standards are not capable of interpretation by trade practitioners).

When it comes to certification, one key difficulty is the stage at which building works should be inspected for a certifier to form a soundly based opinion. Also, does a certifier have the required skills and, for more complex buildings, who would be competent to issue a "complying" certificate?

For the "Mum and Dad" end of the spectrum, it would be difficult to argue that certifiers should not exercise their own judgement. But to do so, they would need practical guidance. For multi-storey developments, designs need to vary for each and it is difficult to identify standard solutions. However, waterproofing in high rise buildings has been a major source of defects and litigation by corporate bodies – presenting a significant certification challenge. Accordingly, analysis of this issue is presented at **Appendix 3**.

4.4 Occupation Certificates

The White Paper proposes that Occupation Certificates (issued at completion) will certify that building work is consistent with development consent (or complying development certificate). It also proposes that tests for the issue of the occupation certificates (and where relevant, attendant compliance certificates) will be specified.

In making this proposal, the White Paper acknowledges that the existing role of the Occupation Certificate is unclear. However, it also argues that the Certificate should provide some level of certainty for owners and occupiers, the builder, the consent authority, financiers and conveyors once it is issued.

This issue is canvassed in section 3.8 of this report, where it is noted that amendments commencing on 1st March this year required the "not inconsistent" test to be applied to the issue of Occupation Certificates, so expanding the scope of certification at the completion stage and significantly increasing the potential liability of certifiers. One insurer has indicated that they may withdraw from providing PI insurance to certifiers because of the added risk.

This would seem to be one White Paper proposal that should be reconsidered, not least because of its regulatory impact on potential liability. However, the purpose of the Occupation Certificate should also be re-visited so that some focus is applied to the problems that the 1 March changes sought to address.

Failure to issue an Occupation Certificate would appear to have a number of consequences. First, an owner may not legally move in (although this is usually "regularised" after 12 months). Contractual provisions for final payment to a builder may not be triggered and an owner may have difficulty in disposing of the property without applying for modifications to consent. However, the question arises as to whether the widened certification requirement would have any impact on the compliance-related behaviours of participants in the building process.

In any case, from a practical perspective, it is too late at completion to remedy non-compliance and construction risks are better addressed at earlier stages of the process. A large number of stakeholders indicated that they doubted whether the widening of scope of the Occupation Certificate would have any discernible impact on behaviours.

4.5 Clear Roles and Responsibilities

The White Paper makes the point that the role and responsibilities of the certifying authority, the consent authority and the Council "are not always clear to members of the community and other practitioners".

As noted in chapter 3 this has also been identified as a central issue for this Review. The White Paper proposes:

- Responsibilities of all parties including the building certifier, the consent authority and Council be clearly defined, as should the builder's responsibilities in relation to certification requirements.
- There should be a clear definition of roles and responsibilities between Councils and private certifiers and in particular the role of Councils in relation to enforcement action. This should involve duties to report non-compliance and Councils to cooperate in the resolution of on-site compliance issues.

However, there can be no resolution or definition of the abovementioned roles and responsibilities unless the scope of required compliance with the building and planning codes is defined. This is dealt with in chapter 9 in this report.

A related issue is that of contracts between owners and certifiers, which is also tied to the question of dissemination of documentation to all the relevant parties. This goes to the issue of public confidence in the certification system (as the White Paper points out) and is discussed in chapter 7 of this Review.

It would seem that considerable work needs to be done to achieve this objective of the White Paper. Detailed work to establish robust policy positions should be completed before statutes and regulations are drafted.

4.6 Implementation and Conclusions relating to White Paper proposals

The White Paper proposes comprehensive improvements, some of which would result in a significant expansion of the certification system.

Most, if not all, of the proposals have a case to be considered and as previously mentioned in themselves most are eminently sensible. However, their regulatory impact when taken together needs to be assessed, as should the feasibility of implementation.

Even if the proposals can meet these hurdles, two further points need to be made:

- They need to be prioritised.
- Many require further study and development.

Also, it may not be possible to complete a regulatory impact assessment without first resolving the scope of certification and boundary issues referred to subsequent chapters. One example of an expanded scope proposal is the addition of mandatory inspections for more complex buildings. This is entirely consistent with good regulatory practice in other jurisdictions, where mandatory inspections are stepped in relation to construction risk. However, the exact technical scope of these inspections and the impact on the certification process need to be assessed and detailed proposals need to be developed.

Accordingly, a three-part assessment process to address these issues is proposed:

- Assessment of the White Paper Chapter 8 proposals by an expert panel of suitably qualified, experienced and competent practitioners (Panel 1).
- Assessment of the scope of certification in relation to both consent and BCA compliance, including the development of an approach to issuing a practice guide with legal status (Panel 2).
- Determination of the role and responsibilities of certifiers and Councils, together with a framework for cooperation (Panel 3).

Clearly, the work of Panel 1 would need to be informed by that of Panels 2 and 3 and hence Panel 1 should be given an overarching and coordinating role. The panels, preferably with a relatively small membership to facilitate decision making, should be supported by reference groups which can be drawn on for requisite expertise.

A diagrammatic presentation of this proposed arrangement is at **Appendix 4**. These arrangements would need to be integrated into broader program management arrangements for overall White Paper implementation.

However, on balance one proposal – that relating to the issue of Occupational Certificates – should be re-considered. In the meantime, it would seem to be appropriate to withdraw the 1st March changes relating to this matter.

5. DEVELOPMENTS IN OTHER JURISDICTIONS

5.1 New Zealand

The national Government amended the Building Act in 2004 in response to the 'Leaky Buildings Crisis (LBC)", which involved some 45,000 buildings being left without adequate weather proofing. This was a systemic building products issue involving the widespread use of a type of cladding that proved to be defective. All building classes including residential, commercial, schools, motels and the like were affected.

The then Government's response to the LBC was to tighten regulatory controls on practitioners and products, mandating that all building consents must be through local Councils. Prior to 2004, building certification was carried out by private certifiers. The regulatory changes essentially put the private certifiers out of business as more stringent requirements left them unable to obtain insurance cover. This was the then Government's policy intent.

As a consequence, Councils now bear the brunt of liability for defects because, under the New Zealand "joint and several" legal framework, the party with the deepest pockets often bears the risk of claims – mostly Councils - who are estimated to have ultimately paid up to 70% of claims costs. Claims have essentially been managed through the courts. Also, Councils now employ certifiers (a small number are private sector contractors) and are accredited for monitoring and compliance systems by the national Government.

One clear consequence of the additional risk borne by Councils and the litigious experience of the LBC was to make Councils more risk averse in the way they approached consent and compliance issues. This resulted in increased costs, delays and barriers to innovation. Also, the only remedies available to consumers were through the courts (unless they had access to private insurance).

The New Zealand Government conducted a review in 2009 to address the following concerns:

- Consumers were poorly informed, in particular what risk cover their builder has and what questions they need to ask about the process.
- Re-work in the construction market was relatively high and leading to higher costs.
- The consenting process was too complex and imposed unnecessary costs.
- There was a lack of clarity regarding who was responsible for what and risk and liability were not allocated optimally.
- The increased focus on regulation in the 2004 legislation was not consistent with sound regulatory practice or desired industry outcomes.

The review concluded that the regulatory system was light handed overall, but unbalanced with the distribution of risk poorly aligned with the ability to manage, leading to undesirable behaviours and inefficiencies. While the 2004 Act provided for most of the system components required, implementation was incomplete and the system relied too heavily on the consent process and third party review. (All relevant issues for White Paper implementation).

Also, consumer protection was difficult and costly to enforce in practice, with consumers having limited home warranty insurance options. To address these weaknesses it was proposed to reduce regulation that added cost for little benefit; re-balance risk to parties best able to manage; create a better risk management environment through better information, better home warranty insurance and more cost-effective dispute resolution; increase incentives for the professional performance of practitioners; simplify the consent and inspection process to make it risks-based; and provide support for smart technology solutions such as on-line consenting.

In 2010 Amendments to the Building Act implemented a first stage of reforms as follows:

- Clarified that providers of designs and specifications, as well as construction services, are accountable to the owners of the building works for meeting the requirements of the New Zealand Building Code and building to approved plans and specifications.
- Owners are accountable to the building regulators and subsequent owners for gaining necessary approvals, for building code compliance in the event they change specifications and for building to approved plans.
- Building regulatory authorities (i.e. Councils) are accountable for issuing building consents, checking plans for code compliance, checking that work done complies with consented plans and certifying that building work has been completed in accordance with any requirements of consent, subject to regulations that provide for inspection points.
- To allow consumers to enforce these accountabilities under contract, a written contract for residential building work was mandated, including mandatory disclosure of prescribed information such as availability of insurance cover and new legal remedies.
- The mandated contract also provided for more options for dispute resolution, to enable the parties to resolve disputes as quickly as possible and under contract.
- The Building Act and Regulations were also amended to exempt a broad range of low-risk building work from consent requirements and to provide for a risk –based approach to issuing consents and inspecting work. The approach was to align requirements with the risk and complexity of work and the skills and capabilities of those undertaking the work.
- The mandated contract requirement was a centre-piece of the reforms designed to re-balance the system from reliance on regulation to incentives for stakeholders to develop appropriate behaviours with relationships defined in contract. This was also designed to put more responsibility on the building contractor rather than the certification process, hence reducing Council involvement and exposure to liability.

In approving the above changes, the New Zealand Cabinet also approved policy directions and subsequent reforms, with a staged approach. Further reforms were to deal with an education campaign for building practitioners, with funding to be provided from the national Budget. Also, licencing arrangements were to be extended to cover additional works and an effective system to monitor and provide information on the quality of outcomes of building work was to be established. The "joint and several" legal framework was to be reviewed by the New Zealand Law Commission.

A further package of legislative changes was recently considered by the New Zealand Parliament. It is understood that the Government plans to reintroduce private sector participation in the consent and certification process progressively as recent changes are bedded down and an insurance market is allowed to develop.

One important future reform flagged in the 2010 package, was investigation of an on-line system for the consenting process. This would have a number of significant advantages, including greater consistency of process (currently there are around 70 Councils, with a high degree of variability in terms of both approach and quality of performance); greater visibility for the National Government of the performance of the overall system; reduced cost and complexity for consumers; and the opportunity to impose user fees.

5.2 South Australia

The South Australian Department of Planning, Transport and Infrastructure has recently completed a review of the Building and Planning Code and has settled on a new policy direction which is currently being implemented and which will be supported by new regulations in due course. Some of the changes seek to limit the degree of influence or control that local Councils have over the planning process. The arrangements being put in place differ significantly from the NSW model.

Private certifiers have been in practice since 1995, but have hitherto been restricted to BCA compliance. However, they will now be allowed to certify Planning Code compliance as well, within a framework that seeks to limit the degree of judgement required by a certifier in this respect. Specification of objectives and the application of measurable standards aim to make this task as mechanical as possible.

In South Australia, more complex buildings are controlled by the Building Development Assessment Commission (BDAC). This consent track covers all developments in the Adelaide CBD as well as any development with a value exceeding $10 Million. A constituent part of the BDAC is the Planning Assessment Commission (PAC). Developments are dealt with in two stages: planning consent (land use and planning code) and building rules consent.

A suite of planning policies has been developed to avoid problems previously encountered with Councils seeking to impose overly prescriptive conditions of consent. Under the new planning code, the private certifiers task will essentially be "tick a box" in character with as much as possible being codified. As with White Paper proposals in NSW, the new planning code has removed some developments from the requirement to obtain approval (e.g. carports, sheds and the like). The policy expectation, again very similar to the NSW White Paper, is that some 70% of developments will be dealt with by private certifiers.

The role of the PAC is to streamline the consent process, so that prior to a development application being made, proposed designs are assessed by a panel of five experts. The Panel's report then goes to the BDAC (or a Council if relevant) to fast track the approval process. Development proposals may proceed without this step, but will inevitably take longer. Also, Councils may refer matters to the Commission, whose mandate is to assess any developments above three storeys or $5 Million in value, or any development with more than ten dwellings.

There are around 80 private certifiers in South Australia and there is a mandated requirement for PI insurance. However, there is also an arrangement for enduring run-off cover.

Certifiers are appointed by the beneficiary of consent (usually the owner) and are precluded from also being involved in the design. Much of the complexity involved with certifiers being required to exercise judgement as to whether detailed plans are compliant has been removed by early involvement by applicants with the PAC. Furthermore, although practice notes are available to guide certifiers with respect to the application of building rules, in the event of uncertainty, reference may be made to the Building Rules Assessment Commission (again a constituent part of the BDAC) to obtain a ruling.

Two further observations may be made:

- First, the jurisdiction has focussed first and foremost on getting policy settled and implemented as far as possible under existing legislation before pursuing amendments to statutes or regulations. For example, reforms to address the policy challenge of Councils and planners becoming overly prescriptive by focussing on outcomes and allowing for innovation.

- Second, fears that establishing the BDAC would result in the system becoming slower to respond to applicants do not appear to have materialised. This is attributed largely to the design panel being a first port of call, allowing for preliminary discussions with building experts and architects. In effect the PAC is an advisory service funded by the State which is appears to have lead to better design outcomes.

5.3 Queensland

As in NSW, responsibilities for planning and related policy matters and operational issues relating to licencing and certification are split between two administrations, albeit along somewhat different lines. The Department of State Development, Infrastructure and Planning looks after planning issues, whereas the Department of Public Works and Housing incorporates Building Codes Queensland (legislation and policy) and the Queensland Building Services Authority (licencing, accreditation, discipline). Local Councils are the consent authorities for most developments in Queensland.   However, building certification is carried out by approximately 400 currently practicing private certifiers.

In recent years there have been concerns regarding the performance of the private certifiers, with some of the issues being similar to those canvassed in this Review. While the broad policy issues around the role and scope of certification are largely settled, process and operational issues such as clarifying accountabilities, resolving conflicts, disciplinary procedures and engagement/disengagement have been the subject of recent review. The Government has yet to make final decisions, although this process is approaching finality with broad agreement having been reached by stakeholders.

A discussion paper entitled "Improving building certification in Queensland" was circulated in August 2011. It comprehensively detailed problems as well as suggesting solutions.   In particular, it proposed that a demerit system, such as the one in force in Queensland for licenced builders, designers and trade contractors, be applied to certifiers. It was suggested that such a system would provide an opportunity to guide or educate building certifiers about their obligations, on the basis that a cumulative disincentive across a range of possible failings would eventually threaten their business viability.

Another suggestion of direct relevance to this Review, was to mandate an enforcement role for private certifiers, but limit this to the initial stages of any enforcement action. This would be aimed at enforcement in the construction stage, when rectification work is more readily undertaken and is least expensive. Rectification at this stage would reduce the pressure on local Councils, which may otherwise need to take on enforcement, perhaps at a stage where rectification is either not possible or far more difficult and costly.

The outcomes of consultation on the discussion paper were reviewed by a government-appointed panel and its recommendations incorporated in an exposure draft Bill. A summary of the key proposals canvassed in the discussion paper, together with their status following the panel's review, is presented at **Appendix 5.**   Again, this deals comprehensively with the problems identified. The two examples presented above are the subject of recommendations to proceed. Indeed, the Queensland Government has recently announced the establishment of a new building industry regulator, the Queensland Building and Construction Commission, to replace the Building Services Authority.

Another key initiative of the Queensland government is the issue of "Guidelines for the Inspection of Class 2 to 9 Buildings (as defined in the Building Code of Australia). This was published in June 2012 and provides building certifiers with guidance as to how to meet their responsibilities for the sufficient inspection of buildings pursuant to the relevant statutes and regulations. The guidelines are risk-based and designed to assist in the achievement of compliance and have legal status.

Evidence of regard to these Guidelines may assist a Certifier to respond to complaints about the performance of a building certification. This guide has no equivalent in NSW.

5.4 Victoria

In Victoria, the Victorian Building Commission (VBC) regulates builders and certifiers, although these institutional arrangements are under review with the release of the Domestic Building Consumer Protection consultation paper. Submissions were received until July 2012 and it is understood that the Victorian Government is currently considering its response, which is expected shortly. Consolidation of consumer protection arrangements in a new building authority is expected as part of a major reform.

The review focussed on the domestic building industry in Victoria and incorporated a broad-ranging examination of the existing building consumer protection framework, which included the regulation of building occupations and the building permit system. However, its prime focus was consumer protection, including contract management, dispute resolution and insurance.

The scope of certification in Victoria is not considered to be a significant issue, with relevant guidelines, standards and tolerances being available to assist the work of private certifiers (there are approximately 570 private certifiers in Victoria). However, the performance of certifiers is now under scrutiny following a report by the Victorian Auditor-General. The Auditor found there was inadequate monitoring of certifier activities; certifier performance lacked compliance with obligations; and poor documentation was being lodged with local Councils. Also, there was patchy performance by local Councils regarding building control, with some Councils being pro-active and others less so.

These findings are expected to result in changes to sanctions and disciplinary arrangements being applied to certifiers, as well as new regulations dealing with disengagement. The VBC has accepted the findings of the Auditor General and is now developing an audit program with two aims. First to reduce the backlog of investigations currently on its books and second to establish a routine audit regime which is more focussed on support. The program aims to initially examine 1000 permits issued by Councils to identify compliance and risk areas to inform the development of a strengthened audit program.

To undertake these audits, the VBC intends to use a small in-house investigations unit supported by a number of expert panels selected for skills relevant to the requirements of particular audits. It is also looking at establishing new resolution processes. The Victorian Department of Planning indicated that they will be seeking assistance from Queensland in developing these changes.

In another response to the Auditor's findings, the VBC has surveyed certifiers to develop a better understanding of how they carry out their role and responsibilities. Some examples of questions put are:

- Is there a conflict between Councils issuing building permits and then having an enforcement role with respect to these permits?
- Does the system encourage more of an adversarial than a cooperative relationship between Councils and certifiers?

- How do certifiers rate the role of the VBC regarding:
  - o Training and professional development?
  - o Technical advice and support services?
  - o Providing guidance and direction to assist certifiers in carrying out their role?

The VBC is currently analysing responses.

Victoria is also developing template legislation for a national occupation licencing scheme. It is intended that the building sector will be second in this process and that all practitioners will be covered. The best aspects of operational models in the various jurisdictions will be adopted and special mention was made of arrangements in Queensland. However, this program is running well behind schedule.

6.   PREVIOUS REVIEWS

There have been a number of recent reviews that relate to the delivery of key aspects of building control in NSW, including certification, where findings and recommendations are currently unresolved. These include the development of a Better Buildings Model (BBM) during 2012 via consultations conducted by the BPB; the Fire Systems Working Party; and the NSW Building Regulation Working Party. A number of other reviews in related areas are also being undertaken contemporaneously with this Review, including a review of the Home Building Act 1989; a review of Strata and Community Title legislation; and the Local Government Act 1993. While the outcome of these related reviews may inform resolution of some issues addressed in this Review, as well as proposals in the White Paper, they are flagged here only for purposes of completeness.

It is also useful to highlight that, as outlined in the last chapter, major reviews of building control have been undertaken recently in Victoria and Queensland and significant changes are expected to flow from these in the near term.

6.1 The Better Buildings Model (BBM)

The BBM was developed by the BPB in recognition of current uncertainty in NSW regarding the role of certifiers and other practitioners in the building process. It identified areas for improvement to practices based on existing requirements and was the result of extensive consultation and research conducted by the BPB in the first half of 2012. It sought to look holistically at the entire building certification process and proposes new processes and documentation to clarify the responsibility of the certifier. In particular it proposes additional roles including the preparation of mandated compliance reports.

At the commencement of the process, the BBM proposes that plans, with an appropriate level of detail and with specified requirements, be prepared by accredited persons. By putting more emphasis on this stage, the proposal targets better compliance with the BCA and consent and seeks to avoid costly non-compliance and rectification at later stages.

Then, the model introduces the option (mandated for more complex buildings), for the certifier to call on the expertise of relevant practitioners (e.g. building designers, architects etc) to certify plans. It also identifies compliance reports which a certifier must prepare to demonstrate compliance. Further, it proposes more critical stage inspections for more complex buildings to ensure that PCAs are on site more often, so reducing non-compliance risk.

A new feature of the compliance regime proposed by the model is the mandating of component certification for the installation and commissioning of critical building elements, together with an expanded accreditation regime for people issuing component certificates.

Finally, it proposes an expanded requirement for the "not inconsistent" test to be applied at the Occupation Certificate stage (addressed in section 4.4).

Taken together, these proposals would amount to a more comprehensive practice guide for certifiers and so better define their role. The document acknowledges that the model is largely conceptual, with relevant details yet to be worked out and that issues of time, cost, administrative and accountability impacts would need to be assessed via industry feedback.

While the model no doubt contains many sensible suggestions, it focuses on consent requirements and does not fundamentally focus on the scope and purpose of certification. Neither does it represent a clear approach which could be given legal status and which would set out how a certifier should discharge his responsibilities (such as the Queensland "Guidelines for the Inspection of Class 2 to 9 Buildings").

To this extent, the model is a conceptual framework which could inform a program to meet the policy directions of the White Paper. However, it would seem that much detailed work has yet to be done.

6.2 NSW Building Regulation Working Party

The Working Party was an interdepartmental group of officials from relevant agencies who were asked by the Minister for Planning and Infrastructure to review issues associated with current regulatory policy, systems and departmental responsibilities for building regulation in NSW. It was specifically asked to make recommendations on initiatives that might improve the efficiency and effectiveness of building regulation. It reported in December 2012.

The consultation and research conducted by the working party identified a range of issues relating to the quality of building work, education and training of builders and contractors and the licencing accreditation, insurance and accountability of all parties. Many of the issues identified, not surprisingly, are consistent with those identified in this Review and outlined in Chapter 3 of this report.

Of particular relevance was the lack of clarity regarding the role of the PCA; a lack of clarity in the tests for the issue of an Occupation Certificate at the end of the construction process; the cost of complying with the requirements of the BCA including the complexity and number of building standards; the relative ineffectiveness of the Home Warranty Scheme; evidence of the failure of some certifiers to either undertake inspections or to do so thoroughly; the difficulty of pursuing subcontractors in building actions; and the practice of owners pursing actions in the courts rather than making complaints to the BPB.

The wide range of issues in itself demonstrates the need for a holistic policy framework to address them, as well as a coordinated approach by the various agencies with responsibilities for the matters concerned. The report includes a very useful outline of the agencies involved and their various responsibilities, together with the main legislative instruments governing the sector and an overview of the current system.

The scope of issues and the complexity of inter-relationships of systems and agencies clearly suggests a need for rigorous prioritisation.

Salient to the Working Party's Review were the following observations:

- Accredited certifiers vary in their practices regarding standards adopted and which matters are addressed during mandatory site inspections. This contributes to a lack of confidence in the certification system.

- There is a poor understanding in the community of the role and desired outcomes of certification.
- There are gaps in the licencing and accreditation system for building practitioners making it difficult to hold some builders accountable.
- Current legislative provisions fail to distinguish between certification regarding building standards or consent conditions relating to the built form and the quality of work, leading to consumer confusion.
- The role of Councils is unclear in relation to enforcing the conditions of development consent. Councils are sometimes reluctant to become involved in enforcement where a private certifier is involved.
- While there is a lack of data, there is anecdotal evidence to suggest that certifiers are being joined in actions against builders because of their professional indemnity insurance.

The working party canvassed a number of structural options to assist in addressing the identified issues, including the establishment of a Building Commission or other integrated agency; better cooperation between agencies and re-establishing a Building Industry Coordination Committee. It is understood that these options are still being considered by the Government.

6.3 Fire Protection Systems Working Party

The Working Party consisted of representatives of the Department of Planning and Infrastructure, Fire and Rescue NSW and the NSW Office of Fair Trading to investigate a number of concerns raised by the industry. These relate to "self certification" of the installation of fire protection systems in new buildings and the ongoing maintenance of such systems. Specifically, industry concerns relate to the absence of third party checks to ensure that certification by an installer complies with the relevant standards, resulting in substandard work.

A stakeholder consultation report was released during 2008, submissions from industry were received in response and the Working Party's final report was released in October 2010.

The report identified a number of "potential issues" worthy of further investigation. These included the adequacy of some fire protection designs; failure to detect non-complying installations; some systems not being maintained; communication of relevant information to end-users; and some practitioners with inadequate technical skills and knowledge and/or understanding of their statutory obligations.

The Working Party made a number of recommendations for further reviews into matters such as the approval process for fire protection system designs; the role of NSW Fire and Rescue Brigades in the approval of fire protection system designs; whether all fire protection related work is covered by statutory requirements for compliance; and the process for checking approved fire protection system installation. In particular, it recommended an examination as to whether there is a need to introduce additional mandatory critical stage inspections for principle certifying authorities, to extend reliance on complying certificates from accredited practitioners and proposed enhancements to education and training of fire protection industry practitioners.

It is understood that some of these recommendations have been pursued in the ongoing work of the relevant agencies. Some key recommendations such as the critical stage inspections and complying certificate and expanded accreditation issues have been taken up in the White Paper.

7.   THE ROLE OF CERTIFIERS

7.1 Issues Relating to Scope

As previously mentioned, this appears to be the central issue with virtually all stakeholders agreeing that the role of certifiers is unclear. The obligations that certifiers have under various legislative provisions are complex, confusing and it is difficult to find a single, comprehensive compilation of these obligations, let alone one that assists with an understanding of their role (a comprehensive listing of the statutory obligations of certifiers, which has been compiled for this Review, is presented at **Appendix 6**). Nor does there appear to be widespread agreement regarding the exact purpose of the certification function, although in general terms, the objectives are relatively clear. Owners and the community are generally ill-informed regarding the outcomes of the certification process. The expectations range from a complete lack of awareness to unreasonable reliance on certifiers for site supervision and builder performance with respect to contracted deliverables.

The consequences of this lack of clarity are a high level of criticism of the performance of certifiers (some manifestly unfair); confusion as to the respective roles of certifiers and local Councils (with some Councils being unhappy with private certifiers); and community confidence in the process being undermined.

There are two broad areas which represent the central purpose of certification:

1. Compliance with building consent relating to planning requirements e.g. State Environment Planning Policy (SEP), which relate to matters such as allowed use, layout, height, floor space ratios, site coverage, landscaping setbacks, parking etc. While planning code requirements are set out in State legislation, in an operational sense, Councils largely "own" the consenting process.

2. Compliance with building standards contained in the Building Code of Australia, and various State add-ons, including BASIX and fire safety. These are usually incorporated into conditions of consent.

Then, there is a third area dealing with community issues which are generally the concern of local Councils, such as encroachment on the road reserve, environment, noise control, public amenity and the like. These are usually the subject of consent conditions in relation to which Councils retain enforcement powers and certifiers have some role.

In a broad sense, compliance with consent conditions relates to all three areas and targets outcomes such as public safety, health, amenity and environment as well as building quality (at a policy level as opposed to the performance of a builder in terms of his contract with an owner). However, in addressing the question of "what is the scope of certification?" for certifiers to adequately carry out their role, a number of boundary issues arise.

First is the extent of compliance with development consent conditions. Should certification cover all conditions, or just the most significant? Here it needs to be recognised that many stakeholders point to problems such as the way they are sometimes internally inconsistent, vary considerably from Council to Council; are attempts to circumvent State planning instruments; are themselves conditional on further approval; and there have even been instances where conditions are virtually impossible to comply with. The White Paper deals with many of these issues in the context of fundamental planning reforms, but the question of exactly how a certifier should deal with all this remains.

Second, the issue of what is reasonable (or even feasible) in terms of the extent to which the certifier can assess and certify compliance with building standards. Should this be limited to some basic requirements such as structural integrity, fire safety, weatherproofing and wet area performance, for example. Is it reasonable to oblige a certifier to apply the "not inconsistent" test in respect of the BCA (together with its State add-ons) in its entirety? And if so, should some components be weighted more than others in the expectation that the certifier will discharge his obligation with reasonable due diligence?

Third, the somewhat vexed question of how Council functions with respect to certification (for which they compete with private certifiers) may be distinguished from their broader remit with respect to "community issues". These include environmental requirements (which may be consent conditions, for example, such as the handling of construction spoil to prevent spill-over to neighbouring properties or the contamination of waterways) and their enforcement powers. In attempting to distinguish these roles, there is the efficiency issue – should Councils undertake both roles in some circumstances because of the synergies of site inspections and enforcement or should the activities of certifiers and Council inspectors be better co-ordinated?

Resolution of all three issues is central to defining the role of certifiers and the extent to which the other parties to the building process may rely on certification. For example, what duty does a certifier have to the owner, who appoints him as a PCA? What services does a PCA provide to the owner as opposed to fulfilling his statutory responsibilities to the planning system and to Council as both "owner" of the consent process and enforcer of local environmental requirements.

In defining this role with greater clarity, there is also the question of risk/liability allocation in the overall building process. What risks are the certifier best able to manage (and consequently what liability should he bear) and what risks should be better managed by the builder. These issues are wider than those of certification, but any effective scheme of regulation should contemplate the appropriate balance in assigning liability.

7.2 Primary Obligation of Certifiers

Appendix 7 depicts the key relationships and accountabilities for certifiers under the current framework. Conceptually, there are two strands to the certification function. The first is focussed on ownership or private interests. The owner is contractually tied to the builder and to secure his ownership interests in terms of a desired development, he must seek consent from the consent authority.

The second strand is focussed on public outcomes which the consent process seeks to achieve (via compliance with planning and building codes). Here both the State and local Council are involved. At the centre of this framework of relationships and processes is the certifier, who has obligations to both strands. Certification protects the owner to some extent, ensuring that his development is compliant, but it is hard to argue against the proposition that his dominant obligation is related to public outcomes – i.e. securing compliance with consent. No doubt for this reason, there is an array of statutory obligations mandating the process of certification and outcomes in terms of issuing certificates. To ensure that the certifier's focus is on his statutory obligations, the concept of a "public official" has been established. However, in some ways, making a person operating a private business a "public official" is somewhat contradictory. There are, of course, many professions where practitioners must have regard to statutory obligations. Council certifiers of course are employees and are by definition "public officials".

7.3 Certifier Views

Certifiers, via their representative bodies, generally agree that currently there is no clear definition of the role of certifiers. A related concern is allocation of compliance responsibility between builders and certifiers. Proportionate liability can only effectively be applied if there is clarity in this respect.

There is also concern that in some cases, there is no-one in the building value chain other than the certifier who carries insurance and in these cases certifiers are "last man standing" and are increasingly being joined in actions against builders.

Certifiers are also wary of increasing obligations and hence liability. Some practitioners in the certification business undertake both general building survey work and certification, but there is anecdotal evidence that some are opting out of certification because of the more onerous obligations and the cost of insurance (including the need to cover themselves over statutory warranty periods after leaving the industry).

There is support for White Paper proposals relating to the mandated use of complying certificates where certifiers must place reliance on the work of other professionals. Also, the Better Buildings Model has general support, with some suggesting that development of this proposal will help to clarify the role of certifiers.

While the BPB has not undertaken any surveys of fees, there is anecdotal evidence of downward pressure on fees and hence the temptation to cut corners. Related to this is the concern that there is no mandatory reporting of the outcomes of inspection, progressively and only limited reporting at completion. Also, certifiers are concerned that the increased scope for the Occupation Certificate (1st March 2013 changes) leads to increased liability and potentially increasing the likelihood of some leaving the industry.

Regarding the requirement for contracts, certifiers point out that many already provide letters to owners on appointment as a PCA, outlining the nature of their services and obligations. The mandated contract is not supported although there is support for regulations facilitating practical relationships and a measure of independence from builders. Certifiers understand that a good working relationship with a builder is important to secure not only regulatory outcomes, but to protect the owner's interests. Builders also would prefer to be protected by effective certification of critical components.

Promulgation of the 1st March 2013 changes, which substantially impacted on the work of certifiers, has been criticised as being totally inadequate. In particular, the view from both Councils and private certifiers was that there was no consultation on the introduction of mandated contracts between owners and certifiers.

Certifiers, both Council and private, have concerns relating to self-certification by fire protection subcontractors, specifically the lack of registration or accreditation for people making certification. There is strong support for a more rigorous approach in this area.

Both Councils and private certifiers would like to see a more cooperative framework for the certification function, with process changes to allow greater reliance on the enforcement powers of Councils. Process changes involving Councils or the BPB should also focus on disengagement of certifiers from a job, because this is often a "red flag" that something has gone wrong on the job.

Finally, certifiers argue that there needs to be guidance provided in the application of the "not inconsistent" test, particularly as BCA standards often do not contain tolerances. More generally, it is acknowledged that the use of the "not inconsistent" test requires judgement to

implement, while there is no general framework in place to guide such judgement. Concern has been expressed as to how this concept may be explained to consumers. Perhaps if the scope of certification could be limited, a form of positive assurance could replace the "not inconsistent" test.

7.4 Certifier Contracts

The issue of certifier contracts was first outlined in Section 3.7. As outlined above, the views of certifiers, both Council and private weaken the case for mandated contracts. Given that this issue is central to the role of certifiers, it is worthy of further analysis here.

The requirement for the PCA to be appointed by the beneficiary of consent arose from the Campbell Inquiry, to address concerns about certifier shopping and potential conflicts in the builder/certifier relationship.

Against this consideration is the requirement for a direct relationship and clear communications between the builder and certifier, not least to ensure that inspections are carried out on a timely basis. This is most relevant to the "Mum and Dad" end of the spectrum, where additional risks may manifest if the owner is mandated to become a contracting party (as noted earlier in this report, contracting does not appear to be an issue at the higher end of the market). One such risk could occur when a certifier may have missed an inspection. The builder may argue that the owner failed to advise of the required inspection (keeping in mind that "Mum and Dad" owners are unlikely to be fully engaged in the building process and the appointment requirement [pursuant to statute] is for the owner to be the conduit of communication between the builder and the certifier). Accordingly, there are clear practical difficulties with this arrangement.

Add to this the analysis in section 7.2 which demonstrates that the primary obligation of the certifier is to the Council (as consent authority). This analysis also points out that "Mum and Dad" owners are hardly natural or engaged contracting parties. Accordingly, the contract case appears even weaker.

The risks posed by inappropriate relationships between certifiers and builders would seem to be better addressed by modifying the consent application process (as suggested in section 3.7) and ensuring an effective regime of compliance for certifiers. Councils should also have a role here and be empowered to act on concerns. Perhaps also, owners could remain free to appoint the PCA if that is their choice, or to allow a builder to choose or even to appoint a PCA from a Council approved list (provided that the particular Council did not complete for certification services). Those who exercise this choice (to appoint a PCA) may be more engaged, but should not be required to be the conduit for communications, an arrangement which is clearly impractical.

7.5 Conclusions Relating to the Role of Certifiers

From the perspective of this Review and given that consideration is being given to sweeping legislative change as outlined in the White Paper, the conclusions of the above analysis are as follows:

- It would be desirable if the statutory obligations for certifiers are streamlined, with appropriate regulation making power to ensure that they can be readily updated and prescribed in a way that is easily accessible and understood by certifiers.
- The boundaries between Council and private certifier responsibilities need to be clarified. (Equally, the role of Council certifiers should be separated and clarified so that the certifier role and function is identified regardless of whether it is performed by Council employees, their contractors or private certifiers).

- Requirements for cooperation between Councils and private certifiers, including the use of Council enforcement powers should be established.
- The concept of a contractual relationship between an owner and private certifier would seem inconsistent with the primary responsibilities of certifiers.
- The appointment of a PCA should form part of a streamlined consent application process with owners being allowed choice whether to make the appointment or to leave that to the builder. They should not be made the conduit for communication between the certifier and the builder. Furthermore, there should be an obligation on Councils to inform applicants of the role of certifiers in common terms for both private and Council certifiers.
- Councils may wish to establish panels of recommended certifiers as long as they do not provide such services themselves.
- Perhaps the most important proposal is to clarify the role of certifiers and define the scope of certification in respect of both planning and building code compliance. This would need to cover: the approach to BCA compliance in terms of areas of focus and approach to risk; reporting of the outcomes of mandatory inspections; cooperation with Councils regarding compliance and the use of enforcement powers; and the appropriate approach to consent compliance, again having regard to risk and focus.

The above issues will require attention to process, definition of approach, cost and risk. It is important to note that there is currently no comprehensive practice guide for certifiers in NSW (as applies in Queensland and Victoria). This is a significant gap which must be addressed and is addressed further in the next chapter.

All mainland Eastern State jurisdictions report that certifier resources are in short supply. However, as mentioned above, there is some evidence that fees charged for certifier services are being forced down by builders exerting pressure. This apparently perverse outcome suggests that there are also pressures to cut corners. One way of better informing the market is to publish a benchmark range of fees which would be consistent with doing the work properly (probably only for the low-rise residential sector where most problems have been reported). This could be set by IPART and could also inform Councils whose rates are published annually (but perhaps not set according to market conditions).

8. THE IMPORTANCE OF BOUNDARIES AND EMPOWERING COUNCILS

The key to holding all the various practitioners in the building chain accountable is to ensure that all the elements of accountability are present in the relevant processes and relationships. These are the clarity with which responsibilities are defined and outcomes specified; the authority of the various parties to act; the way their performance is monitored; and the application of rewards and sanctions. Needless to say, well defined boundaries are consistent with this framework.

Some relationships are defined through contract and are essentially commercial in nature. The effectiveness of this means of ensuring accountability depends on how well contracts are structured, deliverables specified, the competence of the contracting parties and the availability of effective remedies. Licensing and accreditation are also important.

However, the focus of this chapter is on the regulatory relationships, the principal one being with the local Council (which for most developments is the consent authority and on whose

behalf certifiers seek compliance). The other key regulatory relationship is between certifiers and the BPB.

Analysis of this issue must necessarily involve consideration of the perspectives of key stakeholders, as they understandably differ. However, one conclusion that most, if not all, would agree with is that the boundaries are unclear and this must be resolved.

8.1 View of Councils

They key concerns of the Councils consulted may be outlined as follows:

- Councils are accountable to their local communities and problems encountered with the building process, either in the construction phase or at completion are inevitably placed at Council's door. This includes matters relating to environmental compliance which may fall outside the ambit of certification. They then suffer from community fallout because residents are more likely to turn to their local Council for attention to these matters and Council is often powerless to act. Accordingly, there is to some degree, a loss of confidence in both Councils and the certification process.
- Because the State effectively privatised some functions relating to certification which were hitherto the responsibility of Councils, the State (presumably though the BPB) should be responsible for rectification when defective certification creates such a requirement. Furthermore, the State accredits and disciplines certifiers (interestingly, including Council certifiers) and should be held responsible for their failings.
- Some Councils feel that the BPB on occasion fails to exercise proper control and discipline over private certifiers. In particular, complaints by Councils have too high a resource threshold (need for copious documentation, statutory declarations etc); are not dealt with on a timely basis; are sometimes too easily dismissed; and Councils complain that they are often not told of the outcome. In addition, it is alleged that the BPB refers complaints to Councils who have a clear conflict to investigate because they compete against private certifiers. There is also a belief that the audit program is inadequate and needs to be expanded to regain confidence in the role of private certifiers.
- Increasingly onerous requirements on certifiers (more complaints and risk) and tightening of requirements on both private and Council certifiers is having the effect of forcing some of the better certifiers out of the business. This is having a perverse effect on securing compliance.
- BPB communications can be improved. A dedicated point for advice and a more user friendly website might be helpful.
- Better communications (by the State and, presumably Councils) are required to dispel public misconceptions regarding the role of certifiers – in particular that Councils supervise their work and can over-ride their decisions.
- Private certifiers rarely issue "Notices of Intention" to owners or builders regarding matters of non-compliance. There appears to be an expectation that the BPB should follow up such notices, apparently on the basis of separation of Council's roles regarding enforcement and certification. There appears, therefore, to be some confusion in Councils as to the use of their enforcement powers where private certifiers are involved.
- There is some confusion regarding overlaps between investigations by the Office of Fair Trading and those undertaken by the BPB. Some Councils have suggested that the BPB should take over all investigations. Another suggestion is that joint investigations may be helpful in some circumstances.
- Councils perform a useful community function through providing advisory services to residents willing to embark on developments. These support the role of private certifiers, but go unrecognised and unremunerated.

8.2 The View of Developers

The salient views of developers consulted (and their representative bodies) may be outlined as follows:

- Developers expressed some frustration at continued conflict between Councils and private certifiers. Some find it surprising that this is the case given that most private certifiers are former employees of Councils. There is also the view that a conflict exists between Councils' role as consent authority and being involved in certification (i.e. opining on compliance with their own conditions).

- There is a view that antipathy by some Councils stems from loss of revenue and competition with the private certifiers as well as loss of control over development in their areas which Councils had exercised hitherto. And of course, some Councils continue to take a historical view of their role.

- Developers believe that the advent of private certification introduced a degree of professionalism to the sector and provided relief from Council practices which were viewed as restrictive. Developers also prefer to use private certifiers because they provide a timely service, working all hours and weekends, while Council employees work "office hours". This flexibility is important to the construction industry and there is some recognition that Councils also, to some extent, support private certifiers.

- How will the sector perform when a ramp-up in activity occurs? Underlying this is an expectation that a more cooperative approach will assist the sector to cope. Related to this is some questioning of why Councils want to remain involved with the certification function.

- One shift that has occurred with private certification is that prior to its introduction, Councils had much greater involvement with developments. Councils would conduct inspections and assessments and hold discussions with proponents prior to the approval of plans. Indeed, some Councils have suggested that pre-lodgement discussions with Councils would assist in securing greater compliance. For most consents, Councils remain the consent authority and the primary relationship (at least for purposes of statutory compliance) should be with the consent authority. This remains the case even though certifier involvement and relationships with Councils will vary with building complexity and contractual arrangements (i.e. builder/certifier vs. developer).

- At the "Mum and Dad" end of the market (where developers argue most of the problems lie), owners are unlikely to be well informed and may have a greater reliance on Councils to navigate their way through the building process.

- Some Councils put pressure on developers to nominate them as the PCA and for the issue of construction certificates. Developers sometimes may yield to Council pressure to employ their certifiers to avoid delays. Leverage may be applied via the requirement for a bond for incomplete work where development consents call for commencement in stages.

- The way that Councils impose consent conditions sometimes makes the role of a private certifier unclear. If consent is not provided in broad terms, but is overly prescriptive, the PCA has a limited role and the applicant must revert to Council for decisions. A particular example is the use of "after Council review" clauses. There is an acknowledgement that the White Paper seeks to expand the code assessable framework, providing for greater transparency with a simpler and easier to follow approach.

- The use of "after Council review" provisions is of particular concern because resolution can get caught up with the inner workings of the Council (no doubt the "silo" problem manifests in Council beaurecracies as much as it does in government or large private organisations).

- There is a particular issue relating to public domain infrastructure (i.e. roads, open spaces etc). Here there is a regulatory requirement for Council to be the PCA. Delays are often experienced because Councils seek to micro-manage projects and Council certifiers need to satisfy all individual Council departments. Such delays can be very costly to a project. Developers acknowledge that Councils are concerned that they need control over public domains. However, developers counter that Councils are free to specify their requirements and developers are more likely to "overcook" compliance because of the cost of delays. For example, in a retail development, loss of income through delay can be ten times more costly than any increase in compliance cost.
- For this reason, there is a strong preference for public domain infrastructure to be treated in the same way as all other developments for regulatory purposes.

8.3 Conclusions Regarding the Council Interface

To place boundaries so as to ensure proper accountability for each of the participants in the building chain, it is essential to separate out any uncertainty regarding the role and scope of certification. This is an issue common to both Council and private certifiers and will be dealt with in the next chapter.

At the same time, issues relating to the way consents are framed are the province of relevant proposals in the White Paper and it should be assumed that if these proposals are implemented, the task of certifiers will, at least in this respect, be clearer and less complex.

At the core of any resolution of the remaining issues is recognition of Councils' key roles in discharging their obligations to their local communities. These can be outlined as follows:

- Acting as a consent authority in accordance with the requirements of local planning instruments and State imposed codes.
- Exercising their inspection and enforcement powers to secure consent compliance and protecting local communities from environmental impacts of the building and construction process and in this regard, dealing with complains by residents.
- Providing advice and support to residents to assist them in pursuing their development proposals.

The maintenance of a Council certification function would not appear essential to the achievement of the obligations. Neither would it appear necessarily to be a barrier.

It would seem clear that the Councils' obligations can be better achieved if there is a much greater level of cooperation between private certifiers (whose primary role is to secure compliance with consent granted by Council) and Councils. The White Paper proposes mandating notification of non-compliance to Councils to allow them to exercise their inspection and enforcement powers. The certifier is required to be on site for mandatory inspections and working with Councils more closely should secure better compliance.

Clearly, a range of operational issues would need to be worked out and Councils would need to distinguish the roles of certification (where they choose to retain this function) and enforcement and inspection. This may not be straightforward, as Councils' certification role may be difficult to separate because Council employees will always have a wider "community" remit than certifiers. Also, relationships may not be assisted by competition for certification services (which would be the greater imperative, competition or cooperation?).

Perhaps the cleanest resolution would be for Councils to conclude that their objectives may be met without remaining in the certification business. However, this should remain a matter of choice for them.

What should be important is that Councils are clear as to why they would wish to retain this role. A rationale for doing so might include the following:

- Provision of "Certifier of Last Resort" services.
- Maintaining revenue which would, at least in part, fund enforcement and inspections.
- Increasing their ability to secure consent compliance and hence control over outcomes.
- Providing a measure of competition in the market for certification services.

While it is understandable that Councils would wish to retain control over open spaces, it is not at all clear why they should and it is probably unreasonable for Councils to retain the exclusive right to be appointed PCA for public domain developments.

Regarding the revenue objective, funding of enforcement and inspections could more transparently be achieved by a revenue stream related to consent applications and specific fees or charges where inspection and enforcement is required. Certainly, Councils should be assisted to recover their costs relating to inspections and enforcement. Lack of avenues for cost recovery is probably the greatest barrier to more effective enforcement. So, Councils should have the tools to respond to complaints (including those against private certifiers) as well as greater confidence in the achievement of building outcomes through private certification.

More effective coordination between the activities of private certifiers and Council inspectors is therefore an important goal.

One solution currently proposed in Queensland is to mandate that certifiers be given limited (first instance action) enforcement powers with obligations to advise Councils, so that they can pursue timely enforcement if necessary. In addition, it may be worth exploring whether to mandate the submission of certified plans to Councils to give them the option of reviewing plans for compliance.

As for competition, it is difficult to see that a level playing field between Council and private certifiers can ever be achieved. Moreover, private certifiers compete with each other (an issue in itself and dealt with in chapter 5).

Encouraging Councils to focus on the core objectives outlined above may well be the best way to ensure a more natural positioning of boundaries.

9. BUILDING AND CONSENT COMPLIANCE BOUNDARIES

9.1 The Central Challenge

Central to better definition of the role of certifiers is defining the scope of the compliance assessments certifiers (both Council and private) are expected to carry out. Virtually all stakeholders agreed that clarity in this area is required to ensure that certification is effective in respect of its contribution to building outcomes. Successful re-defining of compliance requirements would have a number of benefits:

- Greater ability to hold certifiers accountable for the discharge of their obligations.
- Reduced costs and more effective deployment of certifier resources (key to meeting White Paper directions and coping with any increase in building activity).
- Reduced uncertainty regarding certifier liability, at least in part addressing the trend for practitioners to leave the industry and improving access to insurance.
- Allowing boundaries between Council and private certifiers to be effectively drawn.
- Greater certainty by owners and builders regarding the role of certifiers and the degree of reliance that may be placed on their work.

- Greater focus on the compliance risks which are of most concern.

Of course, a key consideration is the need to address compliance with both the planning and building codes because NSW, unlike other jurisdictions, combines these requirements in the certification process.

9.2 Planning Consent

The task of certifiers is complicated by the way Councils frame development consents. (This in turn is influenced by State Planning instruments). The process specified in relevant legislative provisions also defines the required task. Unlike the development consent which deals primarily with applying planning code requirements such as building envelopes, setbacks etc at a conceptual level; the Construction Certificate deals with building issues, requiring more detailed plans. Many issues arise in respect of staging the process appropriately and applying the requisite technical expertise. The level of information required to ensure that designs may be effectively assessed, the need to emphasise upfront attention at the design stage to de-risk the construction process and then to ensure the right level of attention to critical issues, all need to be considered.

It is not within the scope of this Review to examine these issues in any detail. The White Paper proposals present an opportunity to ensure that expert attention is given to their resolution. While the White Paper proposals, if implemented effectively, will ensure standardisation of consent conditions and address issues of variation in their interpretation, the impact on the consent process, and the process of certification in particular, will need to be examined by relevant experts to provide definitions of scope which:

- Focus on the key areas of concern (currently, the expectation that certification covers all consent conditions is clearly unsustainable).
- Can be readily understood and applied.
- Are appropriately measured in terms of regulatory impact (cost, availability of insurance and skills and administrative efficiency).

9.3 The Building Code

The BCA (together with its NSW add-ons) is complex and incorporates many detailed technical standards which require a high degree of technical knowledge and expertise to interpret and apply. These are requirements for builders to comply with and a balance must necessarily be struck between ensuring builders have the responsibility to build to the relevant standards, without loading up the certification process to an unsustainable level.

As previously mentioned, in NSW there is currently no general practice guide for certifiers that has any legal status. What definitions there are tend to paraphrase high-level legislative obligations and from time to time the BPB issues practice guides limited in scope to particular technical issues. The regulations also mandate inspection regimes for residential and other buildings. (They are the subject of White Paper proposals to better align inspections with building risk). It is instructive to note that checklists have been suggested and rejected by certifiers because of the risk of omitting a specified item in their assessment.

Two approaches (or perhaps a combination) might be suggested to address this issue. One is to identify areas of particular concern such as entry to fire escapes, waterproofing and structural integrity and guide certifiers to emphasize those in their assessments. Another is to take a risk-matrix approach which guides the inspection process according to the size, complexity and nature of buildings, taking into account their BCA classification and applying risk levels to identified risk factors.

This latter approach has been adopted in Queensland in guidelines issued for the purpose of providing building certifiers with an approach that is sufficient for meeting their responsibilities under relevant Queensland statutes and regulations. These guidelines were issued by the Queensland Government in June 2012 and have legal status under relevant provisions. Evidence of regard to these guidelines would assist a building certifier in responding to any complaints about the performance of a building certification function.

9.4 Conclusion Regarding Defining Scope

Resolving issues of scope in both codes is a challenge that will require high level technical expertise to resolve and should form part of the implementation of the White Paper. As presented in chapter 4 and illustrated in **Appendix 4**, an expert group, supported by subject matter reference groups, should be established to recommend appropriate definitions and approaches which may then be facilitated by legislation, regulations and practice guides which have legal status pursuant to the relevant provisions. It would also be a timely opportunity to re-visit the "not inconsistent" test, having regard to the development of case law and whether it would remain appropriate to retain a negative assurance approach or, where scope is reduced, to apply positive assurance, which may be more easily understood by consumers.

10. THE BUILDING PROFESSIONALS BOARD

10.1 Establishment of the Building Professionals Board

A Bill for the creation of the Building Professionals Board was introduced into the NSW Parliament in May 2005 and the Building Professionals Act 2005 (BPA) commenced towards the end of that year. In presenting the Bill, the then Minister referred to the 2002 Campbell Inquiry into the quality of buildings, which concluded that "the building regulation system in NSW was complex, poorly coordinated, poorly understood and lacking in professional rigour". The inquiry recommended increasing the Government's role in regulating builders and other practitioners in the building industry and in 2003 the Government established the Home Building Service to deal with complaints against licenced builders and tradesmen who carry out residential building work.

The 2005 Act extended reforms flowing from the Campbell report to cover building and subdivision certifiers. Initially, the Government proposed to limit the Board's accreditation and disciplinary powers to private certifiers. At the same time, it outlined a commitment to make all certifiers in NSW subject to equivalent competency standards, accepting that for an initial period at least, transitional arrangements would need to be worked through with Councils. This was achieved in 2010 following accreditation of Council certifiers, although with extensive "grandfathering" provisions.

The Act, in essence, established:

- A single accreditation scheme in NSW, specifying the qualifications, skills and experience required for all building certifiers.
- Requirements for investigating complaints and imposing disciplinary measures including fines and potential loss of accreditation.
- Review of Board disciplinary decisions by the Administrative Decisions Tribunal.
- A Board of up to eight members, to be responsible to the Minister.
- A requirement for the Act to be reviewed by the Minister, at some stage after seven years has elapsed after commencement.

However, the functions and obligations of certifiers are mainly specified in the EP&A. As highlighted previously, a comprehensive list of these obligations is set out at **Appendix 5**.

10.2 Current Arrangements

The BPB currently has a staff establishment of 26, with about 20 positions currently filled. It is organised according to the chart depicted at **Appendix 8** and staffed by public servants employed by the DP&I. Its function also extends to providing policy advice and technical support to the work of certifiers through the provision of practice notes, as well as supporting the Board and its Committees. Of particular note is that only three of these staff are currently wholly dedicated to investigations and audits.

Key operational statistics provided by the BPB for 2011/12 may be outlined as follows:

- Approximately 500 private certifiers are accredited by the Board, along with 900 Council certifiers.
- Private Certifiers issued an estimated 12,000 complying development certificates with a value of $1.7 Billion (70% of all certificates issued by value); and around 24,000 construction certificates (about 50% of the total of 48,000).
- 103 complaints were received against accredited certifiers, within the annual range over the last five years. About half of those received were from Councils, with the balance roughly split between owners and neighbours.
- Of those, 30 were found to be proven and accreditation was removed in 2 cases. Over, the last five years, a total of 7 have had their accreditation removed.
- The Board does not monitor actions taken against certifiers in the Courts. Summaries of recent cases, prepared for this Review by the DP&I appear at **Appendix 9**, along with an estimated number of settled cases. (However, information on cases listed, but settled or withdrawn before judgement, is difficult to obtain and certifiers are not surveyed to obtain this data.
- The activities of the BPB are largely funded through a grant from the DP&I - $2.9 Million in 2011/12. In addition, there is a revenue stream of around $800,000 representing a proportion of application fees remitted by Councils. Accreditation fees paid by private certifiers together with some minor income from fines imposed brought the total to $4.074M. Total expenses were $4.584M, resulting in a deficit of $0.510M.
- There have been a number of management reviews of the operations of the BPB, but these are essentially of historical interest for purposes of this Review.

10.3 Governance Issues

One key difficulty, acknowledged by both current Board members and staff, is that the Board is vested with statutory duties which imply a governance role, while the secretariat is provided by staff from the DP&I, who at least in nominal terms, report to the Director General of the Department. The question of "who do you report to?" appears to be answered by "it depends on the issue at hand and relevant circumstances". Clearly this is a recipe for conflict and confusion and there does seem to be evidence of this. The Board feels that their directions and strategic leadership are being undermined, while the staff must balance the needs and views of their Department, as well as requests from the Minister, which are channelled via the Director General.

There is also the question of focus. Understandably, with all the demands on the Department, dealing with controversial issues day to day as well as responding to a sweeping reform agenda initiated by the Government, it is not always possible to provide the required focus on the BPB areas of responsibility. This leaves the staff with a sense of limbo, with no clear strategic directions for the exercise of the functions of the BPB.

Now may not be an appropriate time to deal definitively with governance issues, given both the reform agenda of the White Paper and the mooted review of the BPA (another reason for this Review avoiding structural solutions to problems). However, some options may be canvassed briefly.

The BPB Secretariat could be turned into a more independent entity – for example an "Office of Building Regulation", with a Director being accountable to the Board, which in turn is accountable to the Minister.

Alternatively, the Board could be made an advisory body to the relevant section of the Department. Either way, the present governance difficulties would be alleviated.

However, in the interim (until the reform process is further advanced), the best course would seem to be to clarify accountability in an administrative sense and to retain current governance arrangements.

10.4 Reform Challenges

The BPB now faces very significant challenges at both a strategic and operating level. Strategically, it must address the following:

- To meet the strategic direction of the White Paper, it must plan to ensure that the necessary resources, technical skills, training and accreditation are available and deployed effectively. More to the point, 80% of consents are to be code assessable within a five year period, the BPB must ensure that more certification resources, with relevant skills, are available. To this end the BPB should seek to widen the range of building professionals who may be accredited as certifiers.
- A related strategic issue is the urgent need to resolve the boundary issues of certification scope and local government relationships, if the certification function is to meet not only the reform agenda, but to regain public and institutional confidence in the building regulation scheme.

The key operational challenges include:

- Expanding investigations capacity to allow for a more effective regime of compliance to ensure that certification practitioners discharge their obligations responsibly and that builders, owners and Councils as well as local communities can place greater reliance on their work.
- Modifying the investigations scheme to allow for processes other than those likely to result in disciplinary action. This would include timely investigations to establish facts and support the work of certifiers through guidance, practice notes and, where appropriate, peer review. The establishment of a "demerit" system along the lines of those in other jurisdictions should be considered.
- Establishment of a robust system of accreditation for practitioners competent to issue compliance certificates (such as for fire protection inspections), pursuant to proposals in the White Paper.
- Establish a scheme of peer review to support certification in a technical sense and guide better compliance through the exercise of professional judgement. In particular, the BPB should seek to ensure that certifiers do not become "ticket collectors" whose role is limited to collecting compliance certificates.

A more effective certification function to meet the expectations canvassed in this Review will require more resources, particularly in the investigation/compliance area. Certainly, this area is under-resourced relative to Queensland and Victoria in both an absolute and relative sense.

While it may be possible to use existing resources more effectively (and in the first instance this should be closely examined), a properly resourced compliance function is essential for all the reasons outlined previously. The possibility of further tapping the application fee revenue stream should also be examined, particularly in relation to the level of fees in NSW relative to other jurisdictions.

10.5 Insurance

The continued availability of PI insurance is an essential requirement for maintaining the system of private certification. Indeed, maintenance of PI is mandatory for accreditation as a private certifier. Council certifiers of course, are employees of their respective Councils and any liability that may attach to the performance of their duties is covered under their general insurance arrangements. A number of issues arise regarding insurance arrangements for certifiers:

- First and foremost is the price and continued availability of PI cover given the current momentum for increased liability being attached to the obligations of certifiers. One example is the recent change to the scope of the Occupation Certificate. Changes mooted in Chapter 8 of the White Paper may well have similar consequences. While it is not expected that such changes would have a precipitate effect on major insurers in the PI area, the industry has indicated that risk profile changes are monitored closely and priced accordingly.

- Second, PI insurance policies are written on a "claims made" basis. In effect, cover is available only if a policy is current at the time a claim is made, not at the time an alleged deficiency may have occurred. Accordingly, the logic of mandating PI for accreditation would appear to fail if certifiers leave the industry and then fail to maintain "run off" cover for the relevant statutory warranty period for building defects. Advice from certifier associations indicate that very few certifiers maintain run-off cover, resulting in their personal assets being at risk in the event of claims and/or claimants not having recourse in relation to alleged failures by certifiers.

- Third, a similar problem exists in the event that a certifier, for whatever reason, leaves a job prior to completion. While some such circumstances may be benign (ie illness, family issues etc), in some cases (as indicated previously) they may be a "red flag". The certifier may have fallen out with a builder, or missed inspections, or made irrecoverable errors of judgement. While it is precisely at these times that an aggrieved party may wish to claim, this recourse would not be available.

These problems have been acknowledged by the BPB, which has sought advice on establishing a group insurance scheme to address gaps in cover. However, the lack of data which would enable an insurer to develop a risk profile has stymied these efforts. The solution would seem to be for the BPB to approach one of the major brokers in the insurance industry for a specification of the data required and then, with the assistance of certifier representative associations, acquire the requisite data, so that the feasibility of establishing a group insurance scheme may be properly assessed.

In relation to the more general problem of increasing liability, this is dealt with in sections dealing with the scope of certification and in particular, the regulatory impact assessment of White Paper proposals.

10.6 Communications and Data

The White Paper recognises that stakeholders should have ready access to information at every stage of the building and certification process and that improvements in this area are required.

Certainly, this has been indicated by stakeholders in discussions relating to this Review, not least criticisms of the quality of the BPB's online information. As with other improvements, and however desirable, this would necessarily come at a cost. Perhaps more significant to the day to day operations of the BPB, there appears to be a serious deficiency in the availability of even basic information. A few examples would include the number of jobs, broken down by type, undertaken by individual certifiers; the frequency with which claims are made against PI; the fees charged and applicable rates; the number of cases where claims are made against certifiers in the courts and their outcomes. While some sensitivity attaches to such disclosures, arrangements to protect the privacy of individuals may address concerns. On the other hand, it is not possible to conduct operations effectively without basic data.

It is understood that eplanning is an integral part of the proposed new planning system and it would be expected that the development of online systems would better manage the consent and certification processes. These have been contemplated in other jurisdictions and it may be possible to find partners for joint development if any decision is made to proceed. But these systems are costly and take time to develop. The question of acquiring basic operating data using survey and other methods, should not await the advent of new electronic systems.

10.7 Conclusions Regarding the BPB

The implementation of the White Paper is both a challenge and an opportunity for the BPB. It will require focus, leadership and resources to meet the demanding challenges outlined in this chapter. It would assist the BPB Secretariat and Board to meet these challenges if the following initiatives were pursued.

The Secretariat should be re-structured to support the new requirements, including an expanded investigation/audit function. The re-structure should involve transfer of the Building Systems Unit of the Department to the BPB Secretariat to provide support on technical matters relating to the BCA and building regulatory control development.

A work program be developed and integrated in to the White Paper program management of reforms to address the following elements:

- Support for expert panels charged with defining scope of certification, Council boundaries and regulatory impact of Chapter 8 of the White Paper.
- Expanded compliance activities, including more effective audits; investigations; assessment of a "demerit" system and peer review to support better practice.
- An assessment of the ability of the accreditation scheme to meet the strategic directions of the White Paper and development of changes as required.
- A program to acquire relevant operating information, including data required to support group insurance arrangements.
- Development of initiatives to improve communications with stakeholders.
- Arrangements should be negotiated with the Director-General of the DP&I for the BPB Secretariat to operate as an independent unit (other than for administrative support), responsible to directions by the statutory Building Professionals Board and directly accountable the Minister.
- Examine options for expanding the range of building professionals who should be accredited as certifiers.

11. THE BUILDING SECTOR – A CONSUMER'S VIEW

This Review has focussed on those aspects of building regulation which deal with certification and its role in ensuring that building work complies with building and planning codes, statutes and regulations. These are designed to ensure that buildings are safe and meet appropriate standards relating to matters such as amenity; fire protection; weather proofing and public health. Other measures such as licensing and registration of builders; attendant requirements for qualifications and training; building specific regulations; and consumer protection arrangements including: home warranty insurance; statutory warranty periods; mandated contract arrangements dispute resolution and the like, all contribute to a framework designed to protect customers, whether they are "Mum and Dad" developers, purchasers of strata units, users of commercial buildings, employees in office buildings, or members of the general public.

From the point of view of the consumer, the way that governments assign responsibilities within this framework to various institutions or administrations is not particularly relevant. What matters to them is the achievement of outcomes. Taking a holistic view which keeps those outcomes in sight is therefore important and a coordinated approach is required. One example of a consumer problem which has a number of building control, planning and consumer protection aspects is defects in multi-storey apartments, where a body corporate will conduct surveys towards the end of a statutory warranty period and where there is considerable concern between owners and builders alike.

Given the size and complexity of the building sector and the tendency of parts of government with particular responsibility to operate within silos, this is a difficult task. However, the key principle of assigning the management of risk to those best able to manage it would seem to be a good guide in allocating responsibilities. Another is clarity with which roles and responsibilities are defined. Getting builders to get things right in the first instance would seem to be a better approach than over-reliance on the checking process.

The implementation of a new planning system for NSW will need to be supported by a robust building certification scheme. But, securing outcomes does not end there. Reviews of the Home Warranty Scheme and other aspects of the building consumer protection framework, together with mooted changes to the Local Government Act are all elements of a reform process with interdependent parts.

Accordingly, it would seem to be a good idea for a joint program between the administrations of Planning and Infrastructure, Fair Trading and Local Government to be agreed as the reform process unfolds, to ensure a coordinated approach, with clear assignment of roles and responsibilities to the relevant units within these administrations.

12. CONCLUSIONS AND RECOMMENDATIONS

The analysis in preceding chapters has been followed in each case by conclusions relating to each as follows:

Chapter 4 – White Paper Directions and Priorities

Chapter 7 – The Role of Certifiers

Chapter 8 – The Importance of Boundaries and Empowering Councils

Chapter 9 – Building and Consent Compliance Boundaries

Chapter 10 – The Building Professionals Board

The recommendations provided below, are grouped with a view to implementation processes and assessment rather than seeking to relate them to the analytic conclusions in the above chapters. However, the recommendations are framed having regard to the conclusions in each and any implementation should have regard to these conclusions.

This review has sought to resolve issues at a policy level and to recommend a way forward to resolve issues which require technical expertise. Clearly there will be a cost involved in establishing the expert panels recommended below, but this is unavoidable if issues long identified in other reviews and taken up here are to be resolved as part of the White Paper implementation.

12.1 White Paper Chapter 8

An expert panel be established to conduct an assessment of these proposals, incorporating the following elements:

- Prioritisation.
- Further research and development, where appropriate.
- Regulatory impact.

The panel membership should be relatively small, but be supported by relevant technical reference groups. It should also be tasked with coordinating the work of two other expert panels established to define the scope of certification with respect the local Council interface (Recommendation 12.2) and to the BCA and consent compliance (Recommendation 12.3). It should also have regard to the full suite of Recommendations made here.

12.2 Local Council Empowerment

An expert panel, including Local Government representatives, be established to define the boundaries between the role of private certifiers, Council certifiers and Councils, having regard to both policy objectives and operational processes and addressing the following elements:

- Recognising Councils' role as the consent authority.
- Mandatory initial enforcement action by building certifiers with regard to instances of non compliance by builders, with timely reporting to Councils.
- Requiring Councils to follow up initial enforcement where warranted.
- Creating obligations in securing consent compliance.
- A more cooperative framework between Councils and private certifiers.

12.3 Role of Certifiers

An expert panel be established to define the scope of certification in respect to both BCA and consent compliance. The panel should be required to develop a streamlined set of regulatory obligations and a practice guide which would be capable of being given legal status. New regulations should be drafted once this work is complete.

12.4 Certification Process Changes

While it would be envisaged that the work of the panel in Recommendation 12.3 would be fairly broad, two specific changes should be made, which should not necessarily await the outcome of this body of work.

- Removal of the requirement (promulgated in changes to regulations on 1st March this year) for certifiers to apply the "not inconsistent" test to both BCA and consent compliance at the Occupation Certificate stage. This would allow the purpose of the Occupation Certificate to be reconsidered as part of the work referred to in Recommendation 12.1.
- Removal of the requirement (again 1st March regulation changes) for certifiers (both Council and private) to enter into contracts with owners. This requirement should be replaced with changes to the development application process where the consent authority issues an advice notifying applicants of the need to appoint a PCA (whether Council or private), together with clear and concise outline of what the PCA is required to do. The advice should also detail when and how fees are to be paid and how any variations are to be handled. Clearly, this advice should initially reflect current practices and be amended when issues of scope are determined.

12.5 Guidelines on Fees

IPART be requested to determine an appropriate range for fees applying to relevant classes of residential buildings, which would reflect a reasonable level of remuneration if certification work was rigorous and thorough. This guideline should be incorporated in mandated advice to development applicants (subject to ACCC clearance, if required).

12.6 The Building Professionals Board

The BPB Secretariat should be restructured to better meet current challenges and tasked with developing the work program outlined in section 11.7, specifically:

- Compliance resources should be substantially expanded, at least in line (on a relative basis) with resources available in Queensland and Victoria.
- Investigations should be conducted on two tracks, the first as prescribed in existing legislation, where discipline is clearly indicated and the second where facts are established to provide additional guidance and support to certifiers.
- A demerit system, like the one proposed in Queensland should be assessed and progressed as soon as practicable.
- The acquisition of relevant operating data.
- Development of run-off insurance arrangements.

12.7 Implementation Coordination

To ensure that reforms across Government affecting the building sector are well coordinated, a joint program be agreed between the Administrations of Planning and Infrastructure, Fair Trading and Local Government. This program should allocate responsibilities and ensure that legislation and regulations are drafted in a consistent way, having regard to a holistic view of outcomes.

Clearly, priority should be given to resolving policy issues before the drafting stages are commenced.