



**LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
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Submission Cover Sheet

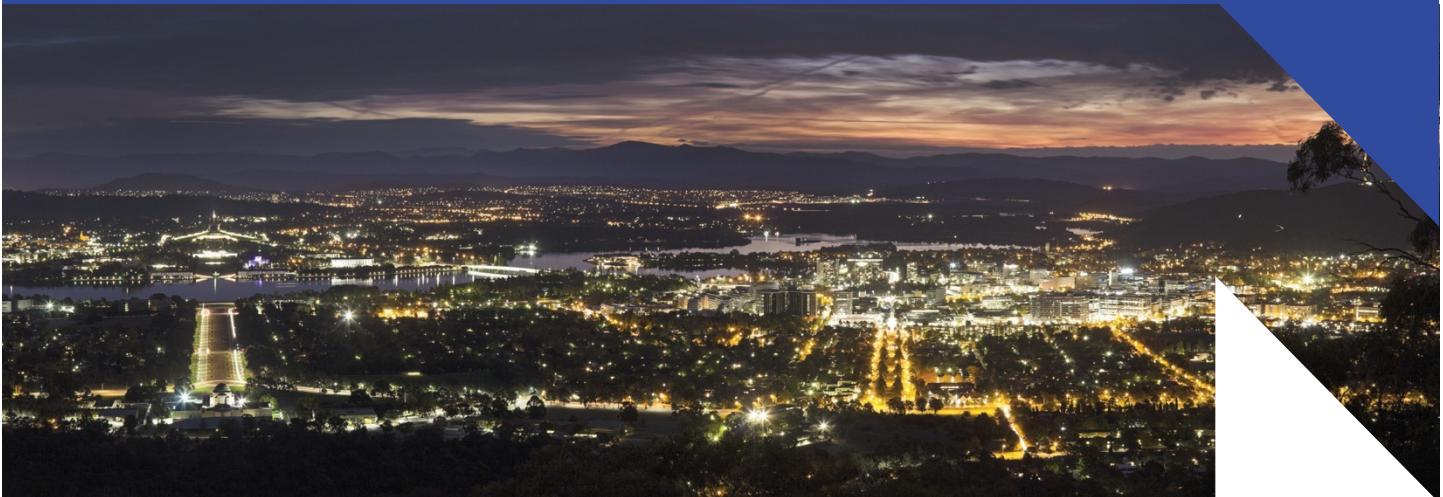
Inquiry into Building Quality in the ACT

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SUBMISSION TO INQUIRY INTO BUILDING QUALITY IN THE ACT



28 NOVEMBER 2018

Master Builders ACT
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Background

Thank you for this opportunity to make a submission to the Legislative Assembly's Standing Committee on Economic Development and Tourism Inquiry into the quality of recently constructed buildings in the ACT (**the Inquiry**).

Representing around 1,200 commercial and residential builders, civil contractors, suppliers, subcontractors, professionals and students, building quality is a topic of fundamental interest to the Master Builders Association of the Australian Capital Territory (**Master Builders ACT**). Since our formation in 1925, the pursuit of quality and excellence in the building and construction industry has been a core value.

This current (2018) inquiry comes after a long history of inquiries and reviews of the ACT's building regulatory system, namely in 2010 and 2016. Master Builders ACT has made submissions to each of these inquiries.

A copy of the relevant submissions is annexed to these submissions:

- Master Builders ACT Submission on the Quality of Building Works Issues, 2010
- Master Builders ACT Building Regulatory Review Submissions, February 2016

Master Builders ACT, in consultation with our members, has developed a Building Quality Policy Paper. A copy of that policy paper is also annexed to this submission.

We also encourage the Committee to review the following reports of previous ACT inquiries:

- Building quality in the ACT: Report to the ACT Legislative Assembly, September 2010
- Improving the ACT Building Regulatory System: Summary of Proposed Reforms, 2016 (**ACT Government Summary of Proposed Reforms 2016**)

The recommendations made by Master Builders ACT in our previous submissions and in our Building Quality Policy Paper have helped to inform the recommendations from the 2010 and 2016 ACT Government reports. However, disappointingly, many of the recommendations made by the ACT Government have not yet been acted upon. In some cases, these recommendations remain incomplete after nearly ten years.

In addition to the ACT inquiries, there have been many national reviews of building quality, or elements of it, including:

- Senate Inquiry into Insolvency in the Australian construction industry, December 2016
- *Building Confidence Report* by Peter Shergold and Bronwyn Weir, February 2018 (**Building Confidence Report**)
- Review of Security of Payment Laws by John Murray, May 2018

The recommendations of the Building Confidence Report are referenced in our recommendations to the ACT committee. To provide further explanation we have also annexed MBA Australia's response to the recommendations made in the Building Confidence Report.

Each of these local and national inquiries and reports repeat a number of key building quality themes, namely:

- Improving the design and minimum documentation requirements
- Greater stage inspection and On-Site supervision

- Expanded building and design practitioner licensing and registration
- Building and design certification
- Improved education and training requirements for building industry practitioners, with a specific focus on the National Construction Code standards
- Standardising and improving stakeholder understanding of contracts for residential buildings and building work
- Greater accountability for all building industry practitioners, and more timely and consistent enforcement of building laws
- Improved dispute resolution, including payment disputes, and
- Strengthening statutory warranties, Fidelity Funds and home warranty insurance

Before examining each of these issues, there is a preliminary point that should be made and carefully considered by the Committee: that is, with close to a decade of inquiries, reviews, research commission and reported completed at a local and national level, why has the ACT Government not fully acted on those recommendations?

Why does the ACT not have an effective and well-resourced complaints and enforcement system?

Why does the ACT not require trade contractors (with the exception of plumbers and electricians) to hold mandatory qualifications or hold a trade contractor license as is required in other jurisdictions?

Why does the ACT Government not insist that license holders undertake continual and regular professional development training?

Why does the ACT Government continue to issue building licenses to known repeat offenders of building quality laws?

In short, why has the ACT Government not acted on building quality before now?

Impact of Poor Building Quality

The *Inquiry into the quality of recently constructed buildings in the ACT Discussion Paper (the Discussion Paper)* estimates the economic cost of poor building quality at \$5 million for every \$100 million spent on construction. When this formula is applied to the value of building work completed since the ACT Government's review into Quality of Building Work Issues in 2010, then the cost of Government inaction on building quality is close to \$1 billion.

However, the total cost of Government in-action is much more. The above figure only includes the actual cost of building rectifications. It does not include a value for the impact on those building and construction businesses that are performing high quality work. These businesses feel the impact of poor building quality through reduced profit margins that are forced down by competing building practitioners who are willing to cut corners, and able to get away with doing so.

Furthermore, if the ACT Government is not willing to set a minimum building standard, and enforce this standard, then the problem of poor building quality will continue to spiral downwards, ultimately forcing many quality operators out of the industry.

Whilst Master Builders ACT welcomes the ACT Government's commitment to inquire into and ultimately improve building quality in the ACT, as outlined above, we are concerned by the previous lack of action by the ACT Government to act on the numerous recommendations of previous local and national inquiries.

Response to Submissions

Master Builders ACT is aware that several submissions have been made by members of the public, community organisations and other industry associations and welcomes that engagement. Building quality is an issue that impacts on the entire ACT community. Master Builders ACT makes the following general comments in relation to issues raised in those submissions:

- **Master Builders ACT is not the regulator.** Members of Master Builders ACT are required to abide by a Code of Conduct, and consumers, members of the public and other Master Builders ACT members can make a complaint about a member if failure to comply with our Code of Conduct is alleged. However, it is often the case that a consumer or member of the public assumes and expects that Master Builders ACT can act on their behalf. It is important to note that Master Builders ACT is first and foremost an industry association, whose primary function is to provide services to and support for members. Master Builders ACT considers it to be part of its role and function to also provide education and support to members of the community, where necessary and appropriate, but it is not, nor should it be, the industry watchdog. Master Builders ACT implores the ACT Government to ensure that it has the capacity and the resources to properly act as the regulator of building quality and conduct.
- **Membership of Master Builders ACT.** As outlined above, members of Master Builders ACT are required to adhere to our Code of Conduct. In the event that a complaint is made, an internal review is conducted. There are often conflicting accounts of the circumstances leading to a complaint, and they often involve complex legal issues. A complaint process to an industry association, however, should not be the primary focus of a consumer, nor should it be their only option. An independent, well-resourced Regulator is required to address this deficiency as a matter of urgency.
- **Education is vital.** A number of submissions spoke about a builder appointing a certifier, not knowing the legalities of their building contract or what statutory warranties exist. Master Builders ACT would encourage all consumers to obtain independent advice before entering into a home building contract. This advice should extend to education of the way the private certification regime operates (the owner is actually the party who appoints the certifier), as well as the potential delays or design changes when purchasing off-the-plan. The education should also include an outline of the certifier's responsibilities, which is ensuring that a building is built to the Building Code standards, and not reviewing or inspecting quality.

Priorities for Action

Master Builders ACT welcomes the ACT Government's commitment to review the building regulatory framework and the quality of building work in the ACT. Ensuring that the ACT Government is committed to building quality is pivotal in giving the community confidence in the local building industry, and in turn, protecting the many reputable operators in our proud local construction industry. As outlined above, however, Master Builders ACT is concerned about the previous lack of inaction by the ACT Government to address building quality issues, despite this inquiry being the third in the past decade.

There is a need for a wide ranging and in-depth review of the ACT building regulatory system. A substantial review of building regulation has not been implemented since the *Building Act 2004* was enacted, now fourteen years ago. As such, it is important that the Government strive for fundamental reform that stands the test of time for the next generation of Territorians, and not race for Band-Aid solutions that only suit election timeframes. Master Builders ACT would also like to ensure that the outcomes of this Inquiry, unlike the others before it, are not cast to the side and are acted upon as a priority.

The recommendations put forward following this Inquiry should be considered carefully. Master Builders ACT supports further discussion with the ACT community and the local building industry, as well as formal consultation with existing structures such as the Building Regulatory Advisory Council and the Building Advisory Board, before new legislation or reforms are introduced.

Given the extensive work previously undertaken by industry, ACT Government and the Building Ministers Forum, there is little need to identify new recommendations to improve building quality. Instead there is value identifying priorities for action amongst the numerous recommendations that already exists.

Broadly, these priorities for action can be grouped in the following topics:

- Improving the design and minimum documentation requirements
- Greater stage inspection and On-Site supervision
- Expanded building and design practitioner licensing and registration
- Building and design certification
- Improved education and training requirements for building industry practitioners
- Standardising and improving stakeholder understanding of contracts for residential buildings and building work
- Greater accountability for all building industry practitioners, and more timely and consistent enforcement of building laws
- Improved dispute resolution, including payment disputes, and
- Strengthening statutory warranties, Fidelity Funds and home warranty insurance

Our recommendations for each topic are addressed in the next section of this submission.

Recommendations

Master Builders ACT makes the following recommendations:

Design and minimum documentation requirements

1. That the ACT Government implement Recommendations 1 and 2 of the ACT Government Summary of Proposed Reforms 2016.
2. That the ACT Government implement Recommendation 12 of the Building Confidence Report.
 - a. *Recommendation 12: Collecting and sharing data and intelligence*
3. That the ACT Government implement Recommendations 13, 14, 15 and 16 of the Building Confidence Report, working in collaboration with other jurisdictions (in particular NSW) to ensure there is consistent regulatory reform to the greatest extent possible.
 - a. *Recommendation 13: Responsibility of design practitioners*
 - b. *Recommendation 14: Adequate documentation for performance solutions*
 - c. *Recommendation 15: Approval of performance solutions for constructed building work*
 - d. *Recommendation 16: Approval of documentation throughout the construction process*
4. That the ACT Government write to the Federal Government requesting that all building practitioners be provided with free access to documents, such as Australian Standards, that are referenced in the National Construction Code.

Greater stage inspection and On-Site supervision

5. That the ACT Government implement Recommendations 3, 4 and 5 of the ACT Government Summary of Proposed Reforms 2016.
6. That the ACT Government require additional mandatory stage inspections as recommended in Recommendations 18 and 19 of the Building Confidence Report.
 - a. *Recommendation 18: Mandatory inspections*
 - b. *Recommendation 19: Inspection and certification of fire safety system installation*

Expanded building and design practitioner licensing and registration

7. That the ACT Government implement Recommendations 9, 13 – 16, and 31 - 36 of the ACT Government Summary of Proposed Reforms 2016.
8. That the ACT Government expand the building and design practitioner licensing and registration regime as recommended in Recommendation 1 of the Building Confidence Report, and to the greatest extent possible registration be consistent with other jurisdictions as recommended in Recommendation 2 of the Building Confidence Report.
 - a. *Recommendation 1: Registration of building practitioners*
 - b. *Recommendation 2: Consistent requirements for registration*
9. That following the implementation of Recommendation 1 of the Building Confidence Report, the ACT Government investigate expanding the design and building registration system to include key categories of trades.
10. That the ACT Government include financial capacity assessments as mandatory criteria when determining whether a building practitioner license should be issued and renewed.

Building and design certification

11. That the ACT Government implement Recommendation 4 of the Building Confidence Report.
 - a. *Recommendation 4: Career paths for building surveyors*
12. That the ACT Government consult further with industry and consumers in relation to Recommendation 9 of the Building Confidence Report.
 - a. *Recommendation 9: Integrity of private building surveyors*
13. That the ACT Government develop a Code of Conduct for building surveyors as recommended by Recommendation 10 of the Building Confidence Report and supported by Recommendation 3 of the ACT Government Summary of Proposed Reforms 2016.
 - a. *Recommendation 10: Codes of conduct for building surveyors*

Improved education and training requirements for building industry practitioners

14. That the ACT Government implement a system of Continuing Professional Development (CPD) training for design and building practitioners licensed to operate in the ACT over three years, commencing with mandated or directed training within 12 months as recommended by Recommendation 3 of the Building Confidence Report.
 - a. *Recommendation 3: Continuing Professional Development*
15. That the ACT Government publish monthly data on complaints received, including a list of the most common building defects so that professional development training and industry training can be tailored to the most common building defects.

Standardising and improving stakeholder understanding of contracts for residential buildings and building work

16. That the ACT Government consult with industry and consumers on the outstanding recommendations relating to Contracts for Residential Buildings and Building Work outlined in the ACT Government Summary of Proposed Reforms 2016.
17. That the ACT Government implement Recommendation 20 of the Building Confidence Report.
 - a. *Recommendation 20: A building manual for Commercial buildings*
18. That the ACT Government provide funding to industry associations to undertake consumer education programs on template industry contracts, dispute resolution methods, stakeholder rights and obligations, role of building surveyors, statutory warranties, Fidelity Funds and home warranty insurance.

Greater accountability for all building industry practitioners, and more timely and consistent enforcement of building laws

19. That the ACT Government implement Recommendation 30 of the ACT Government Summary of Proposed Reforms 2016.
20. That the ACT Government provide funding for additional building inspectors, and that funding for other enforcement staff within Access Canberra be significantly increased so that all building, design and development complaints can be responded to, and disputes resolved, in a timely and consistent manner.

21. That the ACT Government implement Recommendations 5, 6 and 7 of the Building Confidence Report.

- a. *Recommendation 5: Improving collaboration between regulators*
- b. *Recommendation 6: Effective regulatory powers*
- c. *Recommendation 7: Strategy for the proactive regulation of Commercial buildings*

Improved dispute resolution, including payment disputes

22. That the ACT Government consult with industry and consumers on improvements to the alternative dispute resolution model as recommended by Recommendations 28 and 43 of the ACT Government Summary of Proposed Reforms 2016.

23. That the ACT Government consult with industry and consumers on the development of an ACT guideline to tolerances and standards as recommended in Recommendation 29 of the ACT Government Summary of Proposed Reforms 2016.

Strengthening statutory warranties, Fidelity Funds and home warranty insurance

24. That the ACT Government develop consumer education materials about existing statutory warranties, Fidelity Funds and home warranty insurance schemes.

25. That the ACT Government make clarifications, as previously undertaken, to the *Building and Construction Legislation Amendment Act 2016* in relation to home warranty insurance as follows:

- a. when the home warranty applied; and
- b. the implications based on recent court decision(s) affecting statutory warranties.

Other Issues

Master Builders ACT notes that the Building Confidence Report makes further recommendations which should be considered by this Committee, specifically:

- Recommendation 21 in relation to building product safety
- Recommendation 22 in relation to developing a national dictionary of terminology
- Recommendation 23 in relation to implementation of recommendations
- Recommendation 24 in relation to priorities for implementation.

Annexure A: Master Builders ACT Submission on the Quality of Building Works Issues, 2010

MBA SUBMISSION ON THE QUALITY OF BUILDING WORK ISSUES

MBA is one of the oldest industry associations representing the interests of builders for over 100 years. MBA is also a Registered Training Organisation and a Group Training Organisation. One of the key goals of the MBA, as an association, is to train apprentices and cadets to satisfy the future skills needs of our industry. MBA has been training apprentices for over 50 years and, in recent, years we have also established a cadetship program and developed an alliance with the University of Canberra so that our cadets can further their careers by obtaining a degree in building and construction. One of the key drivers in establishing this alliance was a shortfall in para-professional qualifications such as Project Managers and site supervisory personnel with keys roles in the supervision and management of commercial and residential projects.

The MBA has an ongoing commitment to training and upskilling of its members through continuing professional development training and regular updates and technical guidance material in assisting our members in delivering best-practice when applied to construction.

There has been a lot of adverse publicity in recent times regarding the quality of construction work in the ACT. Although these are isolated incidents, it is still of great concern to the MBA as the credibility of our industry can suffer long-term damage if these matters are not given immediate attention by the industry and the regulatory authorities.

Some consumers also have high expectations of what is expected and delivered and do not understand the complexity of issues involved in the building process. A building is something that you cannot purchase at Harvey Normans in a cardboard box. There are a number of factors that affect the buildability and final outcome. Some of these are design factors and some are associated with the skills levels of the individuals delivering the final product. However, given the complexity of the issues involved, it is clearly implied that completed buildings should be suitable for their intended purpose and should, essentially, be free of major defects and constructed in a proper and workman-like manner. Unfortunately, when issues such as the quality of building work are raised by the broader community and receive some adverse publicity, governments tend to react by implementing more regulations. The MBA calls upon the ACT government not to implement more regulations as the current regulations that apply to the construction industry are more than adequate, if properly implemented and enforced. In other words, we don't want more regulation – we want better regulation and better enforcement of the current regulations.

The industry is currently strangled with a myriad of compliance issues that they have to deal with on a regular basis. It could be argued that over-regulation may be impacting on builders' capacity to adequately resource and provide proper onsite supervision for their building projects.

There have been a number of possible solutions put forward, by the affected parties and others, as to how this quality of work issue should be addressed.

As a key industry representative body, we felt that it was important that the industry's perspective and recommendations be put forward for consideration and future discussion.

Factors that impact on the quality of work:

There are several factors that impact on the quality of building work. We have listed some below; not in any specific order or priority. The objective being that some are complex and are longer-term and some can be addressed in the short-term with immediate impact. We have prioritised the short-term recommendations as matters that can be addressed within a three month timeframe and listed the others for consideration in the development of the longer-term policy:

- 1. Skills shortages.** This is a well-publicised issue in the construction industry, with no immediate short-term solution other than the fact that the MBA, through its school-based program, continues to promote the advantages of a career in the construction industry. There is another issue that is associated directly with skills shortages, but it relates more to skills deficiencies. The construction industry is confronted with diminishing skills levels as technologies change and traditional best practices are being replaced by some short-term arrangements that do not deliver quality outcomes in all instances

Some of the common building defects that have been identified, primarily, in multi-unit construction, relate to waterproofing and facade finishes such as rendering. It is therefore critical, in the short-term, that we develop a strategy to deal with these two primary building defect issues. The MBA is addressing this issue and has had discussions with waterproofing component manufacturers to deliver specific training in the application and detailing of waterproofing membranes. We are also planning a trade night for late August that will specifically deal with waterproofing products and their application. The MBA doesn't believe that licensing of waterproofing applicators will address this issue. The MBA has a very strong view that critical skills training is required in this area that will deliver a number of suitably qualified and accredited individuals. Rendering is one of the more traditional-type trades and in recent years there has been somewhat of a renaissance whereby render finishes are applied to facades, rather than traditional face-brick. This can be partially attributed to skills shortages associated with face-bricklaying. There currently is very limited training available for render applicators. This is an issue that industry needs to address if this form of construction finish is to continue.

Recommendation:

- To develop and implement training in waterproofing with specific emphasis on balcony waterproofing; this achievable within three months*
- Promote best-practice in rendering by providing extensive publications and reference material for circulation to the construction industry. Liaise with Canberra Institute of Technology and encourage more trainees to undertake training in rendering; this achievable within six months*



- *In cooperation with the Construction Occupations Registrar, develop a list of the key building defects and implement a training strategy specifically targeted at addressing the common building defects; this achievable within six months*
 - *Provide regular updates, to industry and licensed builders, on appropriate methods of dealing with common construction defects; this achievable three months.*
2. **Onsite supervision.** The principal contractor/licensed builder is responsible for the supervision of the sub-trades. This supervision is sometimes lacking due to the skills of the individuals providing the supervision and lack of commitment, in some instances, by the principal contractor/nominee to provide the required level of supervision

The licensed builder or the nominee is responsible, under the Building Act and the Construction Occupations Licensing Act, for providing adequate supervision of the sub-trades under his/her control. This key role must be emphasised by the industry and the Construction Occupations Registrar in communicating a clear message to the industry that proper supervision is critical.

Recommendation:

- *The industry and the Registrar, jointly, communicate to its members and to all licensed builders, the potential consequences for the licensees if they fail to provide adequate supervision of construction work under their control*
- *Industry supports the Registrar in taking action against recalcitrant builders where there is clearly a breach of the Building Act or the Construction Occupations Licensing Act*

3. **Quality of documentation.** In multi-unit construction it is critical that the documentation provided clearly specifies critical design aspects; this should include detailed specifications of the products and their suitability for the intended purpose. If detailed plans and specifications are provided at the design stage, it is incumbent then, on the builder and the Building Certifier, to ensure that the building work complies with those plans and specifications.

A number of projects, with apparent building defects that the MBA has recently been associated with, have some common themes. Generally, the waterproofing products applied have not been specified, have not been properly detailed and have not been installed in a proper manner. In researching this, we have discovered that no specific products have been specified, the suitability of products used has not been assessed and the end result being major defect and failure. This issue is not primarily related to waterproofing issues, but relates to just about every critical element in the building process, where there isn't proper detailing, no specifications or improperly specified products. If the projects are not properly detailed and if the products are not specified, then this can result in dramatic failure, as the work methods are usually developed on the run, resulting in a totally unsatisfactory outcome for all.



Recommendation:

- *Industry, the Construction Occupations Registrar and the Building Certifiers must agree on a course of action to ensure that project plans are properly detailed and specifications are provided for the key construction elements. The Building Certifiers must have the right to refuse the plans unless these key requirements are satisfied by the applicant/designer; this achievable within six months.*

- 4. Building certification.** The Building Certifier plays a critical role in ensuring that the work is carried out in accordance with the approved plans and in a proper and workmanlike manner, as specified in the ACT Building Act. The Building Certifier does not perform a supervisory role. It is therefore critical that the Building Certifier is satisfied that the quality of documentation provided is acceptable and will deliver a finished project that complies with the Building Act and the Building Code of Australia.

There is no requirement in the Building Act for mandatory inspection of critical stages in Class 2 buildings. This issue has been discussed with the Building Certifiers in the past. The role of the Building Certifier must also be clearly communicated to the consumers. There is this perception that the Building Certifier is the supervisor of the work. This is not the case. There are incidences where improper certification has occurred and also instances where some Certifiers continually fail to satisfy their obligations under the Construction Occupations Licensing Act. The Construction Occupations Registrar must be supported by industry and properly resourced in its auditing role to ensure continuing credibility and consumer confidence in the current certification system.

Recommendation:

- *Industry, the Construction Occupations Registrar and Building Certifiers give serious consideration to the implementation of mandatory stage inspections of the critical elements associated with Class 2 buildings; this achievable within three months*
- *Industry, the Construction Occupations Registrar and Building Certifiers give consideration to the implementation of critical hold-points, such as inspection of waterproofing elements, prior to any further work proceeding; this achievable within six months*
- *The Registrar must be supported by industry and the building certification profession in taking action against Building Certifiers who continually fail to satisfy their obligations under the Construction Occupations Licensing Act.*

- 5. Qualifications and skills of builders.** In some instances the licensed builders do not possess the required skills and experience to satisfactorily understand the complexities associated with the more complex multi-unit-type construction. The licensed builder relies on levels of onsite supervision that may not be appropriate, especially when it relates to critical aspects of the construction. Some builders do not undertake training to upskill their knowledge of the BCA and relevant Australian Standards. A basic understanding of the BCA is critical for any licensed builder.

The Registrar must be satisfied, in the first instance, that the licensed builder has the appropriate qualifications, skills and experience, prior to granting a Builder's License.



especially in the more complex types of projects that require the licensee to hold a Class A or Class B license. Assessing the practical skills of licensed applicants can be a difficult task for the Registrar and the MBA are currently in the process of finalising a skills log book, where the skills of the individuals are documented and verified over a period of time. When granted a builder's licence, builders must continually update their knowledge to ensure they are familiar with current BCA requirements and have a practical knowledge of the relevant Australian Standards, including an acceptable understanding of building specifications.

Recommendation:

- *Industry and the Registrar agree on the adoption of an experience record (log book) for prospective license applicants; this achievable within six months*
- *Industry and the Registrar, in association with licensed builders, develop a targeted Continuing Professional Development program for licensed builders, with the primary purpose of addressing training directed at common building defects and the Building Code of Australia. This could be implemented as a mandatory requirement by the Registrar prior to renewal of a builder's licence; this achievable within 12 months with industry consultation. The MBA is currently in the process of developing a Building Resource Library whereby builders can access the latest information on building products, Building Codes, Standards and up-to-date specifications.*

- 6. Specified products and their suitability for purpose.** In some instances products are specified by manufacturers and it is often ultimately discovered that such products are not suitable for the intended purpose. There needs to be more rigour and assessment and greater liability on the manufacturers of products.

In some instances builders are left with the liability where products specified and installed correctly have not satisfied their design or intended function.

Recommendation:

- *Industry and the Construction Occupations Registrar must play a greater role in supporting the builder where specified products are used and correctly installed by the builder. This may include the Registrar taking issue with the manufacturers of such products as to their suitability for purpose in complying with the Building Act; ongoing long-term issue that requires detailed consultation with industry, including manufacturers, suppliers and importers of products.*

- 7. Builder/nominee role in supervision of the building work.** The licensed builder or the nominee is primarily responsible for supervision of the building work. In some instances building companies only have one nominee who essentially directs others to supervise the work. Companies, especially larger companies, must employ more nominees to ensure that the projects are adequately supervised during the construction phase.

The role of the nominees is clearly defined in the Construction Occupations Licensing Act i.e. responsible for supervising the building work. This is sometimes a misunderstood role; therefore it is not possible for a single nominee to be responsible for the supervision



of several projects under his/her control at the same time. It is important that the Registrar clearly explains the critical role that the nominee has to play in the supervision of the building work prior to the Builders License being issued or prior to the nominee being approved to provide a construction service to an entity.

Recommendation:

- *The Registrar must be satisfied and develop specific criteria to ensure that companies employ an adequate number of nominees to supervise projects where the company is the licensee; this achievable within three months*
- *The Registrar be supported by industry in directing nominees to undertake further training if they are found to be deficient in their knowledge and skills in providing satisfactory supervision of the building work.*

8. Time constraints on project delivery. Builders are usually given very tight timeframes to complete projects. This is primarily due to the excess holding costs associated with larger projects. Builders must ensure, when they take on complex projects, that they have the resources and skills to competently undertake the work.

Recommendation:

- *This is an ongoing education process for industry to make its members aware of the consequences of agreeing to tight timeframes, to the detriment of quality and costs associated with remedial works.*

9. Competitive pricing. In some instances builders and owners/developers select the lowest cost option. This does not necessarily deliver the best long-term results for the end user. Subcontractors are, on occasion, engaged to price projects based on sub-standard documentation which clearly doesn't specify the scope of works. The subcontractor then completes the work based on the subcontractor's understanding of what is required and the price that they have allowed for the works.

Generally, the construction industry is a competitive industry, however, all projects have real costs that have to be attributed and it is contingent on all, including subcontractors, builders and owners, to understand that price and quality are inter-linked.

Jerry Howard
Deputy Executive Director

23 July 2010

Annexure B: Building Quality in the ACT – Report to the Legislative Assembly, September 2010

Building quality in the ACT

Report to the ACT Legislative Assembly



Pursuant to resolution of the Assembly of 1 July 2010
September 2010



ACT Planning &
Land Authority

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- D Minutes of owners' rights working group meeting 26 August 2010
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- F Minutes of industry skills/competence working group meeting 27 August 2010
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Introduction

The built environment is shaped by diverse policies that seek to promote the health, safety and amenity of people, some of which set standards for or influence the form of building work. Residential buildings are also a product of consumer demand for different housing choices, facilities and features across various price ranges. It is ultimately the construction industry that must translate these requirements into quality buildings that meet the needs of owners and the community.

Changes in policy, population and tastes give rise to new styles, designs and methods for construction. Inventive design solutions often require non-traditional construction techniques and products. Industry needs to continually adapt to changing technologies and demands for skills within the constraints of time and cost pressures, particularly on large projects.

For many people, the purchase of a home represents the largest financial investment they will make in their lifetime. Quality is only one of many factors determining property prices. However, it is a reasonable expectation of homeowners that new and established properties will meet the standard set by building and associated regulations for a reasonable length of time.

Over the next five years the Government will release over 17,000 residential sites to help alleviate housing demand in the ACT. In accordance with the Government's Affordable Housing Action, 20 per cent of all new residential estates will be affordably priced.¹ An increasing proportion of these dwellings will be part of multi-unit or apartment buildings.

Land release targets have increased from around 3000 per year in 2009 to 5000 dwelling sites per year for financial years 2010–11 and 2011–12. Therefore, it is particularly important that industry practices and the regulatory system can support increased building activity while maintaining suitable construction standards.

As discussions through the Building Quality Forum have mainly been concerned with class 2 buildings², this report focuses in particular on multi-unit residential buildings. For the purposes of this report multi-unit residential is taken to mean any configuration of dwellings whose owners form a body corporate or owners corporation as defined in the *Unit Titles Act 2001*. This is not to be confused with multi-unit housing as defined in planning legislation, which includes all housing types other than single detached dwellings.

Although measures for private residential buildings comprise the initial considerations for reform, the findings of this report can be adapted for other classes of commercial and residential buildings if required.

¹ Strong sales for prime residential sites — 29 June 2010 <http://www.chiefminister.act.gov.au/media.php?v=9691>

² A building containing two or more sole occupancy units each being a separate dwelling, Building Code of Australia, volume 1, p.39. This does not include attached dwellings such as townhouses and duplexes which are classified as Class 1 buildings.

Executive summary

The recommendations in this report have been developed after intensive consultation between July 2010 and September 2010 with building owners, industry and associated professions. The productive nature of the engagement of all parties has facilitated the development of this report to the ACT Legislative Assembly. The goodwill and cooperative spirit of all participants has greatly assisted in completing this detailed report within the timeframe set by the Assembly.

Reform of construction industry regulation is a complex project which cannot be completed over a few months. However, work over the consultation period has identified a clear set of challenges, directions and reforms that can be pursued by the industry, regulators and building owners over the remainder of this year. The goal of the work to be completed in the short term is to bring substance and form to the ideas and suggestions that have evolved from the Building Quality Forum and its subsequent working groups.

Increasing regulatory involvement needs to be supported by an industry-wide commitment to higher standards of work and to quality training and education. The regulatory system is not intended to compensate for a lack of skills, knowledge and experience. Discussions with industry representatives have shown that there are many effective quality control mechanisms already employed by some practitioners that can be adopted across the whole industry.

The construction sector needs to refocus and commit to improving the skills of potential, new and existing workers to ensure quality is an inherent character of the product the industry provides. Owners corporations must also take appropriate and timely action to address problems.

A continuing commitment by government and the participants in the Building Quality Forum processes will enable this important work to be completed to the benefit of the community and the industry.

1. Background

In response to complaints about sub-standard building work on residential buildings, the ACT Legislative Assembly passed a motion on 1 July 2010 noting the problems raised by the Owners Corporation Network and others related to building standards and building certification. It was agreed that the Government would provide a detailed report to the Assembly by September 2010 on:

- (a) the range and extent of problems related to building standards and certification in the ACT, taking into account:
 - how building-related complaints have been and are dealt with by the ACT Government
 - the role of the Unit Titles Act in addressing building faults and poor workmanship in unit plans in Canberra
 - public input, which is to be called for and detailed as part of the report;
- (b) progress on reform, based on discussion with the Owners Corporation Network, the building industry, and other relevant professional bodies through the Building Quality Forum;
- (c) recommendations relating to regulatory and legislative reform for the short and medium term; and
- (d) measures that can be taken to assist owners and owners' corporations to address existing problems of building faults and poor workmanship.

Process to date

In July 2010 the Minister for Planning, Mr Andrew Barr MLA, established a Building Quality Forum (the forum), made up of representatives from owners corporations, strata management, construction industry associations including unions, the insurance industry, legal and adjudication bodies, the training sector, the ACT Planning and Land Authority (ACTPLA), and the Office of Regulatory Services (ORS) in the Department of Justice and Community Safety (JACS).

The forum met on 26 July 2010 to discuss the extent of building problems and possibilities for addressing major issues. A number of issues were identified for further investigation, specifically:

- forming an accurate picture of the scale of the problem and establishing reform priorities
- clarifying complaints processes and monitoring recurring issues and offenders
- owners' rights and consumer issues
- delineation between fair trading issues and building regulatory issues
- responsibilities of owners, industry and regulators in education and addressing complaints
- insurance coverage for building defects.

To consider issues in more detail the forum agreed to set up four working groups on:

- 1) owners' rights
- 2) industry skills and competence
- 3) effective supervision
- 4) insurance.

Each working group met twice between 24 August 2010 and 10 September 2010. Throughout the process members of the forum and the working groups were encouraged to put forward any ideas either during meetings or directly to ACTPLA.

Further details on membership of working groups and the notes from all meetings held to date form appendices A–K of this paper.

Scale of the problem

In the 2009–2010 financial year ACTPLA's lease and building audit team worked on 320 jobs across all classes of buildings. These jobs do not include routine auditing work; however any issues discovered during auditing that require investigation are moved to the list of jobs. Of the jobs registered for the year, 105 remained active after the end of the financial year.

These matters are generally called complaints as most jobs are registered through the statutory complaints process under the *Construction Occupations (Licensing) Act 2004* (COLA) or the *Planning and Development Act 2007*. However, a number are initiated by ACTPLA as a result of auditing or industry information (e.g. notification of insolvency). In all cases some form of investigation is required. A major part of all investigations is to ascertain what law is engaged and if any breach can be demonstrated.

The following figures attempt to group the jobs into categories. Each job has its own specific set of facts. Building Act matters have been grouped into subsets of common issues.

Issue	Number of Complaints*
Development approval, leasing (Planning and Development Act compliance)	81
Boundary and fence issues	13
Total Building Act compliance	151
Building Act/Building Code of Australia general compliance (70)	
Building approval issue (43)	
Natural ground level issues (2)	
Ground level water runoff (10)	
Certificate of occupancy issue (14)	
Water proofing (7)	
Building warranty (5)	

Fit-out and finish	20
Contractual issues	17
Insolvent (no issue found)	16
Insolvent (issue found)	5
Licensing issue	7
Customer service from licence holder	10
Electricity, gas, water	7
General enquiries (no complaint lodged)	8
Other regulators (matters raised found to be regulated by another agency)	10
Miscellaneous or lack of information provided	15

* Note: In a significant number of cases there are multiple issues, e.g. compliance with the Building Code of Australia as well as a building approval issue or contractual dispute. Consequently, the numbers listed against the categories above will not total 320.

It should be noted that these are the total number of complaints investigated by ACTPLA and not all investigations reveal there has been a breach of building or related legislation. These complaints may also be for any class of building or for alterations and additions to existing buildings.

Complaint statistics are not recorded against types or classes of building as defined in the Building Code of Australia. Therefore complaints cannot easily be disaggregated for Class 1 and 2 residential buildings. However, a subset of figures for ‘building quality’ issues has been compiled. These figures are grouped on the basis of the nature of the matters raised in the Building Quality Forum.

Building quality issues	No. of complaints
Water proofing	7
Certificate of occupancy issue	14
Building warranty	5
Fit-out and finish	20
Contract issues	17
Customer service from licence holder	10
Total	73

To consider this in context in the 2009–2010 financial year 4126 certificates of occupancy or completion were issued for finalised building work on new and altered buildings. The

total number of complaints represents 7.7 per cent of completions, and ‘building quality’ issues 1.7 per cent.

Between July 2006 and June 2010 a total of 15,121 certificates of occupancy were issued across all building work categories in the ACT. During this period 1071 building approvals were registered for new medium density Class 1 building projects (e.g. townhouse complexes) and 147 for new class 2 buildings.

Given that many problems with buildings manifest in the first few years of occupancy, the number of complaints received by ACTPLA represents 2.1 per cent of completions in the preceding 4 years. The percentage that relate to building quality issues is 0.5 per cent. Although problems with buildings do occur outside the statutory warranty period of six years for structural defects, they represent a very small proportion of complaints.

These figures indicate only the number of complaints brought to the attention of ACTPLA. It is difficult to assess the scale of building issues, as many problems may have been resolved between owners and builders, or left unresolved, and are not reported to the regulator.

Industry participants in the forum, most of which also work outside of the ACT in NSW, have acknowledged that problems will and do occasionally occur given the complexity involved in constructing a building. They considered that the standard of building in the ACT is relatively high compared to a number of other jurisdictions.

Scope of building issues

It is necessary to define what is included in the broad spectrum of ‘building issues’. There are a number of distinct legislative areas in which a problem occurring in a building may fall, not all of which can be rectified through ACTPLA’s processes.

Building Code of Australia

The Building Code of Australia (BCA) is the technical performance standard for building work, as applied and enforced by *Building Act 2004*. It is given the status of regulation through that Act and covers structural issues, energy efficiency, fire safety, access and egress, illumination, ventilation and other amenity issues such as facilities in public buildings. It does not regulate decorative finishes and fit-out of a building unless those features are required to meet a performance requirement in the BCA e.g. a waterproofing coat of sealant.

Defects which are BCA-related will usually become evident on completion of the project, or within the first few months after completion. They are often related to structural and major soundproofing defects. On occasions, these defects become evident over greater period of times, such as some residential waterproofing defects.

Complaints about non-compliance with the BCA represent a relatively small percentage of the total complaints received by ACTPLA.

Non-building code issues

Non-building code issues generally relate to fit-out and finish parts of the building and include cabinet-making, painting, and tiling etc, as well as external paving.

Defects include cracked or peeling render, painting and defective tiling, and chipped paths. These defects can either occur close to completion, or manifest a number of years after the original purchase. ACTPLA currently has limited ability to take action on such issues because while they can be associated with building work and often included in a construction contract, they are not explicitly contemplated by the Building Act as building work. Where fit-out and finish work is undertaken separately to building work, these items are clearly outside the scope of the Building Act and are matters for fair trading.

Building Act

The Building Act prescribes processes for issuing building approvals and certificates of occupancy and when inspections must take place on building work. It also defines ‘building work’ and the standards and tolerances that apply to building work. This definition is included at Appendix M.

Complaints about potential breaches of the Building Act generally indicate an issue of quality or a breach of process. For example a certifier not carrying out a mandatory inspection or allowing work to continue before an inspection is completed is a breach of process that may affect quality. The Building Act also requires that work is carried out in a proper and skilful way, and materials and products are used correctly.

Building services

Although the Building Code covers some aspects of building services such as efficiency of air conditioners, in general electrical, plumbing, and gasfitting installations do not fall within the scope of building work. All work of this nature is licensable work and is regulated through the *Electricity Safety Act 1971*, the *Water and Sewerage Act 2000*, and the *Gas Safety Act 2000*. Each occupational area has its own technical standards and all practitioners must hold appropriate licenses issued under COLA.

Where there is a problem with these services, the licensee responsible for the work will be investigated initially rather than the builder or building certifier.

Unit Titles Act

Section 51B of the *Unit Titles Act 2001* allows an owners corporation to take legal action for the rectification of structural defects that affect, or are likely to affect, the support or shelter provided by that part of the building or site to another part of the building or site.

The owners corporation may take legal action for the rectification of structural defects in a building that are part of the units or common property of a units plan if a member does not take legal action within a reasonable time after the defect becomes known.

Contractual issues

Breaches of contract and contractual disputes are matters for resolution by the courts or ORS under fair trading laws. Contractual matters are not conciliated by ACTPLA. One of the complexities of contractual disputes is that they can arise over non-payment as a result of perceived or actual defects in the building.

2. Major building quality issues

While the four working groups divided issues into general areas of concern, a number of issues discussed spanned many areas. The following issues have emerged as those that may benefit from reform.

Information gathering and monitoring

Building and development can be classified many different ways. For example a townhouse could be classified as a Class 1 building in the BCA or as multi-unit housing in planning terms. Complaints also relate to activities on a parcel of land and activities undertaken by licensed or other practitioners. These activities do not necessarily relate to a single issue or a single piece of legislation. Therefore, for investigation purposes, complaints are recorded against the block and section they relate to with links to relevant licensing files. Given this complexity there is presently no single database against which incidents of building quality complaints are recorded and the sources of information are not easily interrogated.

In addition, only a fraction of issues encountered by building owners are reported to ACTPLA and ORS. Some information is held by industry associations that offer a complaints resolution service, but these statistics are not available to ACTPLA, primarily due to privacy issues.

This situation hampers identification and analysis of common issues and may delay responses to emerging problems in the industry. ACTPLA is in the process of modernising its electronic management of complaints and investigations. The current system is outmoded and does not readily access all available data to administer complaints. The new system will use data warehousing to build a single repository of data resources to be incorporated into case management, data capture and data analysis.

Industry skills and training

Licensed builders

Traditional builders' licensing tiers reflected the practical skills builders accumulated as they progressed in the trade. With the development of the Australian Qualifications and Training Framework (AQTF), licensing tiers were altered to reflect the levels of qualifications in the AQTF rather than progression through practical training on increasingly complex building projects.

The current builders' licensing classes under COLA are:

Class	Scope of work
A	building work other than specialist building work or handling asbestos
B	(a) building work (other than specialist building work or handling asbestos) in relation to a building that is 3 storeys or lower; and (b) basic building work
C	(a) building work (other than specialist building work or handling asbestos) in relation to a building that is 2 storeys or lower and is a class 1, class 2 or class 10a [^] building; and (b) building work (other than specialist building work or handling asbestos) in relation to a building that is a class 10b [^] structure (other than a swimming pool or swimming pool fence) and is ancillary to a building mentioned in paragraph (a); and (c) basic building work
D	non-structural basic building work, other than specialist building work or handling asbestos
Owner Builders	building work, other than specialist building work or handling asbestos, in relation to a class 1, class 2* or class 10 building that is, or is to be, the licensee's main home or ancillary to it *this provision is in place to allow owners to undertake additions and alterations to their own sole occupancy unit. It has not been exercised in relation to constructing a class 2 building.

[^]For classification of buildings in the Building Code of Australia, see Appendix L.

Qualifications for higher level licences relate more generally to project design/contract management skills e.g. architects, construction managers, engineers, while the lower tiers align with practical building qualifications. Holders of higher level licences are not restricted to the scope of work described in the licence and can undertake any work a lower level of licence covers.

All licensees must demonstrate at least two years experience relevant to the class of licence they apply for, but not necessarily for the full scope of work the licence permits. At present experience is not competency-based. In the case of company licences, it is only the skills of the nominee (an individual that must also hold a building licence for the type of

work to be undertaken) that are assessed. The nominee is then responsible for all work performed by the company.

For licensees qualified under the vocational education sector (TAFE), assessment of ‘relevant experience’ (not further defined in training materials) has now been included in building qualifications. Under national agreements on training made through COAG, it is expected that regulators will rely on that assessment rather than performing their own.

If a licensee keeps their licence current, renewal of a licence is automatic on payment of the renewal fee. Qualifications, current experience and professional development are not reassessed at the time of renewal, but licensees must maintain ongoing eligibility during the period of the licence.

It should be noted that licensing does not relate to an ability to bid for or enter into contracts.

Three distinct shortcomings have been identified in the current approach.

1. Testing of competency for A Class building licences may be insufficient to encompass all types of buildings that a licensee may work on i.e. from a single dwelling or low-rise residential development to a high-rise office building. Different skills are used in residential and non-residential (commercial) construction and experience is not necessarily interchangeable. If more practical skills are required on a project, those licensees with only theoretical or management knowledge may face difficulties.
2. Conversely, licensees qualified and experienced at the B class level and below have practical on-site experience, but are not trained in project management. This can cause problems when a business expands to take on multiple jobs, as a builder may lack the skills to manage each job effectively. This is further discussed in the section on effective supervision.
3. Standards, legislation and technologies change reasonably rapidly in the construction industry. People that hold licences may not have been active in the industry for a number of years yet are able to remain licensed. Issues of non-compliance and compromised quality could arise when a licensee recommences undertaking jobs after a considerable hiatus.

Industry representatives in the forum working groups generally agreed that the greatest problems were occurring in the medium-rise developments (above three storeys and below 10 storeys), rather than single dwelling or high-rises. This is just above the threshold for B Class licences and for fidelity insurance.

Sub-trades

Builders are only one of many occupations responsible for the workmanship on a project. Other occupations, such as concreters, formworkers, carpenters and glaziers are all responsible for parts of the construction process.

The ACT licenses primary occupations such as builders, electricians and plumbers, but does not licence each and every tradesperson or worker that may be involved in a project. The builder is ultimately responsible for ensuring that work they have contracted under their licence is completed in accordance with the relevant standards and fair trading obligations. It is not common practice for builders to insist on a particular level of qualification or experience when engaging sub-trades.

Currently, the demand for labour in the construction industry is increasing at a rapid rate. This demand together with an absence of licensing and industry quality assurance means these trades have a low completion rate for apprenticeships. People are moving into full-time work with less knowledge rather than deferring a higher income for a higher qualification. More advanced skills development undertaken in the latter stages of formal training is often missed.

Industry representatives in the working group on industry skills believe that professional builders could raise the minimum level of qualifications by requiring trade certificates or other completed qualifications from individuals before they are employed or contracted.

Associated professionals

Quality construction also relies on architects, building designers, engineers and associated professionals. Many defects can be prevented by good quality design and the accountability of design professionals for poor work or specifications needs to be improved. Similarly, quantity surveyors estimate and monitor construction costs, from the feasibility stage of a project through to the completion of the construction period. Errors in this process can lead to substitution of lower quality product or diminished time for completion to compensate for budget discrepancies.

At present architects are registered under the *Architects Act 2004* and engineers can gain industry accreditation by Engineers Australia. These occupations are not subject to the same regulatory framework governing all other licensed construction occupations.

While industry led quasi-regulatory schemes can be successful in maintaining a degree of competency, the capacity of membership associations to restrict any person's livelihood is limited. Professionals are regulated and licensed in different ways across the world, and some professional associations have approached jurisdictional governments to investigate the possibilities of formal licensing for their area of expertise.

Building designers and quantity surveyors in the ACT have previously approached ACTPLA about their potential inclusion under COLA. In a separate process, a discussion paper is being prepared that will canvass options to be considered in a review of the Architects Act.

Skills shortages and skills deficiencies

There are two distinct issues in relation to skills shortages. Skills shortages occur when there are insufficient numbers of people to undertake the amount of work available. Skills deficiencies arise when there are enough workers but the level of competency in one or a number of areas is below the level required to perform a particular type of work well.

There are over 2700 licensed builders in the ACT. The construction industry employs more than 12,000 ACT residents and a large percentage of the more than 20,500³ technicians and trades workers living in the ACT. As with the general workforce, a significant number of workers will reach retirement age over the next five to ten years. This reflects a national trend across the construction industry with 35 per cent of the workforce in the over 45 year demographic⁴.

³ ABS Labour Force Data, four quarter average, May 2010

⁴ ABS, 2006 Census of Population and Housing based on place of usual residence

The ACT economy and housing demand goals rely heavily on reducing, as far as possible, both skills deficiencies and shortages that may be present in the industry.

In the area of skills deficiencies, discussions during the forum process identified that waterproofers, tilers and renderers on the non-structural side, and concreters, formworkers, carpenters and bricklayers in structural trades would benefit from additional regulation and/or skills development. In the non-technical fields there are deficiencies in business skills, customer service skills (especially dealing with complaints) and supervision. Problems also arise when architects design complex or non-standard buildings that some builders may not have sufficient skill to build.

An additional quirk of qualifications for many occupations is that they contain training in how to perform work competently and how to maintain a building or installation, but there is minimal training on fixing problems. This has a direct effect on how builders respond to complaints, and on the operation of rectification orders. Training in using and applying specific products may also be necessary in areas such as waterproofing.

The challenges for training are to improve the skill levels in the identified areas, and maintain ongoing skills for practitioners when regulations and standards are updated and new products and methods of construction are introduced. The cost of training for those that have exhausted their two allocations of funding from the industry training fund for subsidised training may be a deterrent for some practitioners.

Addressing skills shortages is an economy-wide issue and beyond the scope of the Building Quality Forum to address. Apprentice wages, availability and promotion of training and social incentives all play a role in whether sufficient numbers of skilled people are attracted to and trained in the ACT's construction industry. However, incidences of poor quality of building work will most likely be exacerbated by skills shortages, which lead to increasing pressure on the local industry to take on additional work and reduce completion times.

Continuing professional development

Most of the working groups raised the issue of continuing professional development (CPD) or ongoing training for practitioners, to make sure that industry is aware of current regulation and new technologies. This issue has also been included for consideration in the National Occupational Licensing System, which is due for implementation for building-related occupations in 2013.

While some industry associations run CPD schemes and courses for their members, it is difficult to enforce ongoing training across the industry or an occupational area when there is no mandated requirement or deterrent for not completing CPD courses. However, it is possible that CPD can be linked to a licensing outcome, for example a person will not be eligible to renew their licence if the required CPD is not completed.

Retraining

Under the COLA, the Construction Occupations Registrar (the Registrar) may require a licensee to undergo further training in a specific area. The Registrar can also condition a licence so continuing work is conditional on satisfactory completion of particular course of training. An application can also be made to the ACT Civil and Administrative Tribunal

(ACAT) to compel a licence holder to undertake further training or retrain in a certain competency, or an entire qualification.

Role of building certifiers

A building certifier is appointed by the lessee of the land where building work is to be undertaken. Regardless of who prepares the appointment form, the builder for the project cannot appoint a certifier. The certifier is accountable to the lessee; however, the role of a certifier is primarily regulatory and a certifier's obligations are ultimately to the Registrar.

The privatisation of building certification began in the mid 1990s. Since then all jurisdictions, except Western Australia, have some percentage of privatised certification. The ACT has fully privatised the function.

This does not mean that building certifiers are unregulated. Building certifiers must hold a relevant class of building surveyors licence issued under COLA to be appointed as a certifier on a job. Certifiers are subject to the same regulatory framework, demerit point system and disciplinary action provisions as other licensed construction occupations. A certifier's licence can be cancelled, suspended or conditioned to restrict the activities that can be undertaken by a licensee.

The building certifier is responsible for issuing approvals for building work and for certifying that work has been completed in accordance with relevant plans and regulations (predominantly Building Code-related requirements). Certifiers work with builders to make sure buildings meet at least the minimum regulatory standards. They are not necessarily responsible for the quality of fit-out and finish work and are not expected to remain on-site during the entire construction process. The role of building certifiers in supervision is discussed in the section titled effective supervision.

While a certifier can control whether building work is approved or refuse to sign off on mandatory inspections or final approval, they are limited in the action they can take to make builders rectify work. Rectification orders can be issued by the Registrar, ACAT or the Supreme Court. Certifiers are not entitled to issue rectification orders but are obligated to report substantial non-compliance with the BCA to the Registrar.

Many consumers have low awareness about the role of the building certifier, or how they are appointed. This is especially of concern in Class 1 buildings, where the homeowner should be the person that chooses the certifier, rather than the builder who fills out an appointment form for the owner to sign. The expansion of ACTPLA's eDevelopment platform to include building processes will go some way to address this issue. The system will track building approvals online and copy the owner into all project correspondence. Owners will also have to engage a building certifier before engaging a builder.

It is recognised that this does not alleviate concerns for future owners of Class 2 developments, where the developer is the original lessee and therefore appoints the certifier.

The suggestion of a third party or government appointing certifiers for multi-unit projects was raised during the forum. There are significant issues with this proposal, particularly the problem with the government being seen to endorse one licensee over another, conflict of interest with the government being the regulator and the appointer of certifiers, and the issue of liability in the event of poor performance of a certifier or builder. At this stage, widespread failure of the private certification system has not been demonstrated; however the suggestion and concerns regarding Class 2 buildings are acknowledged by government.

Second contracts

There is an emerging issue with ‘second contracts’ whereby owners appoint the certifier and the builder then attempts to engage the certifier in a separate contract outlining timeframes for inspections and other activities they wish the certifier to undertake. This can interfere with the certifier meeting statutory obligations for inspections and other quality control mechanisms. Although these contracts do not negate a certifier’s statutory obligations, making this form of agreement an offence will provide legal protection for certifiers and owners.

Auditing of building work

ACTPLA’s four building inspectors audit 5 –10 per cent of jobs requiring building certification and investigate Building Act related complaints. This is consistent with the level of auditing of other occupations such as electricians and plumbers. Unlike other occupations though, in general, audits will focus on the building certifier, who is expected in turn to ensure the builder produces compliant building work. It should be noted that not everything a builder does or manages can be supervised or inspected by a certifier.

There can be a lack of clarity about the roles of building inspectors and certifiers in auditing builders. Inspectors appointed under COLA and the Building Act can audit any licensed builder, and the scope of audit can extend beyond technical compliance with the BCA.

Limited resources available for auditing, and the need to avoid duplication of stage inspections, has led to minimal direct auditing of builders’ work. Traditionally some building certifiers have also opposed on-site auditing by building inspectors, seeing this as an incursion on their area of responsibility.

This may contribute to a perception that builders are not regulated by government, and to slippages in the overall quality of work, not only those aspects checked by a certifier.

Although certifiers perform a regulatory role, they do not develop policy or the standards they enforce. To avoid prescriptive application of a performance-based standard, little guidance material is given to certifiers to help with interpreting policy intent or applying the relevant sections of the Building Act or the BCA. Performance standards can be unquantified meaning their application becomes highly subjective. It is acknowledged that this may contribute to the variations in building quality outcomes across the industry, and a better balance between information on application of the BCA from ACTPLA and scope for individual interpretation may be beneficial.

Documentation and specifications

Project documentation

Construction faults and defects can occur when information on plans and specifications is insufficient for the builder to ascertain how engineering and other technical requirements are to be met. Architects are often not engaged past preparing plans for development approval (DA), which require little technical detail, and it can be difficult to extrapolate the required technical information to determine compliance with the BCA. Engineers and other technical specialists may not be engaged until after a DA is granted.

Interpreting, or substituting for, documentation increases the amount of time supervisors spend away from the building site. In working group discussion, industry members noted that there had been a marked reduction in detail and quality in the drawings coming through from architects and engineers over time.

Detailed documentation can also assist owners and regulators with determining where the source of any subsequent problem may be for either BCA-related issues (e.g. substitution with an inferior or unsuitable product) or consumer issues (e.g. painting specifications). This would be particularly useful for subsequent owners of a property, or those who purchase a dwelling off plans.

Practice notes and information

The BCA is a performance-based code, and therefore offers minimal guidance on design solutions where prescriptive approaches are unviable or not desired by the client. Practice notes for some construction features have been produced for industry by the Master Builders Association. Forum working group members felt that further practice notes and default design solutions for the major quality issues, such as balconies over habitable areas, could be produced to give greater guidance to builders and designers. Practice notes do not override the performance provisions of the BCA but provide clarity on acceptable practices.

Effective supervision

Role of builders in site supervision

Effective supervision covers the entire building process from interpreting documentation to on-site supervision. In the ACT licensing system, the nominee for a company is responsible for every project undertaken by the business and for ‘adequate supervision’ of each project. This may mean different things depending on the size and complexity of the project. There are no supervision competency requirements for licensing, specialised supervision qualifications or on-site supervision of large projects.

Although builders are responsible for supervision, training in building courses does not equip builders to supervise a full project. Supervision may not be a concern in smaller businesses that have few concurrent jobs, but problems can occur when a nominee is attempting to supervise a large number of jobs at once. In effect, beyond a certain number of jobs the role of the nominee changes from a builder to a construction manager.

Although most businesses try to mitigate on-site problems, time constraints and workload can mean some projects are not subject to an adequate level of supervision.

There are two existing qualifications offered in the ACT at Certificate IV level in management and supervision, and contract administration. Supervisors can have their skills, experience and previous qualifications assessed through recognition of prior learning process undertaken by registered training organisations (RTOs).

Inspections by building certifiers

As stated earlier, it is not the role of the building certifier to act as a full time on-site supervisor of works. The building certifier is required to carry out a number of mandated inspections at defined stages of building work. It is also expected that certifiers will exercise their own discretion to inspect or require specific documentation from the builder or sub-trades at additional stages depending on the risk and complexity of the project.

Current inspection requirements relate to the completion of preparation for pouring a concrete footing or member, completion of a structural framework and laying of a dampcourse. A certifier must ensure that the work is completed, tested or inspected as required before further work can continue.

While there is no requirement for pre-sheet inspections, or inspections of wet areas, noise attenuation and other building aspects, most certifiers will inspect these as a matter of course, especially on Class 2 buildings. If a certificate for work is accepted by the certifier, it should be produced by a competent person. For most sub-trades there is no clear qualification requirement to demonstrate competency, meaning that at present each certifier sets their own requirements.

Although a builder and certifiers are responsible for the work meeting standards, the main objective of inspections by certifiers is to prevent problems from occurring in the first place. More uniform quality control of practitioners is likely to be useful for builders, certifiers and consumers.

Owners' rights and managing complaints

Owners' rights

Most owners do not expect problems will never occur with buildings. A primary concern of owners' organisations represented in the forum was the real or perceived difficulties encountered when attempting to have a complaint looked at by a builder, particularly:

- ‘disappearing builders’ i.e. builders that refuse to respond to owners requests or building companies that are no longer exist
- arranging a time for the builder to attend a site especially when they have moved on to a new job
- delays in locating and fixing more complicated problems, possibly related to skills gaps (see also industry skills and training) and potential rectification costs (see also documentation and specifications)
- problems with finding a person to conduct an independent review. In a small industry, some practitioners are concerned they will jeopardise relationships with current or future clients
- the cost of independent review and commissioning expert reports to prove the existence of a problem where a builder will not cooperate
- lack of pressure by government agencies on practitioners to resolve problems.

If an issue is noticed under contract an owner is able to withhold the final payment until it is fixed and notify ACTPLA of any technical problem. However, some owners are reluctant to exercise this option, and can disadvantage themselves by paying builders too early. Disputes over contractual obligations relate to consumer protection laws, which are enforced by ORS.

Addressing complaints outside the contract period, for second owners of units and common areas in multi-unit residential buildings can be more problematic. In these situations there is no contract between the owner and the builder. There is no formal mediation or adjudication process for owners to access outside the court system.

Owners corporations must also be functioning well to support claims and complaints of individual owners. Not all buildings have a body corporate with this level of organisation.

Complaints process — ACTPLA

ACTPLA uses a triage method to manage complaints about building work. Complaints about issues that represent an imminent risk to life and property are given first priority, followed by possible risk to life and property and then all other complaints. Electrical, plumbing and gasfitting work is referred to the relevant inspectorate in the construction services branch. ACTPLA does not conciliate contractual matters.

ACTPLA can take appropriate action against current and former licensees, but cannot seek a remedy from a company if that company has been dissolved. Pursuing action against builder that has been declared bankrupt is unlikely to result in any rectification of a problem. Other legal options exist, but these can be protracted and cost-prohibitive to pursue. COLA allows ACTPLA to issue orders on building work up to 10 years from the completion of the work. However, investigations and orders must avoid affecting any party's interests if concurrent civil action is proceeding.

The Registrar can impose a number of sanctions against a licensee. A serious incident may be taken to ACAT for disciplinary action or cancellation of a licence. The Registrar can also issue up to fifteen demerit points against a licence for serious breaches. Once a licensee reaches fifteen points the Registrar is empowered to cancel or suspend a practitioner's licence. The Supreme Court can review a cancellation or suspension under the *Administrative Decisions (Judicial Review) Act 1989*.

ACTPLA can investigate offences under the building and other relevant laws, and may brief the Director of Public Prosecutions to prosecute the offence in the Magistrates Court or the Supreme Court. For criminal offences, the case must be proven beyond reasonable doubt. Preparing a case for prosecution is a highly resource intensive process and is usually reserved for the most serious of breaches.

Demonstrating that an offence was committed or that rectification is required can rely on expert testimony and reports in areas such as engineering. The cost of commissioning this expertise is beyond ACTPLA's current enforcement budget. Consequently, on many occasions the onus is on complainants to purchase this expertise to provide evidence to take a matter further.

Under the *Privacy Act 1988* ACTPLA is required to keep information confidential that would identify individuals. Disclosure of investigations, rectification and other sanctions is permitted if the matter is on the public record, for example if the matter was decided by ACAT or the Magistrates Court. Consequently, the public is generally unaware of ACTPLA's investigations and the steps taken to address complaints.

Insurance

There is currently one type of residential building insurance product required by law. Complying policies can be taken out with a private insurer or under an approved fidelity fund scheme. There are only three suppliers of insurance in the Territory. Insurance is private and not underwritten by the ACT Government. Any additional insurance to cover building defects is taken out by builders, developers or owners on a voluntary basis.

This form of insurance covers residential buildings of three storeys or less and has a maximum payout of \$85,000 for each premises. It is expected that if owners track their payments to builders and pay instalments when work is completed satisfactorily, this maximum payout should be sufficient to cover most problems. There have been 17,000 certificates of fidelity issued by MBA, of which only two were paid out to the maximum. An increase in the maximum payout would increase premiums.

There appears to be much public confusion about the role of the Fidelity Fund, which is to provide insurance for circumstances in which the builder is insolvent, dead or has disappeared. Fidelity insurance represents a last resort and is not intended for correction of building defects in any other circumstances, or maintenance work. Owners representatives felt that more information on the limitations of fidelity insurance should be provided by government to avoid confusion.

There is no mandated insurance on multi-unit residential buildings of four storeys and above.

Statutory warranty period

Section 88 of the Building Act provides for statutory warranty periods for residential building work of six years after the completion day in relation to a structural element of a building and two years after the completion day in relation to a non-structural element of a building.

Sinking funds

Under the Unit Titles Act, owners' corporations for buildings in which there are four or more units must establish and maintain a sinking fund from which funds are drawn for maintenance works. Sinking funds are not intended to become a *de facto* insurance pool to pay for rectification of genuine building defects. Recent changes to Unit Titles legislation have also reduced powers of developers to control body corporate structures.

Insurance working group members discussed a range of possible solutions for the insurance gap for class 2 buildings in particular, including establishing a building defects fund and extending residential building insurance. The group agreed that any eventual measures should aim to keep premiums at the lowest possible cost for all contributing parties.

Client-side issues

Throughout the forum discussions a number of industry members expressed frustration with clients accepting tenders from companies that did not put in place quality control

mechanisms such as trained on-site supervision and thorough building practices. This is of particular relevance when it is a government body procuring construction services.

There is an inherent responsibility on clients who expect a reasonable level of building quality to choose a contractor that has quality control procedures in place. However, it is recognised that it is often owners' expectations for short completion timeframes and low costs that increase the risk of poor quality work and the likelihood of costly and time-consuming rectification work.

There is a need to educate consumers and people assessing tenders of expected costs and timeframes associated with high quality work or risk-mitigation measures.

3. Reforms and options for reform

Reform in place

ACTPLA has increased auditing for medium-rise and high-rise residential construction, to capture a higher level of inspection of high-rise development within the Territory.

There is now increased on-site auditing and checking of building approvals focusing on compliance with the relevant requirements of the BCA, Building Act and COLA. These audits are in addition to current inspection programs carried out on residential and commercial properties and the standard complaints investigation workload.

Reforms in progress

Survey of the scale of building defects

ACTPLA will work with the Owners' Corporation Network to run a survey of owners corporations formed under the Unit Titles Act to identify any further issues and quantify the scale of problems with Class 2 buildings. All owners corporations will be invited to respond to the survey, which can be taken online.

This will build on the preliminary analysis ACTPLA has already undertaken. Research can be extended to owners of Class 1 buildings if there is sufficient need to do so at a later date.

Promoting owners' rights

ACTPLA is revising the forms for appointing builders and building certifiers. The aim is to clarify the separate processes and obligations of each party. The ACTPLA website will be updated to include information on the roles and responsibilities of building certifiers, owners and builders in relation to the building process.

ACTPLA will produce publications for owners that outline:

- owners' rights
- the role of the building certifier on a project
- the scope of home warranty insurance and fidelity insurance
- the delineation between Building Code, Building Act, building services, consumer issues and contract disputes and where complaints relating to each are dealt with
- ACTPLA's role and responsibilities in regulating building and other construction work
- common defects and how to recognise them.

The expansion of ACTPLA's eDevelopment platform to include building processes will allow building approvals to be tracked online. In response to issues raised in the forum the system will automatically copy the owner into all correspondence on the project. It will also reinforce the different roles of the building certifier and builder by requiring the appointment of a certifier by the owner before the appointment of a builder.

Capture and use of building complaint information

ACTPLA is modernising its tools for gathering, storing and analysing information on building complaints. This will complement the survey of owners corporations and focus on:

- reviewing the way statistics on building complaints are recorded
- investigating tools for gathering information on building issues, including the potential for a Memorandum of Understanding to receive general information from industry association complaints services and encouraging a ‘for information’ submission to ACTPLA for resolved issues to build a profile of issues and identify repeat problems
- developing prioritised recommendations for improving the completeness, quality and coverage of information available for analysis.

Improving information for building certifiers and builders

ACTPLA will improve links and communication between and building certifiers by:

- establishing a permanent forum with building certifiers (possibly bi-annually), to gain feedback on emerging issues in the industry and develop responses to industry-wide concerns
- the Registrar providing updates to certifiers on problem areas as required.

ACTPLA will also work with industry associations to begin developing a series of practice notes and default design solutions for major quality issues such as balconies over habitable areas, and use of waterproofing products, to give greater guidance on acceptable practices.

New reform options

The following reforms were identified as measures that would likely increase professionalism in the building industry. Any one measure could be implemented in isolation; however many of the proposals naturally complement each other. All major proposals have been discussed at working group meetings.

The proposed reforms are divided into short term (those that can be achieved in the next 6 months), medium term (those that can be completed by the end of 2011) and long term (those proposals that will require major reform, significant legislative changes or industry transitions). Implementing most of the proposals is subject to the allocation of adequate resources to the measures and analysis of the impacts on industry and consumers. These policy considerations are discussed in greater detail later in the paper.

Short-term reforms

a) Mandate inspections of pre-sheet and wet areas stages of building work by building certifiers

Mandatory pre-sheet inspection and wet area/waterproofing inspection were identified by the working groups as steps that would offer immediate improvement in building quality. A number of essential building components would be checked at the pre-sheet stage of building including acoustic materials and fire services. These inspections would form part of building certifiers’ statutory inspection obligations. To assist certifiers to deliver

consistent inspections, ACTPLA will produce a checklist of all aspects that must be assessed by certifiers at this stage.

For waterproofing, a similar system could be used to that in place in NSW. Twenty per cent of wet areas throughout the building—randomly selected—must be inspected. If these are found to be compliant a certificate can be accepted for the remaining areas. As most ACT certifiers also work in NSW this inspection regime should not require additional training or a change of procedure.

b) Introduce provisional licence conditions for new building licence-holders that limit the number of projects they may undertake for the first two to three years of holding a licence.

Putting a limit on the number of building projects a new licence-holder can undertake at any one time would help inexperienced builders to establish their business, supervision and project management skill and practices before taking on multiple projects.

Furthermore, new practitioners could be placed on a higher level of auditing, as occurs with newly-licensed plumbers and electricians. For example, all of their first 5–10 projects could be audited.

This reform would require an immediate increase in the number of ACTPLA building inspectors to conduct the audits. The direct auditing/inspecting of builders would be an expansion of the existing auditing program of building certifiers.

The provisions for new licensees will complement the mechanism that exists in COLA for the Registrar to condition a licence and limit the number of jobs that can be undertaken by a current licensee if they are struggling to effectively manage concurrent jobs.

c) Create a statutory timeframe under COLA for a licensee to respond to a complaint about non-compliant building work

Stipulating a standard timeframe for builders to either rectify problems on their own accord, or deny liability, would alleviate many of the problems faced by owners in getting some practitioners to respond to a complaint and allow ACTPLA to take decisive action after a deadline. Further consultation with industry and building owners is required to consider the implications of this option and the period past completion that the regulation may apply to. If this is adopted, the measure can be implemented by including a blanket condition on all licensees through the COLA regulation.

d) Establish a pro-prosecution and a pro-rectification policy towards developers and builders who fail to comply with the BCA when constructing Class 2 buildings.

As an immediate deterrent to sub-standard work, ACTPLA can establish a policy that favours the initiation of a prosecution and rectification orders when an investigation of a class 2 building demonstrates non-compliance with the BCA. This policy would also include action on existing sub-standard Class 2 buildings within the 10 year period allowed by COLA.

Given the resource intensity of preparing cases for prosecution, implementing this policy would have significant resource implications.

e) ACTPLA and ORS to coordinate referral processes between the agencies and management of complaints common to both agencies.

This would require administrative changes within ACTPLA and ORS to confirm with a complainant that they agree to have a contractual or other consumer issue referred to ORS and transfer the complaint. Likewise, where there are joint regulatory issues the agency that receives the complaint first can seek consent to refer the complaint to the other agency for joint investigation.

This is a natural extension of the good working relationship and cooperation between ACTPLA and ORS on regulatory issues concerning both agencies.

f) Liaise with procurement agencies in the ACT to raise awareness of quality control processes in decision-making and statutory requirements for inspections and other proposals implemented to address building quality.

The ACT Government is a significant purchaser of building services. As a consequence it has considerable capacity to influence quality control and processes to deliver quality in the building and construction industry.

Medium-term reforms

g) Introduce a complaint mediation and adjudication process for residential buildings modelled on the security of payments process.

The recent commencement of security of payments (SoP) legislation in the ACT has led to the establishment of a number of registered adjudication authorities with experience in building-related disputes. This proposal would establish a formal adjudication process supported by legislation through which owners could access an independent expert and reach an early agreement between parties. The benefit of this model is that expert advice is available to determine the real cause of the problem. The idea is not to extend the SoP legislation, but to create an additional avenue for unit owners to address a problem, noting that it would predominantly deal with problems with completed buildings not payment disputes under contracts.

Where agreement cannot be reached with a builder, the owner can apply to a registered body for mediation, or if that fails, adjudication. Decisions would be binding and appealable to a court, but not subject to merits review before ACAT. Adjudication bodies would report all disputes to ACTPLA to improve analysis and to enable systemic issues to be addressed. This would not preclude matters being investigated by ACTPLA if disciplinary action against a licensee is required.

It is proposed that initially the process would cover Class 2 buildings, with complaints on Class 1 buildings to be phased into the system if this is assessed as viable. Matters for dispute resolution could be restricted to BCA and building services, or include all building elements such as fit-out and finish.

Funding for mediation and adjudication is a critical policy issue that requires resolution. It would not be cost-effective for the Government to fund this service, nor in some cases would it be viable for owners to fund the service. There are circumstances particularly in class 1 buildings and potentially for class 2 buildings where the dispute resolution procedures proposed could be contained in a standard building contract.

h) Reform builders licence categories to reflect complexity and type of building.

To address the concern about incomplete skill sets for higher-level licensees, licence categories would be restructured for low-rise, medium-rise, and high-rise work with separate categories in each tier for commercial and residential buildings. Each category would be exclusive, with practitioners needing to demonstrate relevant experience in each of the categories they wish to work in. This is similar to the system in place in Victoria and Queensland and has support from the industry skills working group.

Shifting from time-based assessments to competency-based assessments could be explored as part of this process. Included in this reform would be the elimination of automatic renewals and the introduction of a requirement for current experience. If a licensee has not been active in the industry for a defined period, initially proposed at 5 years, the licence-holder would be ineligible to renew their licence without a further assessment, or be subject to an automatic suspension provision.

A review of the experience requirements for businesses in managing large or multiple projects could also be included in this measure. The allowance for owner builders to manage a class 2 construction would also be reduced to allow only work within the owner's sole occupancy unit.

i) Create an obligation on building licensees to ensure selected sub-trades hold a suitable level of qualifications.

A new regulation, or a blanket condition placed on builders' licences through COLA, could require builders to ensure that certain people they engage hold a skills card/trade certificate issued by an RTO showing appropriate qualifications. The trades identified in forum discussions are waterproofers, tilers, renderers, concreters, formworkers, carpenters and bricklayers.

This would commence in 2011 with waterproofing trades as the first priority identified by the industry skills working group and be expanded to other occupations over time in order of priority indicated by complaints, industry input and the results of the survey of owners corporations. Adequate transition time must allow for affected tradespeople to access the recognition of prior learning process. The reform would be complemented by checking of at least 10 per cent of all building jobs for compliance.

If, after 12 months of operation, problems do not reduce or compliance is low, the option remains to licence further occupations under COLA. Negative licensing also remains a possibility. This would prevent someone who displays serial non-compliance or consistently slovenly practices from operating.

j) Further regulate the extent of documentation, detail and quality of architectural, design and engineering drawings and specifications required for building work

Insufficient, incomplete or incorrect documentation was raised as a concern in most of the working group meetings. Possible documentation standards would include information for builders and certifiers as well as minimum requirements for specifications and as-built information to be provided to owners for future reference. Improving documentation on what was intended to be built will also greatly assist in demonstrating who might be liable for any rectification if something is not built correctly.

Working groups identified the significant role that developers have in regard to this issue. Consideration should be given to bringing developers obligations into the regulatory system to ensure sufficient quality documentation is prepared prior to building approval.

k) Formulate a long-term skills development strategy

The success of reforms to increase and maintain building quality and industry professionalism will be highly dependent on the capacity of the training sector to respond to demand for courses and deliver ‘gap’ training.

ACTPLA will work with training organisations and agencies and industry to create a long-term skills development program that aligns with the rollout of regulation for sub-trades is required to manage the transition for each occupation. Courses in product application, fixing training faults and business skills could be included in the program.

l) Implement a supervision requirement for jobs of a certain size or complexity

Further work with industry will be undertaken to determine the parameters for jobs that would require a full-time on-site supervisor. A legislated obligation would then be placed on the building licensee to name a supervisor for jobs meeting the criteria, and if they are subsequently audited they would need to show what qualifications or training the supervisor has, initially proposed to be a minimum certificate IV level competence in supervision. As with the proposal for sub-trades, an adequate transition time must be allowed for affected practitioners to access the recognition of prior learning process.

The reform would be complemented by checking at least 10 per cent of all building jobs for compliance. If after 12 months of operation problems are not reduced or compliance is low, there remains the option to licence further occupations under COLA.

This reform could also be expanded for companies with a high number of jobs to limit the number any one supervisor or nominee can be responsible for.

m) Investigate regulatory options for associated construction professionals

The quality of work undertaken by construction professionals such as architects, construction engineers, quantity surveyors, building designers and other related professionals directly affects the quality and standard of building.

The current review of the Architects Act could be expanded to investigate options for regulating other design professionals and engineers. The ACT branch of the Building Designers Association has previously approached ACTPLA about the potential for inclusion in the construction occupations licensing framework. Quantity Surveyors have expressed a similar interest in more formal regulation of their profession.

n) Implement a system of continuing professional development (CPD)

The forum has generally supported targeted CPD with a potential model for ACTPLA to identify areas where deficiencies occur and accredited training bodies delivering courses. Satisfactory completion of the required course or courses relating to the scope of work of a licence would be required for licence renewal.

There are many options for ongoing skills maintenance, including requirements for one-off courses or earning minimum points over the period of the licence. Alternative models use disincentives such as higher licensing fees and additional auditing for practitioners that do not undertake voluntary CPD. The program could be applied to selected occupations or all licensees.

Long-term reform

o) Review of the Building Act

The scale of reform proposed requires a complete policy review of the Building Act. The review would support the proposed reforms, for example by introducing an offence for building certifiers that engage in second contracts with builders and allowing for a restructure of the Act to align with current practices.

It would also consider how building regulation relates to the regulation of existing buildings and supports the ongoing maintenance and repair of constructions. This proposal would facilitate mandatory requirements for carrying out regular maintenance of essential building safety services and systems.

p) Develop a new statutory form of insurance tailored to the project rather than to the owner

It is proposed that the government consider creating a new statutory insurance product for Class 2 buildings. Two main options were discussed by the forum working groups.

Option 1

The government could place a new levy on the development/building construction industry and create a separate fund which could be called upon by owners corporations to repair building defects. The fund would be given rights of recovery against builders and developers that would allow the fund to recover a multiple of the cost of the repairs (for example five times) from the builders responsible for the work. To avoid situations in which the fund would not be able to recover its funds due to company liquidations or other legal mechanisms the fund would be empowered to pursue each of the company directors personally.

Option 2

A new form of insurance would be required that runs from the commencement of a project (to cover the construction phase and any rectification work during this phase) to a pre-determined time no longer than ten years, which is the statutory timeframe for rectification on building work set in COLA. It is proposed that the insurance pool for this statutory insurance would be in a similar form to that which exists under the Fidelity Fund.

Insurance would cover Building Code-related issues that affect those areas of a building that an owners corporation can take action on defects for, predominantly common areas. The insurance would only be available when all other avenues for rectification are exhausted.

The insurance policy would be jointly paid for by the developer/builder and the subsequent body corporate. However, to apportion risk appropriately the policy would be ‘front-loaded’ so that most of the premium is paid during the construction phase and the

remainder of the premium is paid by subsequent owners, after certificate of occupancy, for the rest of the insurance period (e.g. 70%:30%, 60%:40%)

The ACT Government could contribute to the insurance pool or to a sub-pool for instances of catastrophic failure. Although some working group members have suggested that the government takes the role of the primary or sole contributor, it is not clear how the government assuming all liability will improve accountability for building quality in the industry or promote a mature industry. However, in the initial years of the fund the government could act as the re-insurer of last resort to support the fund through the years of highest risk.

This form of insurance would be ideal to address the problem of contractual rights not passing from the original owner (the developer/builder) to any subsequent owner, and the issue of disappearing building companies.

A statutory allowance to finance industry training and regulation if income exceeds a certain threshold would be included in legislation. The insurer would also be given powers to investigate and pursue liability for claims and seek punitive damages from any offending party.

4. Context for action

Resources and impact analysis

Many of the proposed reforms will require detailed consideration of regulatory impact and the resources required to fund additional functions and auditing of building work. A number of these options would need to be discussed and supported by JACS and the Attorney General.

The way the administration of regulation for the construction industry is funded may also require reform to enable proposals to be fully realised. There is no further capacity for increasing the workload of ACTPLA's building inspectorate (currently four building inspectors) beyond its current program, without additional inspectors.

At present numerous levies and inspection fees apply to construction work, which are collected by the ACT Government. A percentage of this revenue is retained by, or allocated to, ACTPLA to administer construction regulation. The primary sources of revenue are:

- the Building Levy, which is charged at between 0.745 per cent and 0.12 per cent on the value of works and returned to consolidated revenue
- the Training Levy, a uniform 0.2 per cent of the cost of building works that is provided to the Building and Construction Industry Training Fund (BCITF)
- mandatory electrical, plumbing and gasfitting fees, which fund the respective inspectorates.

It is possible to consolidate all fees into a single levy of between 1 and 2 per cent of the cost of all building works, which would still maintain allocations to the BCITF and other bodies, and return the remainder to the regulatory authority to regulate the construction industry. This model would not only reduce the fees levied on homeowners with building works of valued less than \$500,000 but would allow mandatory first inspection fees to be abolished for residential buildings (presently \$560 per single dwelling). Practitioners would only pay inspection fees if the property required re-inspection due to a failed audit.

The levy could also be used to contribute to the proposed new insurance pool, dispute resolution and industry development with a dividend for the Territory. This is consistent with the Victorian model which sets its levy at 1.32 per cent for most projects in Victoria.

Constraints

National agreements

While the ACT can respond quickly to local issues, there are a number of COAG agreements and national standards that may affect or constrain the government's response.

Building Code of Australia

The BCA is developed collaboratively by all states and territories and the Commonwealth through the Australian Building Codes Board (ABC).

The ACT Government or industry may identify areas of improvement in the BCA and seek to have these implemented by submitting a proposal for change. However, if the majority of jurisdictions do not agree with the change, then it will not be included in the document. Although the ACT can vary or add to the provisions of the BCA, the Intergovernmental Agreement for the ABCB contains an objective to remove all variations and COAG have shown an interest in this issue.

National training packages

Although there have been some suggestions at forum meetings that the ACT introduce an additional building examination before a licence is granted, COAG agreements on training have sought to limit regulators to assess only against competencies included in national training packages. Assessment of relevant building experience has been included in vocational builders training. The MBA is using a logbook and CIT a project book, which is thorough and consistent with assessment of electrical trades. However, there is pressure nationally not to take such a prescriptive step.

The national system is slow to respond and any changes must be agreed to by the industry skills councils in each jurisdiction, regardless of whether that change affects any other jurisdiction. There is greater scope to insist on additional skills or experience to accompany university qualifications.

National occupational licensing system

In July 2008, COAG agreed to develop a national occupational licensing system (NOLS), which will introduce a single national licence for electrical, plumbing, gasfitting and building occupations. While the NOLS is not due for implementation until mid-2012 (2013 for building occupations), work on the scope and qualifications for builders licensing will commence shortly. It is imperative that the ACT preserves any licensing requirements as a result of these reforms in the move to the NOLS, or any gains will be lost in a very short time. It will be extremely difficult to alter licensing provisions and skills requirements once this system is in place.

In the ACT

There are significant crossovers between construction regulation and fair trading regulation. Some proposals will require the support of JACS and the Attorney General to be implemented.

The role of owners' corporations

Owners corporations have a statutory obligation to repair and maintain their common property, even where the cause of a defect may be the fault of a developer or builder.

Accessing complaints mechanisms and organising action on a common property issue in a Class 2 building relies on the presence of a well-functioning, informed body corporate.

ACTPLA can assist owners' corporations with information but it cannot direct the running of an owners' corporation.

Other issues

Restriction on certain licensees bidding for jobs and ‘naming and shaming’

Some forum members have suggested that ACTPLA should stop certain builders bidding on the large development projects. This raises issues about restraint of trade, particularly as a licence is not linked to the ability to run a business but to do work competently. It would be difficult to prevent a licensee with a valid licence from tendering for specific projects. The ACT Government is also specifically prohibited from making laws for corporations. ACTPLA cannot name and shame under privacy laws until a decision from ACAT is handed down.

Timetable for review

The proposed timetable for review of proposals is as follows:

Short term measures — by July 2011

Medium term measures — by December 2011

Long term measures — by December 2012

It is proposed that the Building Quality Forum and working groups are continued at least until the end of 2010. While a number of clear strategies have been identified, additional work on developing the detail of a number of proposals is required. After this period, the function of the forum and working groups in longer-term reforms will be reviewed.

5. Recommendations

1. It is recommended that the Government agree:
 - i. proposals a) to f) be implemented in the short term;
 - ii. proposals g), h), i), k), l) and m) be implemented in the medium term; and
 - iii. proposal o) be implemented in the long term.
2. It is further recommended that the Government:
 - i. considers proposals j), n) and p) continue to be investigated by ACTPLA;
 - ii. notes that implementation of proposals b), d), g), i), j), k), l), m), n), o) and p) is dependent on allocation of adequate resources through the standard budgetary process; and
 - iii. initiate a review of the funding arrangements and resourcing of construction industry regulation.

Appendices

Appendix A

Minister for Planning - Building Quality Forum
Monday 26 July 2010, 2.00 pm
ACT Legislative Assembly

Agenda

- 1. Welcome / introduction**
Minister for Planning, Andrew Barr MLA
- 2. Owners views on building quality**
Owners Corporation Network

Building managers response
Builders response
General comments
- 3. Builders views on building quality**
MBA/HIA

Owners response
Building managers response
General comments
- 4. Development/financing view on building**
Property Council
- 5. Solutions recommendations**

Training/education
Supervision
Inspections
- 6. Next steps**

Appendix B

MINISTER FOR PLANNING - BUILDING QUALITY FORUM

**MONDAY 26 JULY 2010
ACT LEGISLATIVE ASSEMBLY**

NOTES AND ACTIONS

Attendees:

Andrew Barr MLA, Minister for Planning (chair)
Stuart Collins, Housing Industry Association
Jan Browne, Strata Management Institute
Robert Hunt, Australian Institute of Building
Kevin Skauge, Australian Institute of Building Surveyors
Chris Summers, Australian Institute of Building Surveyors
Terry Aulich, Australian Institute of Quantity Surveyors
Brian Hollis, Insurance Council of Australia
Ross Barrett, Master Builders Association
Jerry Howard, Master Builders Association
Jon Quiggin, Office of Regulatory Services, Department of Justice and Community Safety
Gary Petherbridge, Owners Corporation Network
Murray Upton, Owners Corporation Network
Catherine Carter, Property Council of Australia
Bob Winnel, Property Council of Australia
Michael Wellsmore, Real Estate Institute of the ACT
Jason O'Mara, Construction, Forestry, Mining and Energy Union
Bob Gaussen, Adjudicate Today
Larry King, ACT Law Society
John Chamberlain, ACT Law Society
Vince Ball, ACT Regional Building and Construction Industry Training Council
John Hanrahan, Australian Institute of Architects
Gary Guy, ACT Building and Construction Industry Training Fund Board
James Service, ACT Building and Construction Industry Training Fund Board

ACTPLA:

Neil Savery, Chief Planning Executive
Craig Simmons, Director, Construction Services
David Middlemiss, Construction Occupations Registrar
Sean Moysey, Construction Services
Tony Thew, General Counsel
Vic Smorhun, Client Services
Tania Carter, ACTPLA/Minister's Officer (notetaker)

- * The notes below include points brought forward by the Property Owners and Ratepayers Associations of the ACT Inc via an email of 23 June 2010.

1. Welcome / introduction

The Minister for Planning, Andrew Barr, welcomed participants to the Forum, and outlined the agenda and the opportunity for participants to contribute to the discussion.

The Minister called on participants to bring forward their issues for discussion.

2. Owners views in building quality

Owners Corporation Network

Represented by Gary Petherbridge and Murray Upton

- there is a need for change to ensure the quality of buildings – this includes legislation changes to assist ACTPLA in the compliance process
- it is necessary to clarify definitions so that it is accepted that things like fixing ongoing defects is not regarded as maintenance
- need for longer warrant periods as some of the faults will not be evident in the shorter term
- builders to be responsible for the building work – developers to novate contract with the builder
- S51 maintenance – states responsibility of OCN. Issues are not maintenance, but major building defects.
- Insurance – does not include buildings greater than three-storeys
- there is a need for more inspections during construction – noted that there were only two inspections for a high rise apartments building
- issue of inspection, certification and independence – noting the concerns about the relationships between certifiers and builders
- noted that in the construction of multi unit complexes the developer is the owner – the owners corporation has no relationship with certifiers
- the defect/ rectification priorities in terms of costs include: expensive to fix/areas to consider
 - water penetration – roofing, balconies, showers
 - fire safety
 - rendering
- there is a need to upgrade trades skills
- the role of architects and structural engineers in terms of taking on responsibility in signing-off proposed buildings – sustainability and ‘buildability’ and the ongoing maintenance as a result of their designs
- OCN needs to work closely with ORS and ACTPLA to address concerns
- There is a need to access decent data to show the extent of the problems that have been identified – to better understand the problems and therefore establish the mechanisms to address these from a systemic viewpoint
- Developers and their superintendents often push defects and problems solely to their builder (even when it has been their poor specification). The developers should be held responsible for a longer period of time.
- For issues involving significant defects (leaks, glass falling, render falling etc) which are clearly visible; should not require Owners Corporations to spend from \$100,000 to \$1m to get a builder or developer to the table.

Murray Upton tabled a document ‘Summary of building defects in the ‘Viridian’ apartments Kingston’ (updated as at 25 July 2010)

- Owners have genuine concerns
- Defects are significant
- 23 faults in leading complex demonstrates problem in industry
- Building industry in Canberra should be the leader in the field
- Shoddy building work should be a thing of the past.

Strata Management Institute

Represented by Jan Browne

- the complaints process is the biggest problem – uncertainty as to who to turn to and issues not being addressed. Complaints around defects dragging out 6-7 years, the issue of “what is a defect or gradual deterioration then arises”
- agreed with the need to have additional inspections during the building process.
- significant issues with water-proofing (no minimum requirement in the ACT)in multi unit complexes
 - water penetration issue related to class 7 carparks – these are not being constructed in accordance with the Building Code of Australia – not required to be water proofed.
 - drainage and plumbing continue to areas of concern, with a high rectification cost

- balcony water issues
- security of payments model – insurance type scheme required
- need for a complaints mechanism that includes thorough investigation and leads to rectification

3. Builders views in building quality

Represented by Jerry Howard, Master Builders Association

- noted that certifiers are not responsible for the onsite supervision of work
- many of the issues are the result of poor documentation and poor inspection of subcontractors work, and design issues.
- need to agree on the issues that can be addressed in the next three months, those over 6 months and the longer term issue
- the industry cannot keep making excuses for things like leaking buildings (noting some of the issues relate to poor product specification)
- the certifiers are left 'holding the can'
- need to identify critical inspection points beyond which construction cannot proceed unless certified (for example waterproofing balconies over habitable areas)
- identify the 'easier' areas of concern and address these
- do not want more regulation – the process to be effective and efficient.

Stuart Collins, Housing Industry of Australia

- take issue with the suggestion that the ACT is not at the cutting edge – the standard of work in the ACT is exceptional
- there are a lot of issues around multi unit buildings, and the issue relating to water proofing is one that is experienced around the country – there is a need for waterproofing certification (licensing) and mandatory inspections.
- this needs to be looked at from a certification, training and education viewpoint
- there is also the issue of licensing critical trades – in areas such as water proofing
- supervision during construction is also a key point in the debate and in looking at ways to resolve the issues being raised.

General discussion points:

- there is a need to clearly define what is a defect, and what falls under statutory warranty insurance (Stuart Collins)
- some defects go on for 6-7 years – what is a defect (Jan Browne)
- the issue of insurance is a key, noting it does not apply for buildings above three storeys (Gary Petherbridge)
- concern over developers continually changing consortiums.
- security of payments legislation – Tasmania – similar legislation in NT, WA and New Zealand (Bob Gaussen, Adjudicate Today). Appropriate protection to warn parties about their legal exposure. Queensland Government made an announcement two weeks ago – the state is going down this path
- owners corporations to make applications – need to know legal implications (Bob Gaussen)
- there is a mechanism that is in place in other jurisdictions but they do not all work perfectly – an opportunity for the ACT to get it right (Bob Gaussen)

Jerry Howard, Master Builders Association

- there are skill shortages and skills deficiencies in the building industry in the ACT
- need to establish what are the most common defects – then target the training to address these areas
- promote best practice in the industry
- multi unit developments present complexities such as tiered structures (which can be a planning requirement)
- poor quality documentation and low level of specification both add to poor outcomes – buildings are built according to approved documentation and specifications. Call on COR to raise the bar when calling for documentation.
- need to work with industry on certifier issues
- questions have been asked about going back to a government certification system

- qualification and skill level of builders – need for targeted professional development training
- product specification – products can fail after 5 years – the ACT and the Commonwealth governments to work together.
- imported products can fail even if passed as meeting standards
- review the role of supervision of sites – builders to be responsible.
- developer passes a project to a builder who should be responsible for the quality of the construction
- supervision of nominees. The Constructions occupations Registrar to be properly satisfied that nominee has appropriate training.
- quality and cost are limited but quality should meet minimum standards; pricing and quality are interlinked – an issue that is misunderstood.

Vince Ball, Building and Construction Industry Training Council

- developing a training program for water proofing
- a lot of the problems relate to the adequacy of onsite supervision
- damage caused by other trades is a major concern (for example wet seals can be damaged by tilers)
- need to recognise that the ACT has severe temperature variances which impacts on the performance of products
- need for training for site supervisory aspects, especially for units developments
- looking to raise the level of competency for certain trade – Certificate IV, as for plumbing and electrical.

Brian Hollis, Insurance Council of Australia

- The ICA has concerns about the Building Code of Australia only applying to the safety of life and egress which is relevant to the issues being raised including inspection and certification.
- The BCA needs to include a focus on property protection and durability to natural hazards
- There are a number of issues with an insurance solution for multi storey residential properties. Any solution would need to be commercially viable.

General discussion points

- agree with the licensing/training/Certificate IV proposal in key defect areas such as painting, rendering etc (Jason O'Mara, CFMEU)
- the Australian Institute of Quantity Surveyors concerned at the use of its logo by trades who are not qualified. AIQS and the Australian Institute of Building taking action to establish a college of building – to upgrade skills. First graduates from Victoria (Terry Aulich, AIQS)
- need to get the continuing professional development right so that it is continuous (Terry Aulich)
- AIB supports the MBA submission – its about the profession and being professional and not just trades licensing – how to build this into the regulatory/licensing framework. The college of building concept to take this to the next level of professionalism (Robert Hunt, AIB)
- NSW is highly regulated, and faces similar issues – need for the ACT to get the balance right (Vince Ball)
- urge caution on expanding licensing contractors – will impact further on skills shortages (Stuart Collins)
- NSW has a stricter regulatory framework – need to be licensed to quote for projects (Jan Browne)
- Noted MBA cadetship programs with the University of Canberra (Jerry Howard)
- caution against extending licensing of trades (has not worked in NSW which has had five inquiries into building quality in the past 15 years) (Jerry Howard)
- establishment of a ten year sinking fund (under the Unit Titles Act) – developers/ builders to establish (to get around the faulty products issues) (Gary Petherbridge)
- need for proper oversight of buildings; options of profession under the COLA legislation; if specifications are deficient builders are given a range of options, which the flow-on effect on building quality; quality starts at the point of design (Tony Thew, ACTPLA General Counsel).

John Hanrahan, Australian Institute of Architects (ACT)

- method of procurement varies, quality time and cost are all key factors – there may be a lack of knowledge from some clients in determining timing on when a project is delivered. Time should be separated from costs.

- to get a good level of documentation and get the specification right requires time
- In building procurement where project managers have input at the beginning of the design phase, less documentation may be requested by the client
- the client may not have enough knowledge about timing for project delivery
- key brief requirements that the client must consider are quality, cost and time

4. Development/financing view on building

Represented by Catherine Carter, Property Council, Bob Winnell, James Service

Bob Winnel, Property Council

- need to identify weaknesses in the design detail at sign off
- tighter supervision requirements and extra inspections
- there are problems with regulators as well – why do regulators have problems getting responses from builders. Builders would want to protect their reputation
- problems with regulators skills – regulators license people with the capacity to undertake work
- establishing a pool of money may be an easy option for ‘shonks’
- extending home owners warranty for properties beyond three-stories
- need for a detailed examination of these options through a working party – define the problem and the extent of the problems, and agree of the priorities
- skills training is a need that has been foreshadowed and is being addressed by industry. Superintendants and supervision on-site; this is something we have not got right.

James Services, Property Council

- extra documentation is a funding issues; better cost planning will improve many of the concerns
- get the training and the quality right; need to get supervision on site right
- do not want to see new regulations – these would be a disincentive to builders and consumers.

General discussion points

- concern with ‘disappearing companies’ – ‘phoenix’ companies (new companies set up with same people involved) (Gary Petherbridge)
- new companies set up as new consortia to attract funding/financial arrangements; does not agree it is to escape poor workmanship (Michael Wellsmore, Real Estate Institute)
- financiers placing greater pressure to meet performance outcomes (from a financial point of view) (Michael Wellsmore)
- home warranty/property insurance – have not been successful in adopting; alternative solutions need to be looked at such as, a mandatory level of accreditation and licensing of all those involved. (Michael Wellsmore).
- need to build in accountability – the regulator, builder and consumer.
- issue of timing, when it comes for financial approval – if process is slowed up, the valuation of proposed development is reduced (Bob Winnel)
- need for working groups to be established to do the detailed work and establish the common points (Chris Summers, Australian Institute of Building Surveyors)
- need to recognise the accountability to the client
- address the issue of warranty insurance for units / buildings above three storeys
- building certifiers – work on behalf of the regulator (government); bound by rules set by the government. Certifiers main role is about life safety. Certifiers inspect even when regulations do not require inspections (Ian Anlezark, BCA Certifiers)
- not looking at increasing the insurance coverage (a position held Australia-wide; look at accreditation and licensing (Chris Summers)
- concerns if process are too tight – ‘naming and shaming’ (Bob Winnell).

Points provided by Property Owners & Ratepayers Associations of the ACT Inc (email of 23 June 2010)

1. New rules should apply to ALL building
2. Only licensed and qualified tradespeople should be allowed to carry out works requiring a skill level which would normally require formal training
3. All tradespeople should also have a form of registration / licensing. Grandfather clauses could apply in some cases to those currently not qualified

4. Certifiers should be responsible to the buyer of the property
5. For all properties certifiers should be responsible for certifying both compliance and quality of works
6. Certifiers responsibility should be backed up by P I Insurance including run off cover of 10 years
7. A demerit point system & fines should apply to all licensed builders, tradespersons and certifiers. A ‘three strikes & out’ policy should be adopted for breaches over a certain number of demerit points
8. Any compliance or quality breaches should be against the licensed builder, the tradespersons involved and the certifier
9. A public register should exist for repeat offenders.

5. Solutions and recommendations

Craig Simmons, Director, Construction Services, ACTPLA

- meetings with participants to move the agenda forward – key points raised:
 - training and education
 - inspection points – for things like wet sealing
 - interaction between trades on site
 - need for working groups to address priority issues

Discussion on key issues for working groups

- need to keep the matter of extending the home warranty insurance as a topic to be looked at (Bob Winnel)
- process of complaints and penalties / data bases / recurring offenders (Jan Browne)
- owners rights / consumers issues (Andrew Barr)
- consumer affairs/fair trading – definition of building defects; the number of complaints received varies (Jon Quiggin, Office of Regulatory Services)
- need a process that assesses how buildings perform after 5 years/10 years – good work to be recognised (Andrew Barr)
- need to get an accurate picture of the problem – ORS, MBA, OCN – establish the priorities. Gathering information on the extent of the problems – who are the owners corporations (Gary Petherbridge)
- cooperation to move forward in all areas; responsibility for education; industry to come up with solutions as well (Tony Thew)
- regulators to do their job as well (Bob Winnel)
- scope to look at owner builders (Stuart Collins)

6. Next steps

Andrew Barr, Minister for Planning

Announcement of immediate actions to be taken:

Increase to high rise residential auditing

- ACTPLA has commenced an increase on its auditing of high rise and residential apartment building approvals
- the audits to focus on compliance with the relevant requirements of the Building Code of Australia, Building Act and the Construction Occupations (Licensing) Act
- the audits will be in addition to current programs carried out on residential properties, to capture a higher level of review of high-rise development within the Territory.

Working party to review insurance aspects

- creation of a working party on insurance aspects of the construction industry

Promotion of owners' rights

- ACTPLA will be promoting to the community the rights of owners in relation to the appointment of building certifiers – greater accountability to owners

- information will be promoted initially on the ACTPLA website which will alleviate confusion occurring between owners, building certifiers and builders in relation to engagement processes, roles and responsibilities
- examine complaints mechanism / ACTPLA regulatory powers
- gather information through appropriate data base

Increases to mandatory inspections by building certifiers

- ACTPLA reviewing the opportunity for increasing the private certification mandatory inspection regime
- the outcomes of the building quality forum have identified a number of opportunities for additional mandatory inspections to improve the quality of building works which have been attracting concern within the ACT
- these inspections will ensure that the areas of residential development within the ACT which have been the source of criticism are subjected to a much more rigorous review mechanism.

Establish working groups

- ACTPLA to seek nominations from interested parties to form working groups to address the following areas:
 1. Insurance provisions
 - extend insurance cover to purchasers
 - establish building defects fund
 - insurance for units complexes higher than three storeys
 2. Promotion of owners' rights
 - appointment of certifiers and accountability of certifier to owner
 - establish data base to determine the extent of the building defects issues
 - complaints mechanism – who to complain to; recourse action; regulatory role
 3. Increasing industry skills and competence
 - water proofing
 - structural work
 - finishing trades
 - safety aspects
 4. Effective supervision
 - builders
 - site supervisors
 - building certifiers

Meeting agreed that the Forum will look at working group recommendations before re-convening to agree on actions to be progressed – in the short, medium and long term.

Members of the forum agreed that it is important to take the time get the measures right, so that real benefits can be delivered. Expert advice to be sought as required.

Appendix C

BUILDING QUALITY FORUM Working Group Acceptances as at 10 September 2010

Insurance

Mr Stuart Collins, Housing Industry Australia ACT and Southern NSW
Mr Erik Adriaanse, Strata Managers Institute ACT
Mr Gary Petherbridge, Owners Corporation Network (ACT)
Mr Ross Barrett, Master Builders Association of the ACT
Mr Brian Hollis, Insurance Council of Australia
Mr Mark Poretti, ACT Law Society
Mr Craig Simmons, Director Construction Services ACT Planning and Land Authority
Mr David Middlemiss, Construction Occupations Registrar ACT Planning and Land Authority
Mr Tony Thew, General Counsel ACT Planning and Land Authority
Mr Sean Moysey, Manager Utilities, Land and Lease Regulation ACT Planning and Land Authority

Owners' Rights

Mr Stuart Collins/Mr David Humphrey, Housing Industry Australia ACT and Southern NSW
Mr Bob Gaussen/Mr John Murray, Adjudicate Today
Ms Jan Browne, Strata Managers Institute ACT
Mr Murray Upton, unit owner
Mr Peter Jansen, Property Owners & Ratepayers Associations of the ACT Inc
Mr Gary Petherbridge, Owners Corporation Network (ACT)
Mr Jerry Howard, Master Builders Association of the ACT
Mr Jayson Hinder, ACT Law Society
Mr Jon Quiggan, Department of Justice and Community Safety – ORS Compliance

Industry Skills and Competence

Mr Stuart Collins, Housing Industry Australia ACT and Southern NSW
Mr Gary Petherbridge, Owners Corporation Network (ACT)
Mr Jerry Howard, Master Builders Association of the ACT
Mr Vincent Ball, ACT Regional Building and Construction Industry Training Council
Mr Gary Guy/Mr Ray Stowers, ACT Building and Construction Industry Training Fund Authority
Mr Jason Jennings, CFMEU (ACT)
Mr Atul Kumar (on behalf of Robert Hunt), Australian Institute of Building
Mr Ian Anlezark, Australian Institute of Building Surveyors

Effective Supervision

Mr Stuart Collins, Executive Director ACT and Southern NSW, Housing Industry Australia
Mr Gary Petherbridge, Owners Corporation Network (ACT)
Mr Valdis Luks, Master Builders Association of the ACT
Mr Vincent Ball, ACT Regional Building and Construction Industry Training Council
Mr Shane West and Mr David Colbertaldo (on behalf of Mr Robert Hunt) – Act Chapter of the Australian Institute of Building
Mr Ian Cumming – ACT Chapter of the Australian Institute of Building
Mr Ian Anlezark, Australian Institute of Building Surveyors
Mr Hans Sommer – Village Building Co

Appendix D

Tuesday 24 August 2010
3:30pm
DPMB 16 Challis Street Dickson

Building Quality Forum

Working Group Insurance

Attendees:

Craig Simmons — ACTPLA Director, Construction Occupations
David Middlemiss — ACTPLA Registrar, Construction Occupations
Eric Andraanse — Strata Managers Institute ACT (SMI)
Gary Petherbridge — Owners Corporation Network (OCN)
Ross Barrett — Master Builders Association (MBA)
Sean Moysey — ACTPLA Manager, Utilities, Land & Lease Regulation
Stuart Collins — Housing Industry Association (HIA)
Tony Thew — ACTPLA's General Counsel

Welcome:

Mr Simmons welcomed everyone to the first meeting of the Building Quality Forum that focuses on Insurance. Mr Simmons outlined the reasons as to why the Building Quality Forum's sub-groups were formed. The ACT Assembly recently passed a motion to look into building quality in further detail in light of recent building events within the Territory. The Assembly wants a report back by at least September. That gives the meeting members only a short time to clarify significant issues and undertake a demonstrated and genuine process to address the issues raised. Before this meeting, the Minister has spoken with industry figures and has understood there are four major issues that the Building Quality Forum needs to address. Insurance, Consumers (information, complaints etc), Supervision, and Skills and Competencies. This meeting is to identify components within the first issue, Insurance.

Introductions:

Introductions took place, attendees as listed above. Insurance Council of Australia did not attend.

Insurance:

Mr Simmons identified the types of insurances in place now, Home Warranty Insurance (HWI) and the Fidelity Fund. There are only a few suppliers of insurance now in the Territory, QBE, MBA and HIA. Mr Collins told the meeting that government in NSW, VIC and QLD to name a few, underwrite their own insurance schemes, unlike ACT where we privately insure. Currently, the fidelity fund insurance has threshold issues, 3 storeys or lower and caps off at \$85,000 for each premises. Issues raised concerning this threshold were that the limit might to be too low; it does not extend to all classes of buildings. Other major issues surrounding these insurance products include is the product adequate, what are consumers expectations of the product and the fact that it only covers death of a builder, collapse of a structure or insolvency. Mr Petherbridge highlighted that the Insurance Council of Australia (ICA) should attend today. Mr Simmons responded to say he did invite the Canberra representative (Brian Hollis) of the ICA but they could not attend.

Mr Petherbridge feels that the limit of \$85,000 is fine for a residential house but not for multi storey unit apartments. Mr Collins said that there is no statutory legislation mandating insurance on multi-unit and that insurance companies will not cover it. Mr Petherbridge agreed to restrictions in the fidelity fund as he investigated this fund first and found nothing in the product that people need or could use for retrospective work/maintenance. Mr Collins informed the group that VIC is allowing for voluntary insurance however the take up is very low. Product is just not selling to consumers. People identify insurance as a last resort, however in circumstances a homeowner may take it up. Mr Collins said some people believe in taking due diligence and then taking the risk by not having insurance. Mr Barrett believes strife will occur when owners disadvantage themselves by paying the builders too early.

Mr Barrett said that the \$85,000 is not an issue. There have been 17,000 certificates of fidelity issued by MBA and only two were paid out to the maximum. The amount is enough if owners track their payments to builders and know when to pay builders. Mr Collins said insurance was only given to some builders if they have assets. Mr Barrett replied that many factors are taken into account, history, financial status and maintenance. If MBA do not give insurance to a builder then they go through HIA. The builders generally only go to the two insurers. Mr Simmons agreed that the issue of providing information to the consumer group was a factor, and having information on the importance and role of the payment schedule is probably needed.

Mr Tew put forth the idea that banks could come back into play like in previous generations whereby bank managers would check progress stages of building before issuing future cheques. Mr Collins said that work would continue instead of waiting for an inspection. Mr Barratt said that no everyone needs finance from a bank.

Mr Petherbridge said that Class 1 is not represented in the room however, it is under discussion. The meeting needs to focus on Class 2's. There is no parallel that can be used between Classes 1 and 2. Mr Collins replied that a scheme that works for Class 1 could be used for Class 2's to an extent as a class 2 could be a duplex/dual occupancy in some instances not just multi-storey residential.

Mr Barrett thinks that the \$85,000 limit is enough. The actuaries would not like to make the amount bigger with the current statistics being what they are.

Mr Collins identified that if the limit goes up, so will the premiums and that would affect housing affordability.

Mr Thew identified the same issue was raised in writing legislation for workers compensation. Steps taken included attempts at keeping premiums at a low, finding solutions, education and a triage program was introduced. Report and address the problem within the first 24 hrs so as to not have to investigate what they call the long tail of claims. Mr Simmons agreed this should be an approach. Insurance is the last stage. What can we do to stop the problem occurring the in the first instance? Where did a project go wrong?

Mr Barrett asked if there was a problems with buildings after 6 years of being built. Mr Moysey replied that ACTPLA has received complaints of this nature, not a numerous amount but they do exist. Mr Barrett asked if extended insurance coverage further than 5 years was on the cards, however it would affect premiums again. It was offered that the industry might be able to put up with a minority of cases in this instance. Mr Simmons asked Mr Andraanse and Mr Petherbridge to put together what they think the major issues are and how often these issues occur. Mr Petherbridge and Mr Andraanse agreed and will bring these to the next meeting. Mr Moysey and Mr Middlemiss agreed to sum up ACTPLA's complaints figures also.

Mr Barrett believes the issue is isolated to multi-storey developments around the 4-6 storeys mark. He does not see a trend of bad building in Class 1 buildings or the 10+ storeys high rises. Smaller companies do tend to take more shortcuts. Once again, educations and skills come into this.

Mr Simmons identified that builders that are licensed as a Class C builder have a Cert IV in Construction Building not Construction Management. This could pose a problem when they do start taking on more jobs as they may lack the skills to manage each job efficiently. Mr Andraanse said that all these problems can be addressed by the ACT legislation.

Mr Thew offered a suggestion of having a building defects fund that is modelled off an American and English one. If a claim is made then the money crystallises itself and it is taken out of a pool of money. This pool is used to draw on money when an emergency occurs and then parties put money into the pool retrospectively. Mr Simmons identified that there would be criterion and a set amount that would trigger the pool. It needs to be discussed however who would contribute to the pool.

Mr Collins said that good builders want their dodgy counterparts out of the market however will not appreciate having to pay out of their own pockets to fix dodgy work. Mr Barrett asked if this pool was to be considered for just Class 2, and Mr Simmons said it was. Mr Moysey identified the pool would be ideal for second owners where insurance does not exist anymore and the builder is no longer around. Mr Collins advised that if the insurers were to foot this future-pooling bill then insurers would pull out of the ACT market. Mr Petherbridge thinks that the pool should be a last resort, what would happen to the minor claims such as leaks, render and other obvious

problems. It gets expensive just for builders to take notice. That is an issue to be discussed.

Mr Thew said that the best approach was coercion through legislation. Behaviour programs need to be put in place firstly. Insurance today is inadequate or not available. Mr Simmons said also that body corporations would need education because if they are not diligent they can harm any claims to be made as they do not have the necessary organisation needed to make a claim. Mr Moysey said that the pool can be made using statutory powers. ACTPLA cannot provide civil action on behalf of individuals. They just do not have them. The insurance pool is about an agreement between parties.

Mr Petherbridge said more discussion is needed on what the real problems are first. Each discussion group needs to do this. Mr Simmons says the direction from government is not to rule anything out and consider all options.

Mr Barrett said that he thinks the current fidelity system works and wants to look at possible amendments to this before the pool idea is explored further.

Mr Adraanse wanted it noted that the ACT Government should consider being contributors to this pool from the first instance or be a major contributor and get the industry to pitch in the rest. Other ideas would include all forms of occupations pitching into this pool, whether by a levy on project work or otherwise. He also highlighted that when builders are found to be consistently dodgy, they could have to pay more into the fund. Mr Adraanse also said that the ACT government has to be seen by community as acting on this issue, this means they should take some responsibility in the finances.

Mr Simmons said that next time there should be more discussion around this idea. In Class 2's the issue is quality. When there is no one to chase, beyond reasonable expectations of body corporate than the ACT government may have a role. Mr Barrett suggested another idea was to cease dodgy builders from being able to bid for developments and projects.

Mr Moysey agreed to this but advised that the effort required to prove a case before a judiciary is significant. He gave an example of a recent case which took 6 months of work just to prepare a prosecution brief to the DPP (Director of Public Prosecutions). ACTPLA cannot name and shame under privacy laws until a decision from ACAT is handed down. Mr Simmons also spoke of another instance where ACAT had not yet made a decision on an ACTPLA matter which went before the tribunal in early 2009.

Meeting was adjourned at 5:20pm.

Key Outcomes:

- **Mr Andraanse and Mr Petherbridge to put together statistics/ideas on what they think the major issues are and how often these issues occur.**

- **Mr Moysey and Mr Middlemiss to put together complaint figures for Class 1 and Class 2 buildings to get a general idea of what problems keep occurring also.**

Next Meeting:

Date for the next meeting was to be decided via email.

Appendix E

Friday 10 September, 2010
10.30am
DPMB 16 Challis Street Dickson

Building Quality Forum Working Group on Owners' Rights – Draft Minutes

Attendees:

Craig Simmons, ACTPLA
David Middlemiss, ACTPLA
Gillian Walsh, Strata Managers Institute ACT
Stuart Collins, Housing Industry Association
Jon Quiggan, Department of Justice and Community Safety
Peter Jansen, Property Owner' and Ratepayers Association of the ACT Inc
Bob Gaußen, Adjudicate Today
Murray Upton, independent representative
Gary Petherbridge, Owners Corporation Network (ACT)
Jerry Howard, Master Builders Association of the ACT

Apologies:

Tony Thew, ACTPLA
Sean Moysey, ACTPLA

Welcome

Mr Simmons welcomed the working group participants and gave an update on the process for reporting to the Assembly.

Minutes

The minutes of 26 August 2010 were accepted.

Mr Simmons asked participants to provide feedback on proposals that have been developed as a result of the initial round of working group meetings in the following areas:

1. Mechanisms available to owners to identify the party responsibility for a defect on common property and to get it rectified.
2. Getting information to assess the size and nature of the problems.
3. Complaint mechanisms.

1. Mechanisms available to owners to identify the party responsible for a defect on common property and to get it rectified.

Mr Simmons noted that outside of insurance products, there are no statutory requirements for timeframes in which a licenced person has to come back to address a problem and that in many cases the amount of time taken to resolve the matter needs to be reduced. He proposed that there could be a legislative mechanism specifying timeframes in which a builder must respond to a complaint to prevent problems being drawn out over long periods of time. This mechanism would operate under a statutory arrangement, voluntary at first, then setting timeframes and then using statutory powers if voluntary compliance is not exercised.

It was agreed that determining what the respective liabilities are and if they are shared between multiple parties is important, and that it could be a struggle to find competent people to assess a problem with Mr Petherbridge noting this is increased by the small market in Canberra. Mr Collins agreed that someone needs to make a determination on whether work is defective in the case of a dispute. Mr GausSEN noted that this could be overcome if work was of a sufficient volume and that specialists can be directly contracted to dispute resolution bodies.

Mr GausSEN informed the group about a draft contractual clause he had overseen the development of, which focused on payment disputes focus and provisions in relation to completion of work. He outlined that there is an option for capacity to legally bind parties and that discussions with relevant groups to suggest an amendment to dispute resolution and construction contract should occur.

Mr Simmons also explained that the insurance working group was looking at mechanisms that can apply even when a builder is no longer in business, particularly the creation of a new type of insurance product targeted to projects.

Mr Petherbridge expressed concern about how builders could be prevented from continuing to operate in a shoddy manner under a different company name. Mr Simmons stated that alternative approach to phoenixing companies needs to be explored with the DPP. He noted that this would not be a quick fix but has potential to be successful. He informed the group that the Minister was interested in immediate, medium and long term reforms.

Dispute resolution

The group agreed that there is a need to explore a quick, effective and definitive mechanism for resolution of building disputes. Mr Collins asked whether there was scope to use the current security of payments model for post construction issues.

Mr Simmons informed that ACTPLA was looking at how the ACT could apply this to defects found after expiry of the contract. This would provide access to a group of experienced professionals in the market whose job it is to mediate disputes.

Mr Gaussen agreed that some form of statutory relief would be beneficial, but that how this would apply needs to be worked through carefully with the cooperation of all of the parties involved in the working group.

Mr Simmons confirmed that the owners corporation could engage the mediation body on issues within their legal scope to address and that complaints could be brought for a period of time after the defect occurs.

2. Gathering information to assess the size and nature of the problems.

The group agreed that a vital piece of work was to collate information on the true size and nature of the problem and how this information can be collected immediately and in the future. Mr Simmons informed participants that ACTPLA and ORS would assist with a mail-out to owners corporations of class 2 buildings to overcome any privacy concerns. The intended process is to write to body corporates for all unit plans less than 10 years old (approximately 1500 complexes) to bring the survey to their attention and the work that the OCN (ACT) and the Strata Managers Institute (SMI) is undertaking to gather information about common property issues. ACTPLA will create an online survey that can be completed and information can be forwarded to the OCN or SMI for collation.

Mr Petherbridge and Mr Howard informed the group that they had started preparing the survey and were happy to create a document to be included in the mail-out. The survey needs to have targeted questions to maintain the focus on building quality issues.

It was noted that while strata managers may complete the survey because they may have more direct experience with the building, correspondence would be addressed to owners corporations and must be signed off by their Executive Committees.

The survey was supported as an excellent way to identify inherent building problems and Mr Simmons noted that it will provide information on the scale of problems so that the Assembly can target areas for improvement and future reforms. It would also help to feed issues back into

the training system and improve skills development. Mr Howard agreed that there was a need make sure that industry doesn't keep making the same mistakes.

3. Complaint mechanisms

The group discussed complaints mechanisms and the need to identify whether problems were a building or a consumer protection matter. It was agreed that clarification was needed for the public about who is responsible for addressing different matters and how they are directed within government. Mr Simmons gave the example of painting, which does not affect compliance with the building code and does not necessarily impact on habitability.

Mr Quiggan agreed there is a need to collectively educate consumers about contractual issues, how design can be varied under the contract, compliance with standards, and where they can obtain advice. It was suggested that there could be a role for solicitors to educate their clients about what they are buying and the risks, although there would most likely be an increased cost for this advice.

It was noted that although there are Australian Standards and guides to tolerances for many issues, little information on these is available to consumers and defects need to be proven through a series of tests. This places a greater need for specifications for finishes and other building aspects that are tied to the contract and can be more easily enforced. Clear specifications can minimise disputes as both parties are aware of what is contractually required. Products and finishes must also be fit for purpose under fair trading laws. The group also noted the lack of control over products claiming to be compliant with product standards, but that this was a national concern.

Mr Simmons suggested that there could also be a default set of specifications required in the ACT, that if agreed under contract protect both parties. There was general support for this approach.

Mr Howard suggested that false advertising and misleading and deceptive conduct are possible legal avenues to explore. Mr Gaussen noted the difficulty in enforcing these matters. He suggested that owners buying off plans in particular look to the party to the contract to take recourse. There is a capacity to bring in an independently appointed expert who can look at property and firstly encourage parties. The expert can then make a direction about payment. It was noted that the proposal could also be used by builders to get outstanding payments where an owner has not paid despite problem not being present.

Other issues

Mr Petherbridge raised the issue of how demerit points are applied to prevent builders that have produced poor quality work from continuing on with Commonwealth Government contracts. Mr Gaussen noted that this was an important debate for governments and there was a potential to

apply the “three strikes and you’re out” policy in force in Queensland. Mr Simmons noted that this would interact with the proposed national licensing scheme due for implementation for builders in 2013, under which a single national licence would be issued.

Mr Simmons thanked the Working Group participants for their contribution and informed that the next meeting would be held after the report had been provided to the Assembly.

Meeting closed 12.10pm

Appendix F

Friday 27 August 2010
11:30am
DPMB 16 Challis Street Dickson

Building Quality Forum *Industry Skills / Competences.*

Attendees:

Atul Kumar — Village Building Company
Craig Simmons — ACTPLA Director, Construction Occupations
David Middlemiss — ACTPLA Registrar, Construction Occupations
Gary Petherbridge — Owners Corporation Network (OCN)
Ian Anlezark — BCA Certifiers (rep. Australian Institute of Building Surveyors)
Jason Jennings — Construction Forestry Mining and Energy Union
Jerry Howard — Master Builders Association (MBA)
Ray Stowers — Training Fund Authority
Stuart Collins — Housing Industry Association

Welcome:

Mr Simmons welcomed everyone to the first meeting of the Building Quality Forum that focuses on industry skills and competences in the ACT building industry. Mr Simmons outlined the reasons as to why the Building Quality Forum's sub-groups were formed. The ACT Assembly recently passed a motion to look into building quality in further detail in light of recent building events within the Territory. The Assembly requires a report back on the quality of buildings by 23rd September. That gives the meeting members only a short time to clarify significant issues and undertake a demonstrated and genuine process to address the issues raised. Prior to this meeting, the Minister has spoken with industry figures behind the scenes and had gained the understanding that there are four major issues that the Building Quality Forum needs to address. Insurance, Owners Rights (information, complaints etc), Supervision, and Skills & Competencies. This meeting was to identify components within the fourth group, industry skills and competencies. Mr Simmons asked the group to bring up any issues they feel needed to be discussed, and to offer the various perspectives on any issues raised. Mr Simmons asked the group to also bear in mind that some issues may be discussed to some extent across the different groups.

Introductions:

Introductions took place, attendees as listed above. Sean Moysey, Tony Thew and Vincent Ball did not attend.

Industry Skills / Competences:

Mr Simmons asked whether the level of knowledge builders have is sufficient or if it needs to be improved. Mr Howard identified that over the years builders came up through the ranks as tradesmen. They had a great knowledge of practical building and skills experience gained over the years. The qualification system changed this. The different levels of licensing changed this. No prerequisite for a qualification any more under *Construction Occupations (Licensing) Act 2004* (COLA) and not enough detailed assessments on practical experience. On site experiences need to be verified. Building companies can do almost anything with just one nominee. That sole individual is then responsible. In Class 2 development, this can make that arrangement particularly complex. Under current assessment arrangements, how can we be satisfied that the individual knows the work? Many buildings end up inferior because builders are trying to build what they do not know. There is also no assessment on a company's competence; they just have to have a licensed nominee. To Mr Howard, there are shortcomings in this approach. MBA has tried to raise standards through University of Canberra and a cadetship. MBA thinks this is a better approach.

Mr Anlezark identified that this issue is particularly related to A class building licences. The people at the high end need more rigorous testing. Mr Anlezark indicated that this also applies to Greenfields builders who switch back into regular Class 2 buildings and that the two areas of building, Residential and Commercial, should not be interchangeable. Many Residential builders are not experienced to build commercial developments and vice versa.

Mr Kumar agreed that there was evidence of inadequate training and experience. Everyone goes to university instead of doing the experience up front. Mr Kumar expressed the concern that recently qualified builders do not learn enough in these 2 years.

Mr Simmons identified that the tiered system has been in effect for a while now and it also does not help when the Class A's have only have a project management background. A Class C builder for example may have a more on site presence. Mr Simmons asked what people thought of moving into a Low Rise, Medium Rise, and High Rise class system. Mr Collins thinks splitting the classes into Commercial/Residential would assist. Mr Simmons has talked to some builders who think residential work can be more difficult than commercial. Mr Petherbridge said also the issue is how long the buildings are built to last for. The perception is that residential single dwellings will last longer than townhouse/multi storey complexes.

Mr Anlezark agreed saying the lifespan of a residential house is 35 years and commercial is a bit shorter.

Mr Anlezark believes that Architects should not be A Class builders. Mr Kumar agreed. Mr Kumar believes that the 2 years experience is inadequate because trainees are rarely allowed to be hand on. The first few years with a company might be merely as an admin officer which is difficult to check. Mr Anlezark agrees and thinks the practical experience should be competency based not time based.

Mr Simmons said that all the qualifications in the ACT align with National Licensing. A training package in Victoria for electricians has a 3-day test at the end of the apprenticeship. If you do not pass that then you have to continue studying. 30% of electricians fail this. We do not have that control with builders. Recently the Mandatory Qualifications were changed to include the statement *relevant* building experience. Now MBA is using a logbook and CIT a project book. There is pressure nationally, not to do that. Mr Simmons said VIC is already using the class system of low, medium, and high; NSW does not licence anything commercial and QLD does the same as the ACT. Mr Collins said that NSW licences a lot more trades than the ACT. Mr Petherbridge supported the idea of the ACT moving forward to the low, medium, high system.

Mr Kumar proposed the testing procedure to be more aligned with the principles of drivers licence testing. If one cannot pass the test, they cannot drive. He suggested a move into practical examinations for builders.

Mr Collins identified the course that was previously available that gave people the skills needed was the Clerk of Works. Many are now lacking business skills. Mr Kumar suggested that ACTPLA should undertake a building examination, held apart from the RTO's before a licence is granted.

Mr Simmons said that the electricity apprenticeship is criticised, as one of the hardest to pass yet the electrical industry prefers it that way. The RTO provides the facilities and then a third party is brought in to oversee the testing process. ACTPLA's Senior Electrical Regulator oversees the test for CIT and Electrogroep.

Mr Anlezark also suggested not allowing renewals to be automatic. He stated that ACTPLA should look at each builders licence history yearly and if they do not use the licence and do not have any jobs then take it off them or place it on hold. Mr Kumar wants the nominee/company licence system to go away. Mr Kumar thinks it is the supervisor on site that should hold a licence also. Mr Kumar feels even though there is pressure on doctors as an example, you do not see the government pushing them through school. The testing and training is still quite strict. Mr Collins thinks these meetings should not focus on pressure, as it will always be there. Mr Collins introduced the idea of ongoing provisions of training even though the ACT does not have a Continual Professional Development (CPD) points system.

Mr Simmons said that CPD over all trades could be an issue. Mr Anlezark informed that Certifiers in NSW have 90 points to be obtained each three years. There are three streams to how the points can be earned and points must be distributed

amongst the streams. There should be targeted training courses for builders whether CPD applies or not. e.g. Waterproofing training, if they do not keep up to date with that, then they do not get their licence back. Mr Howard thinks a strictly targeted CPD system could then disadvantage certain builders who do not work in these streams.

Mr Simmons summarised the issues brought up so far in the discussion; licensing structure, clean out existing licences, site supervisors, nomineeship, skills maintenance, and CPD.

Mr Petherbridge believes another issue is surrounding documentation. There are builders who cannot read specifications and elevation plans and this should be a competency. Mr Anlezark thinks that problem lies with the Architects/Draftsmen. Some times, they just do not put measurements on the plans and so builders have to guess where parts of the structure go. Mr Anlezark agreed with Mr Petherbridge in that documentation needs to provide better detail and be more tightly controlled.

Mr Simmons said builders are not the only ones to blame. (Other occupations which show poor workmanship include concreting, formwork, carpentry and bricklaying) Mr Collins said many contractors are aging and the new people in the industry have a lot to learn. Mr Collins asked if ACTPLA would consider licensing these trades. Mr Simmons said ACTPLA is often asked. He asked if the reason no one is being trained up in the trade properly is because it is not licensed. Individuals commence studying the trade, at the 80% they drop out and work at full pay. It is the 20% they learn at the end which is crucial in quality work. Mr Stowers said the statistics are that only 50% complete the trade. Mr Anlezark expressed concern that no one has pride in what they do anymore.

Mr Kumar agreed. An example he used is when builders use inferior products in their buildings. They may not necessarily be illegal products, but products that builders would not necessarily deem as good quality.

Mr Collins thinks that the main concern is with the finishing trades. Plasters, painters and glaziers. Shortage compromises quality. Mr Jennings believes people are thinking about the benefits of getting straight into the industry to work as opposed to struggling as an apprentice for 4 years.

Mr Simmons does not believe that licensing in sub trades will necessarily fix this problem. It has not stopped the same problem from existing in other states. Mr Jennings mentioned that there is no requirement for some trades to have any qualification and that each tradesperson should have a minimum certificate III level qualification, not only builders.

Mr Kumar asked Mr Simmons if complaints were structural or finishing. Mr Simmons said it is often not that simple. A complaint will be about an entire job not individual aspects. Mr Moysey also informed the meeting that his inspectors only audit about 5% of work. Mr Anlezark thinks there is no punishment sufficient enough to deter people from doing the wrong thing.

Mr Simmons advised ACTPLA may never be aware of a problem, if the builder is notified by the customer and fixes it.

Mr Simmons also spoke about the resources and time that goes into preparing information and evidence for the Administrative Civil Appeals Tribunal. In addition, how long ACAT can take on making a decision. Mr Kumar asked if the licensee is personally responsible. Mr Simmons said that whilst the licensee is personally responsible, demerit points act as a means of disposing of the problem not an admission of guilt, similar to the speeding fine system.

Mr Petherbridge brought up the issue of documentation again. For instance, home occupiers would know if the builders (painters) used one coat of paint or two. Even though it is not regulated, there should be documentation in regards to everything in a unit so homeowners are aware. Especially homeowners who buy off the developer. Mr Anlezark thinks identified finishing trades are a consumer issue. From a certifier point of view, the walls comply regardless of the number of coats of paint.

Mr Simmons identified a potential means of dealing with the waterproofing issue. That is to make a waterproofing certificate part of S48 under the *Building Act 2000*. Mr Howard agreed saying that some companies provide training in their specific products; they would show this training to builders.

Mr Anlezark expressed concern regarding disappearing builders. Mr Simmons identified that some builders just won't go back on site to fix the problem; they don't know how or its time consuming or too costly.

Mr Stowers spoke about the apprenticeships. The wage is low especially in comparison to living requirements at 18 years of age. Mr Anlezark agrees and industry has to realise that there is a shortage of good tradesmen coming through.

Mr Simmons suggested there should be a south side and a north side school dedicated to the building industry and associated trades. In the same spirit that Narrabundah is, known for the Arts. Mr Collins said many schools have a workshop or practical class but no bulk time subjects.

Mr Howard said professional builders would raise the level if required. Start by asking builders to request the trade certificates off individuals. Do not hire them unless they are fully qualified. Mr Anlezark believes also that when a problem is found, retrain the builder in that specific problem not a generic refresher course.

Mr Howard brought up the subject of having mail out industry letters. Mr Howard wrote one that people can read on waterproofing.

Mr Howard also spoke about a situation where builders are signing liability on the design of a project. He cannot believe builders take that responsibility. Mr Petherbridge said that is another skills shortage; business management.

Mr Simmons ended the meeting by asking for further ideas to be sent to his email address.

Meeting was adjourned at 1:10pm.

Key Outcomes:

Next Meeting:

Date for the next meeting was to be decided via email.

Appendix G

Friday 10 September, 2010
1.00pm
DPMB 16 Challis Street Dickson

Building Quality Forum

Working Group on Industry Skills and Competence – Draft Minutes

Attendees:

Craig Simmons, ACTPLA

David Middlemiss, ACTPLA

Vince Ball, Construction Industry Training Council

Gary Guy, ACT Building and Construction Industry Training Fund Authority

Jason Jennings, CFMEU ACT

Stuart Collins, Housing Industry Association

Ian Anlezark, BCA Certifiers

Gary Petherbridge, Owners Corporation Network (ACT)

Jerry Howard, Master Builders Association of the ACT

Apologies:

Tony Thew, ACTPLA

Sean Moysey, ACTPLA

Atul Kumar, AIB

Welcome

Mr Simmons welcomed the working group participants, and extended a particular welcome to Mr Guy on attending his first meeting.

Minutes

Mr Jennings requested amendments to be made on Page 3 of the minutes of 27 August 2010 to change the reference to Cert IV to Cert III and clarify that there is no requirement to have a certificate and that tradespersons should have Cert III rather than Cert IV. The minutes were accepted as amended.

The group was given an update on the process for reporting to the Assembly and informed that the report would include the directions that can be taken, how they can be progressed and what has been dealt with already. He noted that new issues could still be incorporated.

Mr Simmons asked participants to provide feedback on the following areas that emerged from the previous working group meeting:

1. Sub-trades skills and regulation.
2. Ongoing skills maintenance.
3. Structure of licences.

1. Sub-trades skills and regulation

Mr Simmons noted that working group and Building Quality Forum discussions had identified a number of structural trades that need a greater level of skill - concreting, bricklaying, carpentry, waterproofing and roofing. The group agreed that discussion should also include improvement of skills in sub-trades where there is no requirement for any minimum Cert III qualifications as for regulated trades.

The group agreed that emphasis on e-learning at the cert III and cert IV level impacts on the need to have practical experience and skills in trades. Mr Jennings was also concerned that many sub-trades are not regulated. Mr Ball mentioned that there is a difference between regulation and licensing and that there are ways to regulate people without requiring them to be licensed. It was also noted that licensing can be related to consumer protection issues rather than technical competency.

Mr Simmons stated that licences should reflect the work that is being done and that regulation could be scaled for the type of work being done. Licensing could be placed at the company level for large jobs, and at individual level for small jobs. Not everyone doing the work would have to be licensed, as the licence holder will have to produce evidence that all workers meet minimum skills requirements.

The group asked Mr Simmons how this could realistically be enforced. He replied that the regulatory system allows for action against a licensee but that implementing and enforcing effective regulation does come at a cost and require adequate resources. Where the primary obligation is on the company to apply qualification standards this is less resource-intensive than licensing each individual tradesperson. He agreed that regulation will be judged by how effectively it can be enforced.

Mr Jennings stated that if compliance is under-resourced it will not achieve the desired outcomes and that what the group is proposing would need more resources to implement and monitor. Mr Howard noted that licensing does not solve problems by itself and needs to be underpinned with skills and competencies, which was agreed amongst participants. He mentioned that the gold, silver and bronze licensing system introduced in NSW failed because it didn't have an underlying system of training.

There was general support from industry representatives that placing responsibility for checking skills cards for sub-trades with principal licensees prior to work commencing had merit and could strengthen the direct relationship between principal and sub-contractor.

The group discussed whether this should apply to all sub-trades or only selected ones. Mr Howard commented that if ACTPLA was going to license everyone then they won't have the resources to regulate. Mr Jennings felt that workmanship, safety and consumer satisfaction should be the licensing benchmarks.

Mr Simmons noted that what was needed was a mechanism that drives increasing levels of skill that is appropriate to the work that is being done. This did not automatically mean licensing. Mr Howard and Mr Guy supported the current structure of the licensing system and believed that licensed builders and principal contractors should have responsibility for the trades on their projects as applies for asbestos licensing in the ACT. Action can be taken if they fail to follow regulations for appropriate skills evidenced on skills cards.

The group discussed the need to have consistent skills levels across all building trades and to allow a sufficient transition or 'amnesty' period – such as that in place for energy assessors – to give practitioners time to get qualifications and undertake additional training if required. This will represent a significant cultural change for most of industry. It was also noted that inspections need to take place at pressure times to make sure builders are complying at all stages of a project.

There was further conversation on the possibility for practitioners to command higher pay or gain a better rate on workers compensation premiums to provide financial incentives for builders to have qualified people.

Mr Simmons noted the need to restrict requirements to trades that can reasonably be managed initially ie 3-5 areas and expand to other sub-trades if required. The group identified waterproofing and tiling in multi unit residential buildings, concreting, carpentry and bricklaying as priority trades. Mr Jennings considered that a Cert III in scaffolding will lift the standard in this area (Note: scaffolding licenses are not issued by ACTPLA but under OH&S regulation).

Mr Petherbridge mentioned that rendering, metal roofing, water proofing and fire safety are costing owners the most to rectify.

Mr Simmons confirmed that there was reasonable agreement for this approach. He noted that it can be tried and that if industry does not fulfil its obligations the option to introduce licensing or stricter regulation remains.

It was also suggested that skills could be regulated through government tendering processes. Try it first and if does not work, licence everybody. It is about putting pressure on the way people perceive what is going on and placing an obligation on the principal to check.

2. Ongoing skills maintenance.

Mr Simmons asked the group whether CPD is effective and if it should be voluntary or compulsory. Mr Collins noted that there could be a focus on gaining points or completing specific training. Mr Howard stated that ACTPLA would need to drive the training because it will have awareness of industry-wide issues and will be able to target training. It was agreed that there would be more weight to education about problems if it comes from the regulator. It was noted that training bodies and industry associations could gain accreditation from ACTPLA to run the training, which could also include OH&S training approved by the Commissioner.

The group discussed linking CPD completion to the licence renewal period of 3 years. Individual licensees or tradespersons where not directly licensed, would be responsible for their own skills cards. It was agreed that training also needed to include awareness of new products and new technologies not only practical skills and that it is important to educate as well as regulate people.

3. Structure of licences.

Unused licences

Mr Simmons mentioned the preliminary analysis ACTPLA had done to determine licenses that have no building approvals issued against them for over a year. He stated that there was a possibility to suspend a licence, or part of licence, with no activity for a specified period e.g. 3 years and cancel if no activity is recorded for 5 years. There could then be a test for builders reapplying after the 5 year period have elapsed to pass a test on the current version of building standards. Mr Anlezark considered that there would be little objection to this.

Builders licence categories

Mr Simmons asked the group whether there was a need to target licensing categories more closely to what a person is qualified to do. He mentioned ACTPLA was in favour of licences being more descriptive of the type of work the holder is able to do, and allow owners to know what a builder's specialty is eg residential building work or high rise construction projects.

He proposed that changing names to low rise, medium rise and high rise could achieve this. The group supported investigating this further, noting there is a need to licence based on the complexity of work. Mr Collins felt that this form of licensing will provide a better picture of the skill levels in the industry.

The group noted that for assessment of practical experience in building the MBA are using a log book approach and CIT are using a project approach. Mr Jennings stated that there should also be a pre-requisite minimum on the job experience (eg 3-4 years) for progressing to the Cert V in building construction. There was general agreement that all builders should have a minimum of certificate IV plus experience and that the qualifications for those without building knowledge coming through non-traditional "project management" pathways should be reviewed for adequacy. It was also noted that current training may not cover the BCA in sufficient depth and did not align well with the reality of the BCA requirements.

Mr Simmons considered that there could be an option to give probationary licences for new builders that restrict the number of projects the builder can work on simultaneously. He informed the group that any changes needed to be put in place before national licensing or they may be lost in the transition.

Mr Simmons thanked the Working Group participants for their contribution.

Meeting Closed 2.45pm

Appendix H

Friday 27 August 2010
1:00pm
DPMB 16 Challis Street Dickson

Building Quality Forum *Effective Supervision.*

Attendees:

Craig Simmons — ACTPLA Director, Construction Occupations
David Middlemiss — ACTPLA Registrar, Construction Occupations
Gary Petherbridge — Owners Corporation Network (OCN)
Hans Sommer — Village Building Company
Ian Anlezark — BCA Certifiers (rep. Australian Institute of Building Surveyors)
Ian Cummings — Australian Institute of Building
Roger Poels — GE Shaw for Valdis Luks – Master Builders Association
Shane West — Australian Institute of Building
Stuart Collins — Housing Industry Association
Vince Ball — Canberra Institute of Technology

Apologies

Jerry Howard — Master Builders Association

Welcome

Mr Simmons welcomed attendees to the first meeting of the Effective Supervision Working Group. He gave an overview of the history of the Building Quality Forum (the Forum) and the formation of working groups on specific matters.

The ACT Assembly recently passed a motion to investigate building quality in further detail in light of recent concerns expressed by owners about buildings within the Territory. The Planning Minister will report on the outcomes of the Forum to the Legislative Assembly by 23rd September. Mr Simmons advised the group of the short timeframe for the initial report to clarify significant issues and begin to address the issues raised. He noted that the engagement process would continue throughout 2010 and most likely 2011 on issues requiring significant reform or legislative changes.

The group was informed that the Minister had met previously with industry figures and from these meetings four major issues the Forum needs to address emerged: insurance, owners' rights (information, complaints etc), effective supervision, and skills & competencies. Mr Simmons said that this working group had been formed to identify issues and possible courses of action for effective supervision of building to work to minimise post-construction problems. He noted that some issues will overlap a number of working groups.

Mr Simmons asked the group to bring up any issues they feel needed to be discussed on either class 1 or class 2 buildings and to offer their ideas on how to address them. He noted that the Government would consider all suggestions in making its recommendations to the Assembly.

Introductions, attendees and apologies

Introductions took place, attendees and apologies as listed above.

Insurance

There was a brief discussion on the coverage of insurance and the public misunderstanding of the purpose of the fidelity fund. Mr Simmons noted that this would be addressed by the Insurance Working Group.

Role of Builders in Site Supervision

Mr Ball questioned the group as to what was meant by supervision. Mr Simmons stressed that effective supervision was the focus and could cover the entire building process from documentation to on-site supervision. He encouraged the group to identify where the most obvious problems might be and possible solutions. He gave an example of regulation in Queensland where all large building projects must have an on site supervisor with a minimum relevant Certificate IV level qualification.

Mr Collins stated that he did not consider that supervision is a major issue in smaller businesses that have few jobs, but that the problem was with companies trying to supervise a large number of jobs at once. Mr Simmons confirmed that there are no licensing and qualifications requirements relating to supervision, noting that the role of the builder changes from a builder to a construction manager beyond a certain increase in jobs.

Mr Sommer considered that although some businesses tried to mitigate on-site problems by working in a design team, time constraints on some projects meant supervision may not as rigorous as required.

Additional Inspections

The possibility for additional steps in the building process to be finished, tested or inspected before further work can continue was raised. Mr West noted that there was

no requirement for sign-off of wet areas. Mr Anlezark informed the group that in NSW 20% of areas must be inspected and a certificate can be accepted for the remaining areas, but that he was not sure how well this works to prevent problems. He also noted that although there were no requirements for pre-sheet inspections, noise attenuation and other building aspects that most certifiers inspected these as a matter of course.

Mr Anlezark said that if additional inspections were required this would not be a big inconvenience, but raised the issue of validity of certificates being used as a basis for compliance. Mr West gave an example of engineers changing specifications for the fabrication of roof trusses to align with their software but not necessarily producing a suitable product. These products are all given certification because they produced on accepted software. Mr Sommer and Mr Anlezark noted that as long as the performance of a product was equivalent exact adherence to the original calculations should not be required, but that accepting certification does assume the person providing the certificate is competent.

Licensing, Qualifications and Training

Mr Ball agreed that there was a presumption that building supervisors are competent. He agreed that although it is usually builders that end up supervising there is little training in building and other courses that equip builders to supervise a full project. He noted that there were currently two qualifications offered in the ACT at certificate IV level in management and supervision, and contract administration.

Mr Simmons clarified that in the ACT's licensing system, the nominee for a company is responsible for every project undertaken by the business and for 'adequate supervision' of each project. He asked the group what they considered adequate supervision and how this would affect different sites. Mr Simmons stated that it was possible to introduce a requirement to have supervision but should this apply to all projects or should full time on-site supervision only be required of large projects.

Mr Poels said that one of the frustrations for his company was that he was continually being undercut by competition that does not insist on the level of supervision his company does. He outlined his company's process, which is to conduct a risk analysis and appoint a fulltime supervisor to high-risk projects. His supervisors mostly have a trade, particularly carpentry, background and have worked as an offsider for 2-3 years before they can work by themselves.

Mr Cummings raised the issue of client-side risk, and agreed that there is also a responsibility on clients to choose a contractor that has quality control procedures in place. Roger said that it is often client-side demands and expectations for short completion timeframes and low costs that increase risk, and that this is especially disappointing when government procurement emphasise these over quality. Mr Poels felt that if supervisors should be licensed then it should not be restricted to certain qualifications. Mr Simmons noted that under COLA the Registrar has discretion to use other criteria as there were inherent peculiarities in relying only on newly

developed qualifications for an existing industry. Mr Ball also explained the recognition of prior learning process for practitioners to have skills and experience assessed against the formal qualifications.

The group briefly discussed the problem with the amount of time spent on OHS paperwork taking time away from supervision time on-site. It was agreed that this was a pre-acknowledged issue in the construction industry, that it was unlikely to change in the foreseeable future, and was a national matter for COAG.

Mr Collins stated he was not convinced that licensing is required but acknowledged that it allows practitioners to be regulated in other ways e.g. continuing professional development (cpd) can be tied to a licensing outcome. He noted the issue is how those who do not have good practices can be made to adopt them.

Mr Petherbridge noted that the current system doesn't consider the end client i.e. the purchaser and asked how they could be better represented. He considered that a major issue was that builders did not necessarily return to fix problems when they are identified and agreed some builders may accept contracts with forced timelines that perhaps they shouldn't.

The group agreed that it was not necessarily a matter that supervisors required degrees and that there were some trades, such as carpentry, that are usually on site throughout a project from which people could advance to further training in site supervision. Mr Simmons said that there was a need to consider industry in totality. He agreed that not all of industry needed further regulation as some practitioners already do what they should, but that others will take the risk and cut corners. He asked the group what mechanism should be used to prevent this and noted that if this was to be a licensing issue, then monitoring by ACTPLA would be required.

Mr Cummings suggested that regulation should be competency-based and asked whether it should be industry that does the policing of supervisors. Mr Anlezark agreed that quality control mechanisms are needed in industry, but that a regulatory system is a decision for government. He asked how a formalised method could be brought in given the range of qualifications and experience in the industry.

Mr Petherbridge asked whether monitoring could be done as part of building approval. Mr Anlezark considered that this would have to come back to licensing of either the nominee or the licensee for the job to be consistent and transparent. Mr Simmons suggested that there could be an obligation on the building licensee to name a supervisor, and if they are subsequently audited they would need to show what qualifications or training the supervisor has. He noted this would increase pressure to access the training system and recognition of prior learning mechanisms for those with experience. The question is then how sophisticated regulation in COLA would need to be to drive outcomes was then raised.

The group agreed that current building licence classes do not necessarily align with practical experience and competency to physically build a structure e.g. class A

licenses allow the building of a high rise but the qualification is more focused on contract management.

The question why supervision was the government's concern if the building licensee is ultimately responsible was asked. There was general agreement that holding the licensee accountable is needed when something becomes an issue, but the objective is to avoid problems from occurring in the first place. Mr Anlezark noted that the courts do hold certifiers and builders accountable but that insurance cover for certifiers has never been tested.

Project documentation, practice notes and guidance documents

The issue of the quality of information of plans and other specification documents was raised. It was noted that architects are often not engaged past preparation of DA plans and there was an expectation that a certifier can extrapolate the required technical information from minimal detail for BCA compliance. Industry members agreed that there had been a marked reduction in detail and quality in the drawings coming through from architects and engineers over time.

Mr Anlezark agreed that often detail is not developed until the DA has been given but there is a push for the builder to start work immediately even though the plans are not finalised. The plans are being developed in parallel with the building process making it difficult to approve the whole project at once or make corrections.

The group agreed that there is a need for better communication between the architect, engineer and builder and improved documentation would reduce the amount of time away from the site for supervisors. Mr Poels noted that it is often time pressures that lead to poor documentation and this is not easy to fix.

The group also agreed that practice notes and design papers for the major quality issues such as balconies over habitable areas could be produced for industry. It was acknowledged that the BCA represented basic requirements but that all builders needed to at least meet BCA standard. Mr Simmons reminded the group that a prescriptive solution could be too strict and that the performance-based nature of building regulation needed to be preserved. He agreed that it is possible to have a default design solution for those that needed guidance on acceptable practice.

Mr Poels left the meeting

Mr Petherbridge suggested that using the recent MBA paper on quality issues in construction should be built on with a further survey to bring out and address all issues. Mr West mentioned the work that AIB was undertaking on building design analysis and thought that the outcomes should be linked to cpd not only for builders but architects and engineers.

Regulation of Associated Professionals

Mr Cummings informed the group that the AIB is developing a certified practicing builder program on the model of the certified practicing engineer accreditation. Mr Anlezark noted that engineers did not require public indemnity insurance and that those professions that are relied on for the construction process could be brought into COLA and be subject to similar disciplinary action such as demerit points. It was noted that the Western Australian branch of Engineers Australia has approached the WA building regulator to consider licensing for engineers in that jurisdiction.

The group agreed that the capacity of membership industry associations to administer quasi-regulatory schemes, especially if they need to make a decision on removal of a member's livelihood, is limited. It was acknowledged that the capacity to fully regulate, if required, lies with government.

The group discussed the advantages of two mechanisms of regulating behaviour: direct regulation and financial imperative. There was no agreement in which was preferred but some members noted that some businesses will continue to take financial risks if there is no adequate regulation.

Mr West left the meeting

Mr Cummings said that it was possible to licence certain work in professions such as engineering and that there are examples of this all across the world. He asked if the group could make the recommendation that it be looked into and Mr Simmons confirmed that it could.

Mr Simmons thanked the attendees for their input and undertook to set up the next meeting in the next few weeks.

Outcomes:

Areas identified for further discussion were:

- **Minimum qualifications and options for regulating supervision of building sites**
- **Mechanisms for improving the detail and quality of architectural and engineering drawings**
- **Managing client-side risks**
- **Inspection and certification of key steps in the construction process**
- **Regulatory and non-regulatory quality controls for architects, engineers and other construction professionals**
- **Design guidelines and practice notes for major issues**

Next Meeting:

Date for the next meeting was to be decided via email.

Appendix I

Friday 10 September, 2010
3.30pm
DPMB 16 Challis Street Dickson

Building Quality Forum Working Group on Effective Supervision – Draft Minutes

Attendees:

Craig Simmons, ACTPLA
David Middlemiss, ACTPLA
Vince Ball, Construction Industry Training Council
Stuart Collins, Housing Industry Association
Ian Anlezark, BCA Certifiers
Gary Petherbridge, Owners Corporation Network (ACT)

Apologies:

Tony Thew, ACTPLA
Sean Moysey, ACTPLA
Shane West, AIB
Jerry Howard, Master Builders Association of the ACT

Welcome

Mr Simmons welcomed the Working Group participants.

Minutes

The minutes from the 27 August 2010 meeting were accepted.

Mr Simmons asked participants for their feedback on mechanisms that could provide effective site supervision. He suggested that an obligation could be put on builders of multi-unit constructions to prove there is proper supervision of the site, which could be supported by an audit function.

Participants agreed that there needs to be a threshold on how many sites one builder can supervise at the one time. The threshold, skills and knowledge for supervisors will have to be

commensurate with the level of site supervision required and appropriate for the type of construction.

Role of supervisor

The group discussed what a supervisor should be overseeing on site. Mr Collins stated that supervisors need to be onsite for the critical stages of construction.

Participants agreed that there was a need for supervisors to work with the building certifier to apply building regulation and that they should have sufficient knowledge of the building code to assist the certifier. This was supported with Mr Anlezark noting that where supervisors have a good knowledge of the BCA the site generally runs well. There should be an expectation for high-rise builders that they can find out the answers to questions about the application of the BCA rather than relying on the certifier to deal with all BCA issues. He also stated that while the extra inspections by certifiers are important it would be expected that supervisors would also be checking riskier construction stages such as waterproofing and fire safety.

Mr Ball agreed that the main weakness is that there are few builders with knowledge of how the BCA works and a lack of trainers who can educate industry. Certifiers have to take on the role of educators because of rapid changes in the building code. It was noted that many courses focus on development approvals and not compliance with the BCA.

It was agreed that an additional pre-sheet inspection for certifiers could address some of the problems, which could cover noise attenuation, thermal insulation, fire safety at a minimum. Mr Middlemiss and Mr Simmons agreed that ACTPLA could develop a checklist for certifiers to assess against and to educate supervisors.

Mr Anlezark also noted the implications of changes to the Building Act regarding energy ratings and that sign-off on an energy report at the end of a project may be required. Mr Simmons noted that this was being dealt with through new auditing of energy efficiency that will commence shortly.

Skills and qualifications

The group discussed appropriate qualifications, generally noting that knowledge of construction management is required at a minimum of certificate IV level. Mr Ball noted that few people were enrolling in the advanced diploma as they do not meet the prerequisite qualifications. Mr Anlezark stated that the framework put in place needs to accurately assess practitioners skills across building as well as supervision.

It was agreed that a common set of skills for supervisors should include:

- An awareness of the building process and what occurs at each stage, particularly for structural trades
- Ability to interpret what the final building is supposed to look like so problems are not missed
- The consequences to the building of defects in the short and long term
- Application and compliance with the BCA
- Product knowledge and how to interpret specifications

These could be included in skills cards to provide an opportunity for builders to start checking supervision qualifications.

Education

Mr Ball felt that education was the greatest step that industry could take to improve workmanship. The group noted that problems often occurred due to a lack of awareness and respect for the work of other trades and that communication on site, between the trades and with the builder was important. The consequences of causing defects in the short and long term are not included in current training packages.

Regulation of supervision

Mr Simmons suggested that a starting point was to place the obligation on a builder and move to more traditional licensing if this was not effective. Mr Petherbridge raised the option of builders nominating the method of supervision through the building application. Mr Anlezark noted that checking could be easily done through application for a commencement notice, when a supervisor must be nominated. Additional checking could be done by ACTPLA when auditing builders.

The group noted that industry already collected a large amount of information about who is on-site and what their roles are through OHS and induction processes, and that this data can be used to better manage sites.

It was agreed that there was a need to inform builders if changes to supervision are to happen, to make sure the changes and requirements are understood, and allow a suitable transition period.

Mr Simmons thanked the Working Group participants for their contribution.

Meeting closed: 4.30pm

Appendix J

Tuesday 24 August 2010
3:30pm
DPMB 16 Challis Street Dickson

Building Quality Forum

Working Group Insurance

Attendees:

Craig Simmons — ACTPLA Director, Construction Occupations
David Middlemiss — ACTPLA Registrar, Construction Occupations
Eric Andraanse — Strata Managers Institute ACT (SMI)
Gary Petherbridge — Owners Corporation Network (OCN)
Ross Barrett — Master Builders Association (MBA)
Sean Moysey — ACTPLA Manager, Utilities, Land & Lease Regulation
Stuart Collins — Housing Industry Association (HIA)
Tony Thew — ACTPLA's General Counsel

Welcome:

Mr Simmons welcomed everyone to the first meeting of the Building Quality Forum that focuses on Insurance. Mr Simmons outlined the reasons as to why the Building Quality Forum's sub-groups were formed. The ACT Assembly recently passed a motion to look into building quality in further detail in light of recent building events within the Territory. The Assembly wants a report back by at least September. That gives the meeting members only a short time to clarify significant issues and undertake a demonstrated and genuine process to address the issues raised. Before this meeting, the Minister has spoken with industry figures and has understood there are four major issues that the Building Quality Forum needs to address. Insurance, Consumers (information, complaints etc), Supervision, and Skills and Competencies. This meeting is to identify components within the first issue, Insurance.

Introductions:

Introductions took place, attendees as listed above. Insurance Council of Australia did not attend.

Insurance:

Mr Simmons identified the types of insurances in place now, Home Warranty Insurance (HWI) and the Fidelity Fund. There are only a few suppliers of insurance now in the Territory, QBE, MBA and HIA. Mr Collins told the meeting that government

in NSW, VIC and QLD to name a few, underwrite their own insurance schemes, unlike ACT where we privately insure. Currently, the fidelity fund insurance has threshold issues, 3 storeys or lower and caps off at \$85,000 for each premises. Issues raised concerning this threshold were that the limit might to be too low; it does not extend to all classes of buildings. Other major issues surrounding these insurance products include is the product adequate, what are consumers expectations of the product and the fact that it only covers death of a builder, collapse of a structure or insolvency. Mr Petherbridge highlighted that the Insurance Council of Australia (ICA) should attend today. Mr Simmons responded to say he did invite the Canberra representative (Brian Hollis) of the ICA but they could not attend.

Mr Petherbridge feels that the limit of \$85,000 is fine for a residential house but not for multi storey unit apartments. Mr Collins said that there is no statutory legislation mandating insurance on multi-unit and that insurance companies will not cover it. Mr Petherbridge agreed to restrictions in the fidelity fund as he investigated this fund first and found nothing in the product that people need or could use for retrospective work/maintenance. Mr Collins informed the group that VIC is allowing for voluntary insurance however the take up is very low. Product is just not selling to consumers. People identify insurance as a last resort, however in circumstances a homeowner may take it up. Mr Collins said some people believe in taking due diligence and then taking the risk by not having insurance. Mr Barrett believes strife will occur when owners disadvantage themselves by paying the builders too early.

Mr Barrett said that the \$85,000 is not an issue. There have been 17,000 certificates of fidelity issued by MBA and only two were paid out to the maximum. The amount is enough if owners track their payments to builders and know when to pay builders. Mr Collins said insurance was only given to some builders if they have assets. Mr Barrett replied that many factors are taken into account, history, financial status and maintenance. If MBA do not give insurance to a builder then they go through HIA. The builders generally only go to the two insurers. Mr Simmons agreed that the issue of providing information to the consumer group was a factor, and having information on the importance and role of the payment schedule is probably needed.

Mr Thew put forth the idea that banks could come back into play like in previous generations whereby bank managers would check progress stages of building before issuing future cheques. Mr Collins said that work would continue instead of waiting for an inspection. Mr Barratt said that no everyone needs finance from a bank.

Mr Petherbridge said that Class 1 is not represented in the room however, it is under discussion. The meeting needs to focus on Class 2's. There is no parallel that can be used between Classes 1 and 2. Mr Collins replied that a scheme that works for Class 1 could be used for Class 2's to an extent as a class 2 could be a duplex/dual occupancy in some instances not just multi-storey residential.

Mr Barrett thinks that the \$85,000 limit is enough. The actuaries would not like to make the amount bigger with the current statistics being what they are.

Mr Collins identified that if the limit goes up, so will the premiums and that would affect housing affordability.

Mr Thew identified the same issue was raised in writing legislation for workers compensation. Steps taken included attempts at keeping premiums at a low, finding solutions, education and a triage program was introduced. Report and address the problem within the first 24 hrs so as to not have to investigate what they call the long tail of claims. Mr Simmons agreed this should be an approach. Insurance is the last stage. What can we do to stop the problem occurring the in the first instance? Where did a project go wrong?

Mr Barrett asked if there was a problems with buildings after 6 years of being built. Mr Moysey replied that ACTPLA has received complaints of this nature, not a numerous amount but they do exist. Mr Barrett asked if extended insurance coverage further than 5 years was on the cards, however it would affect premiums again. It was offered that the industry might be able to put up with a minority of cases in this instance. Mr Simmons asked Mr Andraanse and Mr Petherbridge to put together what they think the major issues are and how often these issues occur. Mr Petherbridge and Mr Andraanse agreed and will bring these to the next meeting. Mr Moysey and Mr Middlemiss agreed to sum up ACTPLA's complaints figures also.

Mr Barrett believes the issue is isolated to multi-storey developments around the 4-6 storeys mark. He does not see a trend of bad building in Class 1 buildings or the 10+ storeys high rises. Smaller companies do tend to take more shortcuts. Once again, educations and skills come into this.

Mr Simmons identified that builders that are licensed as a Class C builder have a Cert IV in Construction Building not Construction Management. This could pose a problem when they do start taking on more jobs as they may lack the skills to manage each job efficiently. Mr Andraanse said that all these problems can be addressed by the ACT legislation.

Mr Thew offered a suggestion of having a building defects fund that is modelled off an American and English one. If a claim is made then the money crystallises itself and it is taken out of a pool of money. This pool is used to draw on money when an emergency occurs and then parties put money into the pool retrospectively. Mr Simmons identified that there would be criterion and a set amount that would trigger the pool. It needs to be discussed however who would contribute to the pool.

Mr Collins said that good builders want their dodgy counterparts out of the market however will not appreciate having to pay out of their own pockets to fix dodgy work. Mr Barrett asked if this pool was to be considered for just Class 2, and Mr Simmons said it was. Mr Moysey identified the pool would be ideal for second owners where insurance does not exist anymore and the builder is no longer around. Mr Collins advised that if the insurers were to foot this future-pooling bill then insurers would pull out of the ACT market. Mr Petherbridge thinks that the pool should be a last resort, what would happen to the minor claims such as leaks, render and other obvious problems. It gets expensive just for builders to take notice. That is an issue to be discussed.

Mr Thew said that the best approach was coercion through legislation. Behaviour programs need to be put in place firstly. Insurance today is inadequate or not

available. Mr Simmons said also that body corporations would need education because if they are not diligent they can harm any claims to be made as they do not have the necessary organisation needed to make a claim. Mr Moysey said that the pool can be made using statutory powers. ACTPLA cannot provide civil action on behalf of individuals. They just do not have them. The insurance pool is about an agreement between parties.

Mr Petherbridge said more discussion is needed on what the real problems are first. Each discussion group needs to do this. Mr Simmons says the direction from government is not to rule anything out and consider all options.

Mr Barrett said that he thinks the current fidelity system works and wants to look at possible amendments to this before the pool idea is explored further.

Mr Adraanse wanted it noted that the ACT Government should consider being contributors to this pool from the first instance or be a major contributor and get the industry to pitch in the rest. Other ideas would include all forms of occupations pitching into this pool, whether by a levy on project work or otherwise. He also highlighted that when builders are found to be consistently dodgy, they could have to pay more into the fund. Mr Adraanse also said that the ACT government has to be seen by community as acting on this issue, this means they should take some responsibility in the finances.

Mr Simmons said that next time there should be more discussion around this idea. In Class 2's the issue is quality. When there is no one to chase, beyond reasonable expectations of body corporate than the ACT government may have a role. Mr Barrett suggested another idea was to cease dodgy builders from being able to bid for developments and projects.

Mr Moysey agreed to this but advised that the effort required to prove a case before a judiciary is significant. He gave an example of a recent case which took 6 months of work just to prepare a prosecution brief to the DPP (Director of Public Prosecutions). ACTPLA cannot name and shame under privacy laws until a decision from ACAT is handed down. Mr Simmons also spoke of another instance where ACAT had not yet made a decision on an ACTPLA matter which went before the tribunal in early 2009.

Meeting was adjourned at 5:20pm.

Key Outcomes:

- **Mr Andraanse and Mr Petherbridge to put together statistics/ideas on what they think the major issues are and how often these issues occur.**
- **Mr Moysey and Mr Middlemiss to put together complaint figures for Class 1 and Class 2 buildings to get a general idea of what problems keep occurring also.**

Next Meeting:

Date for the next meeting was to be decided via email.

Appendix K

Thursday 9 September, 2010
1.30pm
DPMB 16 Challis Street Dickson

Building Quality Forum Working Group on Insurance – Draft Minutes

Attendees:

Craig Simmons, ACTPLA
David Middlemiss, ACTPLA
Sean Moysey, ACTPLA
Tony Thew, ACTPLA
Stuart Collins, Housing Industry Association
Gary Petherbridge, Owners Corporation Network (ACT)
Jerry Howard, Master Builders Association of the ACT
Mark Poretti, ACT Law Society
Jan Browne, Strata Managers Institute ACT

Apologies:

Mr Brian Hollis, Insurance Council of Australia

Welcome

Mr Simmons welcomed the Working Group participants.

Minutes

The minutes of 24 August 2010 were accepted.

Mr Simmons asked participants to provide their views, comments and updates on key areas.

Mr Petherbridge stated that the main concern was with common property in multi-unit buildings and that there were recourses for problems in individual units. He noted that he had started to

draft a survey to help identify what and how many problems owner were experiencing with building quality issues.

Participants reconfirmed that better information should be provided to owners on the scope and function of residential building insurance, and how they can prevent problems by paying installments after satisfactory completion of certain stages of construction, not prior to the work being finished.

They also agreed that education for consumers on contractual obligations of both the owner/developer and builder in construction contracts and lease conditions is needed.

Insurance products

Mr Simmons outlined a possible reform to address problems with common areas in particular that had been discussed between ACTPLA officers as a result of discussions at the previous working group meeting. He suggested that insurance of a project starting from commencement to 10 years after completion, in line with statutory timeframes in the *Construction Occupations (Licensing) Act 2004*, could be used as a last resort (eg when rectification powers had been exhausted) for non-compliance with building code and Building Act matters. Insurance premiums would be shared between the developer and /or builder and body corporate, who share responsibility for correcting problems. The policy could be ‘front-loaded’ eg 70/30 so that the bulk of the premium is paid in the first few years by the builder/developer to better apportion costs to risks.

Participants noted that it was likely a general insurer may not have the expertise to underwrite the product but that a fidelity fund could be set up to support the scheme. There could be a case to government to provide funding for the fund.

It was noted that although it may be set up as a last resort policy, it will provide pressure to improve standards and fix problems to keep premiums low and possibly remove the need for the product in the future.

It was suggested that claims could also be made against professional indemnity insurance to recoup costs. Mr Simmons noted that ACTPLA was looking at models already in place in other jurisdictions and how the fund may be given the right of recovery of rectification costs from the builder. There was a suggestion that insurers could be involved at the building design stage to mitigate risks.

Dispute resolution

Mr Simmons suggested project insurance could be supported by a dispute resolution or mediation process specific to the construction industry similar to that in place for security of payments disputes, which allows owners to access specialists – possibly existing adjudication authorities – to decide a matter quickly. Decisions could be enforceable and appealable in court. Mr Thew noted that this would not deny owners or builders any rights they currently have. Mr Howard agreed that a rapid determination was required for both parties and the proposed process could cut down the time and expense in proving a defect. It was agreed that builders need to take more responsibility when taking over designs from the developer.

The following issues were identified to work through in developing any new insurance product:

- The trigger for accessing insurance.
- Creating definitions for common property/areas that is consistent across insurance, government and legislation.
- Addressing liability issues
- What recourse can be given if a building becomes uninhabitable
- Limitations to insurance and warranties
- How insurance is funded in the short and long term and by which parties
- Unit titles definitions and scope of owners corporation responsibilities must match the scope of work covered by insurance (noting the current review of the Unit Titles Act).

Liability

The group discussed the need to be able to determine liability for defects, and noted that this could be difficult and may be jointly shared between the developer and the builder in some cases. It was noted that mediation bodies should have the capacity to find the root cause of the problems and give advice on what needs to be done to rectify and the process should be of sufficient scope to bring in all practitioners or businesses that may be involved in causing a defect.

It was also suggested that works assessors may be able to play a role in certifying common areas for aspects not included in the building code.

Reporting of problems

Ms Browne stated that reporting of problems could be a concern as many strata managers do not have the expertise in identifying defects or reporting. It was agreed that mechanisms need to make it clear who is responsible for reporting problems and how this should be done effectively.

Funding

The group noted that additional resources would be required to support the proposals. There was discussion of the various levies and inspection fees that are currently administered separately and

whether there was a possibility for redirecting any of this revenue into regulation of the industry or introducing new levies or increasing stamp duty. It was noted that sinking funds were being accessed to fix defects although they are not intended for this use. Mr Howard stated that he would not want owners to have to carry the burden in a less-than-perfect development. Mr Collins suggested that the Government should underwrite the insurance scheme in its early stages.

The working group expressed interest in further exploring the possibility of an insurance product that acts/deals with a project that has a broad scope to bring in builder, developer and body corporate and would cover building code and Building Act issues.

Mr Simmons stated he would propose that the working group continue to refine the proposal throughout the rest of the year thanked the working group participants for their contribution and ideas.

Meeting closed 2.45pm.

Appendix L

Classification of Buildings in the Building Code of Australia

CLASSES OF BUILDING		
Class 1	Class 1a	A single dwelling being a detached house, or one or more attached dwellings, each being a building, separated by a <i>fire-resistant</i> wall, including a row house, terrace house, town house or villa unit.
	Class 1b	A boarding house, guest house, hostel or the like with a total area of all floors not exceeding 300m ² , and where not more than 12 reside, and is not located above or below another dwelling or another Class of building other than a private garage.
Class 2	A building containing 2 or more sole-occupancy units each being a separate dwelling.	
Class 3	A residential building, other than a Class 1 or 2 building, which is a common place of long term or transient living for a number of unrelated persons. <i>Example: boarding-house, hostel, backpackers accommodation or residential part of a hotel, motel, school or detention centre.</i>	
Class 4	A dwelling in a building that is Class 5, 6, 7, 8 or 9 if it is the only dwelling in the building.	
Class 5	An office building used for professional or commercial purposes, excluding buildings of Class 6, 7, 8 or 9.	
Class 6	A shop or other building for the sale of goods by retail or the supply of services direct to the public. <i>Example: café, restaurant, kiosk, hairdressers, showroom or service station.</i>	
Class 7	Class 7a	A building which is a carpark.
	Class 7b	A building which is for storage or display of goods or produce for sale by wholesale.
Class 8	A laboratory, or a building in which a handicraft or process for the production, assembling, altering, repairing, packing, finishing, or cleaning of goods or produce is carried on for trade, sale or gain.	
Class 9	A building of a public nature -	
	Class 9a	A health care building, including those parts of the building set aside as a laboratory.
	Class 9b	An assembly building, including a trade workshop, laboratory or the like, in a primary or secondary school, but excluding any other parts of the building that are of another class.
	Class 9c	An aged care building.
Class 10	A non habitable building or structure -	
	Class 10a	A private garage, carport, shed or the like.
	Class 10b	A structure being a fence, mast, antenna, retaining or free standing wall, swimming pool or the like.

Appendix M

Definition of building work in the *Building Act 2004*

6 Meaning of *building work*

(1) In this Act:

building work means—

- (a) work in relation to the erection, alteration or demolition of a building, and includes disposal of waste materials generated—
 - (i) by the alteration of a building other than a building excluded under the regulations; or
 - (ii) by the demolition of a building (but not part of the building); or
- (b) work in relation to repairs of a structural nature to a building.

(2) The regulations may—

- (a) exempt a kind of work from the definition of *building work*; or
- (b) include a kind of work in the definition of *building work*.

7 Meaning of *building*

(1) In this Act:

building includes—

- (a) a structure on or attached to land; and
- (b) an addition to a building; and
- (c) a structure attached to a building; and
- (d) fixtures; and
- (e) part of a building, whether the building is completed or not.

(2) However, *building* does not include—

- (a) a vehicle or craft that is not used or adapted for use as a class of building or structure classified under the building code; or
- (b) a transportable building, mobile home, caravan or similar that—
 - (i) is not used for long-term habitation; and
 - (ii) is readily transportable without being disassembled or removed from associated components including a footing, pier, stump, rigid annexe or an attached building or similar; or
- (c) if on the ground and not inside a building—paving, a driveway or a road; or
- (d) a surface-level carpark that is not inside a building; or
- (e) a ground treatment; or
- (f) vegetation; or
- (g) ground excavations or fillings; or
- (h) fittings, other than fittings included in a building—
 - (i) to make the building comply with the building code; or
 - (ii) that cause the building to not comply with the building code; or
 - (i) fixtures that are not integral to the building, but are fixed to the

building to prevent theft or for some other reason not related to the building; or

- (j) something exempted under the regulations.

Examples—par (h)

1 An existing house was built when there was no requirement for the house to satisfy any energy efficiency requirements or thermal insulation requirements. Bulk thermal insulation batts are included in an extension to the house to comply with the building code's energy efficiency provisions which apply to the extension. The opportunity is taken to include batts in the ceiling of the existing house. The batts sit loosely on the ceiling and are not fixed to the building. The batts are part of the extension, because they are regulated under the building code for the extension. However, they are not part of the existing house, because they are not fixtures, and are not regulated under the building code in relation to the existing house, unless they are needed in the existing house to make the extension comply with the building code.

2 Some light fittings in an office building are fitted with energy efficient lamps to comply with the energy efficiency provisions of the building code. The lamps are part of the building. However, other lamps that are not relied on to comply with the building code are not part of the building unless another provision brings them within the definition of *building* for the Act.

3 An office building has cubicles that are not fixed to the building. The cubicles have partition walls, are part of the fit-out for the building and are shown in the building approval. Some cubicles are placed where they obstruct a fire evacuation path in a way that prevents compliance with the building code. Those cubicles are part of the building. The others are not unless another provision brings them within the definition of *building* for the Act.

4 A warehouse is being extended. The warehouse stores furniture. Some partitions for cubicles stored in the warehouse impede fire evacuation paths relied on for the extension to comply with the fire evacuation provisions of the building code. The partitions cause the extension to not comply with the building code. The partitions are stored goods and not fittings, so they are not part of the building unless another provision of the Act brings them within the definition of *building* for the Act.

5 An apartment building has a surface-level carpark, part of which is below the apartments and part of which is adjacent to the building with no building above, below or within it. The part of the surface-level carpark below the apartments is part of the building or a separate building, depending on the building code. The other part of the carpark is not part of the building unless another provision of the Act brings it within the definition of *building* for the Act.

6 A concrete floor slab for a home is being poured together with a floor slab for a garage and a surface-level driveway to the garage. The floor slabs are parts of the building. The surface-level driveway is not part of the building unless another provision of the Act brings it within the definition of *building* for the Act.

- (3) To remove any doubt, something is not excluded from the definition of *building* only because it is temporary or novel.

Appendix N

Summary of reform proposals

Short term reforms

- a Mandate inspections of pre-sheet and wet areas stages of building work by building certifiers
- b Introduce provisional licence conditions for new building licence-holders that limit the number of projects they may undertake for the first two to three years of holding a licence
- c Create a statutory timeframe under COLA for a licensee to respond to a complaint about non-compliant building work
- d Establish a pro-prosecution and a pro-rectification policy towards developers and builders who fail to comply with the BCA when constructing Class 2 buildings.
- e ACTPLA and ORS to coordinate referral processes between the agencies and management of complaints common to both agencies.
- f Liaise with procurement agencies in the ACT to raise awareness of quality control processes in decision-making and statutory requirements for inspections and other proposals implemented to address building quality.

Medium term reforms

- g Introduce a complaint mediation and adjudication process for residential buildings modelled on the security of payments process.
- h Reform builders licence categories to reflect complexity and type of building.
- i Create an obligation on building licensees to ensure selected sub-trades hold a suitable level of qualifications.
- j Further regulate the extent of documentation, detail and quality of architectural, design and engineering drawings and specifications required for building work
- k Formulate a long-term skills development strategy
- l Implement a supervision requirement for jobs of a certain size or complexity
- m Investigate regulatory options for associated construction professionals
- n Implement a system of continuing professional development (CPD)

Long term reforms

- o Review the Building Act
- p Develop a new statutory form of insurance tailored to the project rather than to the owner

Annexure C: Master Builders ACT Building Regulatory Review Submissions, 2016

**Master Builders ACT
Submission to the ACT
Building Regulatory Review
February 2016**



MASTER BUILDERS
AUSTRALIAN CAPITAL TERRITORY

Contact Details:

Michael Hopkins
Deputy Executive Director

[REDACTED]

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About the Master Builders Association (ACT)

Master Builders ACT was formed in 1925 and represents the interests of around 1,200 commercial builders, residential builders, civil contractors, suppliers/subcontractors and professionals. The MBA ACT is also a Registered Training Organisation and a Group Training Organisation.

We would like to acknowledge our five Sector Councils and all of our members that have contributed to this submission.

1. INTRODUCTION

Reform of the ACT building regulatory system is long over-due.

Over the last two decades the building industry has become more complex and more sophisticated. This has resulted in industry participants needing more specialised skills and working in much larger project teams, even for domestic housing projects. The industry is embracing new technology at a rapid rate, not just in computer aided design, but in construction methods including pre-fabrication and 3D printing.

The ACT requires a modern building regulatory system which, not only, catches up with recent innovation in the industry, but also keeps up with new and emerging trends.

The MBA ACT has been a long-term campaigner for increasing building standards for the local building industry. As the peak body representing local builders, contractors, and professionals, we recognise that the industry is changing and regulation needs to respond. Failure by government to reform building regulation will lead to greater occurrences of poor building quality, more consumer complaints, and ultimately a loss of public confidence in this proud local industry.

The MBA ACT outlined reforms to the building regulatory system in 2015 with the release of its “Master Builders ACT’s Building Quality Policy Document”. The key policy objectives of this document are:

1. *Advocate to the ACT Government for the establishment of the Building Regulatory Advisory Committee.*
2. *Implement targeted professional development training for MBA members and the industry. Support the implementation of mandatory professional development training for all construction industry licensed practitioners.*
3. *Advocate to the ACT Government for the establishment of a peer review of Class 2 buildings greater than two storeys.*
4. *Implement two-day annual training seminars delivered by industry professionals for members and industry practitioners.*
5. *Develop proforma checklists for MBA members using a technology based document management system for recording critical hold point inspection stages on projects.*
6. *Advocate to the ACT Government for establishing a review of the current building certification and inspection system.*

The MBA policy objectives, as with the recommendations in the government’s Discussion Paper, set a broad policy direction. Further detail is required to expand each of the MBA policy objectives and proposals in the Discussion Paper, into workable and specific actions for implementation. We urge government to consult further with the MBA and other industry bodies regarding the detailed and specific implementation actions, and their priority for implementation. We also request that government consult extensively with the Building Regulation Advisory Committee (BRAC) regarding recommended reforms, priorities and draft legislation.

Finally, we would like to highlight the need for building regulation to be, to the greatest extent possible, consistent with other jurisdictions. The increased complexity of modern building projects and project teams means that many participants in the building industry work in multiple jurisdictions on a daily basis. This factor is more prevalent in the ACT because of our proximity to New South Wales. Nationally consistent building regulation is an important driver of productivity in the building industry.

We consider that now is an ideal time to move towards nationally consistent building laws with the Northern Territory and Victoria currently undertaking reviews similar to the ACT. Queensland has recently reviewed its building system. Further, the recent Federal Economics Reference Committee inquiry into insolvency in the Australian construction industry has recommended nationally consistent security of payment laws be introduced.

To assist in the review of our submission, we have adopted the structure of the government's Discussion Paper in making our submission.

2. PRIORITIES FOR ACTION

MBA welcomes the ACT government's commitment to reforming the building regulatory system. Such a reform is a vital part of improving building quality, giving community confidence in the local building industry, and in turn, protecting the many reputable operators in our proud local construction industry.

This is a wide ranging and in-depth review of the building industry. Such a substantial review of building regulation has not been implemented since the *Building Act 2004* was enacted. As such, it is important that the government strive for fundamental reform that stands the test of time for the next generation of Territorians, and not race for Band-Aid solutions that suit election timeframes.

The review's recommendations should be considered carefully and further discussion with the ACT community and the local building industry should occur, as well as through formal structures such as the Building Regulatory Advisory Council, before new legislation is introduced.

MBA's priorities for action focus on 5 key reforms:

1. Get builders licensing right from the beginning

- Invest in more rigorous assessment of new license applications at the start of a builder's career, including an assessment a builder's financial capacity.

2. Maintain standards

- Introduce a system of continuing professional development training for the construction industry.
- Audit registered training organisations for quality training outcomes.
- Introduce new measures at the time of license renewal to ensure skills and qualifications are being maintained.

3. Accountability is key

- Introduce greater accountability for corporate builders to avoid phoenix activity.
- Investigate additional license classes for building supervisors and key trade contractors.
- Hold licensed contractors accountable throughout the statutory warranty period.

4. Establish a fair, fast and low-cost dispute resolution process

- Increase the capacity of ACAT to deal with building disputes.
- Reform security of payment legislation to ensure subcontractors and builders are paid on time.

5. Make best building practice, normal building practice

- Introduce peer review of complex building projects at DA stage.
- Increase the level of design documentation.
- Support additional mandatory stage inspections.

3. DESIGN AND DOCUMENTATION

Minimum design documentation

Appropriately detailed and accurate drawings which form part of the building approval are the basis for quality building. The existing rules, which require minimum documentation for Class 1 and 10 buildings, have proved insufficient for the following reasons:

- Building certifiers have discretion to approve building applications without certain documentation. A system which allows discretion will inevitably result in some building certifiers taking a more risky approach in a drive to save time and money for their clients.
- There is currently no requirement for minimum documentation requirements for Class 2 to 9 buildings. This allows building certifiers to issue approvals, in some cases for substantial buildings, with no minimum legal requirement to document important building details or provide appropriately specified drawings to the builder.
- The minimum documentation required for Class 1 and 10 buildings is, in some cases, inadequate in that it doesn't require waterproofing detail, stormwater layouts, truss layouts, window details, expansion joints, external applied finishes and anti-corrosion measures.
- There is no safeguard to ensure drawings are prepared by registered architects or certified building designers.
- Minimum design documentation can currently be satisfied by providing 'typical' drawings which can be significantly different from the 'actual' building design. This is exacerbated by the Building Code of Australia (BCA) also including less 'typical' drawings to assist builders.

The MBA supports the government's intention to increase the minimum documentation required in building approvals, however we recommend these changes be implemented through expanding the current minimum document requirements, rather than discretionary guidelines. Higher quality documents and details will assist builders in applying appropriate methods during the project construction.

Specifically, we recommend that:

- The Minimum Documentation Requirements for Building Approval be expanded to include additional documents such as waterproofing detail, stormwater layouts, truss layouts, window details, expansion joints, external applied finishes and anti-corrosion measures.
- The "Required Information" as identified in the Minimum Documentation Requirements be expanded to call for specific plans, specifications and details of the actual construction method, as opposed to a typical construction method.
- New mandatory Minimum Documentation Requirements for Building Approval for Class 2 to 9 buildings be prepared.
- Design certificates for Class 2 to 9 buildings be required by the building designer(s) and sent to the building certifier prior to the building approval being issued.
- An Engineer's Certificate be required to certify the structural efficiency of Class 2 to 9 buildings against Part B of Volume 1 of the BCA. Liability for failure of the engineering design rest with the certifying engineer, rather than the building certifier.
- The Minimum Documentation Requirements (Approved Form AF2013-38) not allow building certifiers to exercise discretion by indicating documents are not required.
- Changes and new Minimum Documentation Requirements be prepared in consultation with the BRAC prior to being mandated.

Review of applications and approvals

Peer review of complex building design can be an effective method of resolving design conflicts at an early stage in the building design process, and can minimise the occurrence of design changes during the construction process. In some cases, building designers utilise peer review as part of their standard design process.

MBA is concerned about mandating a parallel peer review process in addition to the existing process of building design, approval and construction. Two parallel processes could create confusion about roles and responsibilities of everyone involved in the design process. A separate peer review process will also add unnecessary cost and potentially time delays to the building design process.

As an alternative, we support involving members of the ACT government's building team in the development assessment (DA) process for projects requiring a DA. The established process of pre-application meetings and DA assessment could easily be expanded to add a building professional to the team. The building professional would provide a preliminary assessment of projects for compliance with the BCA, provide an early assessment of alternative solutions, and identify specific minimum documentation requirements.

Recommendation:

- The proposed government peer review panel not be introduced as a parallel approval process in the form described in the Discussion Paper.
- A building professional (part of the ACT Government) be added to the DA assessment team to review the DA plans for compliance with the BCA and to identify high risk elements of the building which could be flagged on the DA conditions or result in additional Minimum Documentation Requirements.

4. STAGE INSPECTION AND ON-SITE SUPERVISION

Critical stages of work

To maintain quality standards at critical stages of work, the MBA supports the introduction of a checklist of critical construction items, similar to the stages of construction inspection requirements required by Building Certifiers. The checklist would be utilised on building sites to aid on-site operatives of the critical quality stages of construction that will be required to be certified.

To address this issue, we suggest recommendation 5 of the MBA Building Quality Policy be implemented, as follows:

- ***Develop proforma checklists for MBA members using a technology based document management system for recording critical hold-point inspection stages on projects.***

The objective of this checklist is that this critical hold-point checklist is completed by the person doing the work and signed off by the next person in the onsite management structure. The checklist is project-specific in that it reflects the particular quality issues on the job and is changed on the job to include new quality problems as they are identified, e.g. the floor tiling cannot be completed until the waterproofing system has been inspected and signed off as compliant.

Mandatory stage inspections

In addition to guidelines for hold points at critical stages of work, we support the additional mandatory stage inspections:

- For Class 1 and 10 buildings – implement an additional mandatory inspection for water proofing (internal and external)
- For Class 2 and 3 buildings – the existing mandatory inspections that apply to class 1 and 10 buildings apply, plus the additional inspection for water proofing (internal and external).
- For Class 2 to 9 buildings – additional mandatory inspections be considered for pre-sheet, passive fire protection and water proofing (internal and external) to match Class 1 and 10 buildings.
- For all buildings – ‘as built’ drawings be required for stormwater as inspected by the appointed certifier.

Government auditing and inspections

As acknowledged in the Discussion Paper, ACT government building inspectors may audit and inspect building work at any time. In fact, government has a responsibility to the ACT community to ensure building laws and regulations are being complied with. An effective auditing regime would focus limited government resources towards the highest risk cases, by targeting building inspector’s efforts as follows:

- In the design phase of projects (such as reviewing DA projects recommended above), and during construction, rather than focusing on responding to complaints after construction is completed.
- On building certifiers and builders with a history of complaints and offences, rather than auditing quality builders with a clear building record.
- Random audits in the first 2 years of a new licensee’s career.
- Audits of all building projects for a limited period in response to a trend of complaints about a particular building issue, for example balcony design on apartment buildings.

Building audits should have an overall focus on improving building quality and educating builders where non-compliances are identified. Where audits are undertaken in response to a trend of complaints, audit campaigns should be run in conjunction with a communication campaign to provide builders an opportunity address issues of non-compliance.

Further, to assist government building inspectors, building certifiers should electronically forward mandatory inspection records to government within 2 days, rather than all at the completion of the project.

Designated Inspectors

The Discussion Paper proposes a number of measures aimed at improving building quality, in particular the quality of apartment buildings (Class 2 buildings). MBA believes the most effective way to improve building quality is through a combination of these measures, in particular improved training, greater assessment of new license applications and a more effective dispute resolution process.

The introduction of an additional layer of designated inspectors, while attempting to address an acknowledged problem, risks introducing a layer of complexity and additional red-tape which is not warranted if alternative measures are introduced.

The introduction of designated inspectors into the existing contractual and approval regime risks confusing roles, responsibilities and accountability. It could create greater uncertainty and disputes between multiple parties could in fact increase as a result of introducing designated inspectors.

MBA believes the *Civil Law (Property) Act 2006* provides sufficient existing protection to owners that purchase apartments off-the-plan. If these owners encounter problems with building defects, the developer or building regulator will have right to enforce rectification of the building defects under the building contract (between the developer and builder), or using statutory warranties provided by law. Other recommendations in this submission will provide addition protection if the building company ‘phoenixes’ within the statutory warranty period.

5. BUILDERS AND BUILDING SURVEYORS LICENSING

Introduction

In its common meaning, the granting of a *license* to a person (or company) authorises or permits the person (or company) to do something. The issue of a license implies that the person (or company) is suitably qualified, experienced and skilled to perform the task. The ACT public should be able to rely on the issue of a building license as proof that a builder can perform building work to the minimum standard. The issuance of a license by the government to a person (or company) is also important because it establishes a system whereby license holders can be held accountable when problems occur.

In the case of building works, the current ACT builders licensing regime doesn't meet this objective. The current licensing system has the following failings:

- Many building practitioners (most notably key trade contractors) can perform work without a license.
- Many building licenses have been historically issued to people who do not have the necessary skills, experience and knowledge to undertake the work permitted by the license.
- There are insufficient safe-guards in place to ensure that a licensee's skills and knowledge continues to meet the minimum standard over their career.
- The license application process does not require any demonstration of financial capacity to complete building works.
- The license application process does not require any demonstration that the applicant possess experience in business management or knowledge of dispute resolution processes.
- Regulatory tools which hold licensees accountable when problems occur either don't exist, or existing tools are not used.

Builders Licensing

Formal Qualifications

MBA agrees with the proposal in the Discussion Paper that formal qualifications for builders' licenses be limited to qualification that includes a majority of content and competencies in building or construction management. This would necessitate civil engineering, structural engineering and architectural qualifications being removed from the qualification requirements for Class A, B or C licenses in Schedule 1 of the *Construction Occupations (Licensing) Regulation 2004*.

Holders of architectural or engineering qualifications would not be disadvantaged from applying for a builders license if these changes were made, because people holding these qualifications could enrol in a building qualification and be assessed using a Recognised Prior Learning (RPL) method should they wish to change fields.

Changes made in August 2015 to require at least one year (of the two year minimum) building experience to be post-qualification are supported as a small step towards a more effective ACT licensing regime, however much more is required to ensure public confidence in the system.

Building experience

Schedule 2 (Mandatory building work experience requirements) of the *Construction Occupations (Licensing) Regulation 2004 Mandatory Qualifications Schedule* currently identifies the standard of competency for each license class. This schedule sets out a broad range of competencies for each building class. MBA believes this schedule is sufficient to ensure applicants have necessary experience associated with each license Class.

In relation to question 3 on page 10 of the submission survey, applicants should be required to demonstrate a broad range of experience (as is currently the case), associated with the particular license class being applied for, however if this was to cover “all critical stages”, these stages would need to be defined. For this to be considered further, government should define the “critical project stages” and further develop the method for verifying building experience.

MBA does not believe demonstrating experience across a range of project stages is as important as demonstrating building experience associated with the particular license class (as currently exists). In other words, it is more important that an applicant for a Class A license demonstrate they have building experience associated with structural principles associated with Class 1 to 10 buildings, rather than demonstrating experience across a range of project stages which may be on Class 1 buildings.

Use of Restricted Licences

Applying restrictions (either permanently or temporarily) are an effective way of managing new licensees, or licensees that don’t fully meet minimum building experience requirements, or as a penalty for licensees that repeatedly commit an offence.

For new Class C license applications, consideration should be given to restricting the licensee to a maximum allowable turnover for a period of time. For example, a turnover limit of \$1,000,000 for the first year, or a limit of 3 residential projects, would be an appropriate restriction for new entrants to the industry.

In relation to question 2 on page 10 of the submission survey, where applicants for new Class A or B licenses don’t meet the building experience requirements, ideally those applicants should be given a lower class of license. For example, an individual that meets the minimum qualification requirements for a Class B license, but only has building experience on new housing construction, should be given a Class C license, not a restricted Class B license. When the applicant achieves 2 years of building experience in relevant to the Class B license, then an application to upgrade the Class C license, to a Class B license could be made.

Verification of experience

It goes without saying that claims of building experience on building license applications should be accurate, and should be verified by the building regulator. As with any legal document, an application for a building license must not contain false or misleading statements or give false or misleading information¹. Where the building regulator has doubts about the accuracy or legitimacy of a claim of building experience, they can rightfully verify claims made by the applicant.

As part of the assessment of a license application, the building regulator should verify building experience claims through the following means:

- Phone calls to references and past employers (listed on the license application form).
- Review of documentation signed by past employers outlining the relevant experience.
- Use of license review panels to interview applicants to test the applicant’s relevant knowledge and experience.

Further consideration could also be given to developing a log book to record building experience. This would assist apprentices and new entrants to the industry record and have verified relevant experience progressively, rather than attempt to document 2 years of experience at the time of making a license application.

¹ *Criminal Code 2002 (ACT)* states that it is an offence to make false or misleading statements or to give false or misleading information – refer sections 337 and 338.

Pre-license assessment

Pre-license assessment has emerged as a potential method of validating the quality of license applications due to the large variation in the quality of ACT based training providers. MBA Group Training has grown to become one of the largest, most successful, and highly regarded local providers of construction industry training. While we believe our focus on quality training will serve the long term interests of our industry, not all training organisations follow the same approach. Our focus on quality has translated into apprentice retention rates (first year apprentices that complete their training with the MBA) of more than 90%. This impressive statistic is a benchmark other training organisations across Australia can only aspire to.

Unfortunately, there are other ACT based training providers that mass-produce building graduates with a 12 week training course. In the eyes of the ACT government graduates from the 12 week course are seen equal to a graduate of a 4 year MBA building apprenticeship - which includes training, mentoring, on-site building experience supervised by local industry leaders, and 2 years of practical experience.

The MBA is supportive of any effort by the ACT government to improve the quality of training providers and their graduates. A pre-license assessment through a combination of panel interview and exam would highlight those training organisations that produce quality graduates, and those training organisation's graduates who fall short.

Alternatively, the ACT government could work with the Australian Skills Quality Authority (ASQA) to deal with rogue training providers. Specifically, the ACT government could advocate for training quality to be included in audits carried out by ASQA.

An approach which focuses on improving training quality would allow government to better utilise its finite resources to assess license holders (either pre-application or for license renewals) based on a risk approach. Applicants who have demonstrated a history of poor building practice, who fall short on relevant building experience, or who are applying for licenses under the mutual recognition program, could be the focus on assessment.

The pre-license assessment should be structured as follows (questions 6, 7 and 8 of the Discussion Paper submission survey):

- Cover building licensee's obligations, building standards, quality management and supervision, and legislative requirements.
- Comprise a combination of subjective assessment (through a panel interview of industry experts – if required) and objective (through a written assessment).
- Written assessment should be conducted by the government as an impartial regulator. Panel interviews should be coordinated by the government and comprise industry leaders (either current or retired builders with recent and broad industry experience).

Corporation and Partnership licenses, Nominees and Supervisors licenses

MBA supports the continued operation of company and partnership licenses. We also support the continued requirement to appoint a nominee for each company or partnership license.

To provide greater accountability for company and partnership licensees, the MBA supports measures which provide a greater connection between the nominee supervisor and the company, such as requiring a nominee to be a partner, director or officer of the company.

We also support additional assessment criteria being considered when granting new company or partnership licenses. As a potential model to identify additional requirements for company or

partnership licenses, consideration should be given to applying criteria similar to those already considered for pre-qualification for ACT government works. These criteria currently consider:

- Identification of company structure and organisation structure,
- Identification of any other pre-qualifications held in other jurisdictions,
- A detailed financial assessment,
- Confirmation of company insurances, including public liability,
- Demonstration of past experience of the company and past experience and qualifications of directors and/or key staff, and
- Demonstration of workplace, health and safety (WH&S) management systems and business management systems.

The assessment of a company or partnership license would result in an approval to complete building projects up to a maximum project limit, based on the detailed financial assessment. These licenses should be reviewed annually to allow financial information to be reviewed on a regular basis.

In addition to company and partnership licenses (with expanded assessment criteria) and nominee licenses, we also suggest further investigation be undertaken into the benefits of a new license class for building supervisors. Supervisors manage the day-to-day operations of the building site, and are critical to building quality. This new license class should include minimum experience and qualifications, and be renewed annually. A potential model for further investigation is the supervisor license class currently operating in Queensland.

Recommendation:

- That company or partnership licenses be retained with additional assessment criteria, including financial assessment, experience and qualifications of directors and/key staff, demonstration of WH&S and business management systems.
- That the nominee supervisor be a single person (not multiple people who collectively meet the minimum qualification and building experience requirements).
- That the nominee supervisor be an officer, director or partner of the company.
- Investigation be undertaken into the benefits of introducing a new license class for building supervisor, including identifying minimum qualification and experience requirements, with the licensed supervisor to be subject to the same disciplinary action as the related company or partnership license.

Trade Contractor Licensing

As stated earlier, it is important that all participants in the construction industry can be held accountable for work in the ACT. This principle applies to developers, builders, architects and building designers, engineers and building surveyors.

In the ACT the main omission from the building licensing system is key trade contractors. With limited exceptions, trade contractors do not currently require a license to undertake work. This is out of step with some other Australian jurisdictions such as New South Wales and Queensland (which require trade contractor licenses for an extensive list of residential and commercial trades). Recently the Northern Territory government has sought to introduce licensing for all builders and trade contractors performing work over \$12,000. There have been similar calls for licensing of trade contractors in Victoria. Some trade contractors operating in the ACT also hold contractors licenses in New South Wales.

It is important that trade contractors be licensed and held accountable for the quality of their building work, because the nature of modern day construction relies heavily on work that is carried out by trade contractors, under supervision from a builder. As the construction industry becomes more

complex and more specialised fields emerge, this trend would be expected to increase. Two issues will emerge from this trend:

- Firstly, the importance of builders to hold skills in business management, project management and supervision will increase. MBA has previously advocated for greater on-site supervision training for builders. The Senate Inquiry into Insolvency in the Construction Industry has recommended more business management training be completed by builders.
- Secondly, trade contractors will perform an increasing amount of building work. This will lead to disputes, building defects, non-payment issues which increasingly result from the actions of trade contractors, rather than builders. An effective means of resolving disputes involving trade contractors must be implemented.

Recommendations:

- That further investigation be conducted into the benefits of requiring key trade contractor licenses (for companies and individuals) be required for trade contractors undertaking work more than \$12,000, and that minimum experience, qualification and license application processes be implemented similar to those in place for licensed builders.
- That a new license class be created for building supervisor (residential and commercial), with minimum qualification and experience requirements associated with supervision.

Renewals and ongoing eligibility

The MBA has long-supported greater scrutiny of license renewals to ensure license holders are maintaining the minimum skills that are tested at the initial license application stage through minimum qualification and building experience requirements. In addition to confirming that licensees have maintained relevant experience and qualifications, license renewals should require a higher level of assessment at renewal stage, if:

- The licensee has had a long period of inactivity,
- The license has demonstrated a track record of breaches of the Building Act or Regulation, or
- A significant change in the licensee's financial capacity.

In addition to this review at license renewal time, the MBA recommends the introduction of a continuing professional development (CPD) scheme. CPD schemes currently operate in other jurisdictions and for other industries as a method of ensuring license holders maintain minimum knowledge requirements. The CPD scheme would require licensees to undertake regular quality training, provided by registered training organisations, and aimed at recognised deficiencies in current building practices, for example internal and external waterproofing, business management, or supervision.

Builders licensing - other considerations

The Senate Economics Reference Committee report into Insolvency in the Australian construction industry has made a number of recommendations which should be considered by the ACT government as part of this review of the building regulatory system.

While the Senate committee's focus was on insolvency in the construction industry, and the majority of recommendations are aimed at reducing insolvency, a number of recommendations highlight sensible improvements to builders licensing.

In particular, the Senate committee recommended the following in relation to licensing:

Recommendation 33

11.38 The committee recommends that each state and territory licensing regime contain three key requirements:

- *that licence holders demonstrate that they hold adequate financial backing for the scale of their intended project. This capital backing requirement should be graduated, with increased levels of proof required for more significant projects;*
- *that on registration, licence holders provide evidence they have completed an agreed level of financial and business training program(s), including principles of commercial contract law, developed in consultation with industry bodies; and*
- *that licence holders demonstrate that they are a fit and proper person to hold a licence.*

The committee made a number of other recommendations which, if implemented in the ACT, would improve the builder licensing system, building quality and provide greater consumer protection. The recommendations of the Senate Inquiry should be considered in conjunction with the submissions to the ACT Discussion Paper.

Building surveyors licences

The focus on building surveyors licenses is an important component of improving building quality. As the Discussion Paper states, building surveyors acting as certifiers must understand ACT-specific building and planning legislation.

An additional ACT-specific training course for surveyors from other jurisdictions intending to work on ACT projects is supported. The course should be sufficient to ensure surveyors are fully trained in ACT-specific building and planning legislation so that surveyors trained in other jurisdictions are equally skilled to ACT trained surveyors. The training should be rigorous enough to remove any incentive for ACT-based surveyors to short-cut the training requirements by obtaining necessary qualifications in other jurisdictions and then completing the proposed ACT training course.

Professional indemnity insurance

It is important to consider whether the proposal to require mandatory professional indemnity (PI) insurance for builders is intended to cover builder's professional advice, or also cover against defective building work. Many builders, particularly commercial builders, hold PI insurance because they are involved in design and construction projects. This PI insurance would protect the builder's input into the design process, but not against defective work. PI insurance to cover defective work, while available through a limited number of insurance providers, would add a substantial cost to building companies.

MBA considers that existing regulatory tools, with the addition of improvements recommended in this submission, provide government sufficient regulatory power to hold builders accountable for defective work, without the need for mandatory PI insurance. We support the continued use of PI insurance by some builders on a voluntary basis.

Owner builder licensing

MBA also suggests that a review of licensing rules for owner builders be carried out. Presently owners can undertake building work on Class 1 and 10 buildings with very limited training or accountability. We recommend the government investigate removing owner building licenses for Class 1 buildings, and restrict this form of licensing to Class 10 only.

6. CONTRACTS FOR RESIDENTIAL BUILDINGS AND BUILDING WORK

Standard contract provisions

Adding some more rigour to the legislative framework controlling residential building contracts is supported. Greater consistency, definition of common terms, and improved consumer protections will benefit all stakeholders involved in the building process.

Stages of Work

MBA is supportive of adopting common definitions for stages of work. Definitions for the following stages are suggested:

- Base Stage
- Frame Stage
- Lock-up Stage
- Fixing Stage
- Painting Stage
- Practical Completion

Stages of work are also important for builders because they represent hold points for payment. The nature of the building process means that builders carry the cost of supplying materials and providing labour at their cost until a payment stage is reached. For complex projects the time periods between stage payments can be many months. Between payment stages, builders would typically have to make multiple payments to suppliers and subcontractors. For complex projects, MBA is supportive of allowing contracts to vary the standard progress payment approach. For example, payments may be scheduled monthly, or additional payments stages may be added. It is important that this flexibility be retained.

Changes to the buildings or materials

Changes to the building or changes in building materials are items which should be specified in detail and form part of the contract of sale between the developer and owner. A dispute resolution process for these contractual disputes is required, and the suggestion to refer them to an alternative dispute resolution process, prior to expensive litigation, is supported.

Agency – residential owners

MBA is supportive of measures to help consumers understand the role of certifiers and their relationship with the builder. As the Discussion Paper states, the MBA has elected to remove the clause which would allow the client to authorise the builder to appoint the certifier from our standard domestic building contract. However, we remain supportive of an owner appointing a builder to make this appointment of their behalf.

To address this issue, we are supportive of legislation remaining unchanged, except for the addition of a contract warning statement or contract information statement² informing owners of their legal right to appoint a certifier of their choice.

Statutory warranties for residential building work

MBA is supportive of clarifying the applicability of statutory warranties for apartment buildings over 3 storeys, where there is currently doubt arising from the recent High Court decision (*Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*). The existing statutory warranty provisions should apply to apartment buildings as proposed in the Discussion Paper.

² See example: <http://www.qbcc.qld.gov.au/sites/default/files/Construction%20Management%20Contracts.pdf>

In making this clarification, the MBA recommends the existing statutory warranty periods (2 years for defects in non-structural elements of the building and six years for defects in structure elements) remain unchanged.

Further, we support the retention of the existing home warranty insurance provisions, and recommend these not be increased beyond the current \$85,000 limit, nor should they be increased to apply to residential buildings for medium-high rise buildings.

Maximum progress payments

The MBA is not supportive of capping progress payments to \$85,000. For a common house contract of ~\$400,000 there is typically payment of a deposit, 4 progress payments and a final payment. Payments at enclosed stage and fixing stage combined can often comprise 50-60% of the total contract price (more than \$100,000 for each stage of a \$400,000 contract). Many building contracts involve contract values far in excess of \$400,000, and sometimes more than \$1 million.

Capping progress payments at \$85,000 would result in many more progress payments being required over the contract period, resulting in additional administrative costs for builders and for banks (who typically authorise each progress payment).

During the 13 year operation of the MBA Fidelity Fund, claims resulting in a maximum payment of \$85,000 are rare. This indicates the benefits of aligning maximum progress payments with the maximum insurance limit would only apply to a very small number of claims.

MBA is aware of a limited number of disputes where an owner has paid for work yet to be completed. Where these disputes involve the insolvency of the builder, the owner may have an exposure of more than \$85,000. To address these cases, we support further investigation of introducing greater protections in the Building Act to prevent builders invoicing for work not yet completed. If a builder was restricted from invoicing for work not yet completed, in the event of an insurance claim, the maximum exposure for the home owner and insurer would be for the work completed since the last progress payment.

Accountability for contractors

This section of the Discussion Paper deals with an important issue concerning the ‘phoenixing’ of companies to avoid accountability to owners of apartments, subcontractors, or to avoid disciplinary action from the building regulator. This is a national issue which has specific impact in the ACT in relation to apartment buildings.

MBA supports measures which would operate to act against the fraudulent ‘phoenixing’ of companies. Our national policy on phoenix company activity was communicated to the Federal Government at the time of the release of the Cole Royal Commission Report into the Building and Construction Industry³.

At the time, Master Builders Australia supported a number of the recommendations that were made by the Royal Commissioner. Recommendation 106, in particular, related to the need for greater scrutiny of ASIC registers and better enforcement of the current law. The issue and recommendation is as follows:

There is evidence of persons associated with fraudulent phoenix company activity in the building and construction industry being appointed as directors of companies operating in the

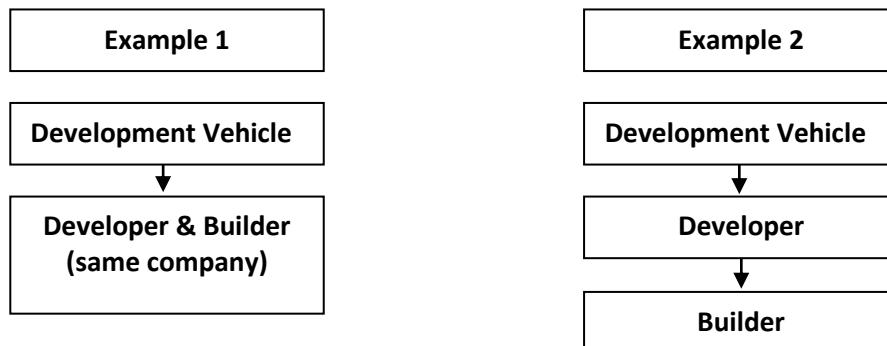
³ Final report of the Royal Commission into the building and construction industry February 2003
<http://www.royalcombc.gov.au/hearings/reports.asp>

building and construction industry, although they are bankrupt and disqualified to act as directors, without being detected by the regulatory authorities.

The measures developed by the Australian Securities and Investments Commission to check all new company officers against the national Personal Insolvency Index and to check that current directors have not been declared bankrupt appear to address this issue and should be implemented without further delay⁴.

A number of recommendations, if implemented, from the Cole Royal Commission and the more recent Senate committee report on insolvency in the construction industry would help address this issue. Such measures include introduction of simple safeguards around identification of company director, underpinned by an identification process along the lines of the 100 point identity check required to establish a bank account, would enable the monitoring of director registration (including the detection of disqualified or fraudulent directors), the collection of data regarding director appointments over time (to establish patterns of director involvement in repeat business failures), and detection of possible fraudulent and phoenix activity by the Inter-agency Phoenix Forum and investors.

Further measures could be established by the ACT government to specifically address problems with the construction of apartment buildings, and the enforcement of statutory warranties after a building is completed and occupied. To explain these measures it is first important to understand that apartment buildings are generally developed and built using one of two company structures, as illustrated below:



Problems occur when the development company (in example 1) or builder (in example 2) voluntarily close within the statutory warranty period. In this case, body corporates or individual unit owners have limited opportunities to enforce the statutory warranties because the licensed entity no longer exists.

In order to avoid this problem, MBA is supportive of imposing a requirement on the licensed builder to pay a bond to cover potential building rectification if the licensed entity is voluntarily closed within the 6 year statutory warranty period.

⁴ Final report of the Royal Commission into the building and construction industry February 2003
<http://www.royalcombc.gov.au/hearings/reports.asp> (Vol 8 Chapter 12 at 165)

7. PROJECT FUNDING, PAYMENT CLAIMS AND RETENTIONS

Section 5 of the Discussion Paper addresses the inter-related issues of project funding, payment claims and retentions. These issues have also recently been considered by the Federal Senate Economics Reference Committee's inquiry into insolvency in the Australian Construction industry. MBA ACT, MBA Victoria and Master Builders Australia made submissions to the Senate Inquiry. The inquiry also considered a 2012 Submission from MBA NSW to the "Inquiry into Construction Industry Insolvency in NSW" which also considered project funding and payment claims.

These submissions have consistently acknowledged that payment claims are an important, yet complex, problem that requires addressing.

Prompt payment is a critical issue for the construction industry, as delays in payment and non-payment can have a dramatic impact on the viability of the industry, especially on some of the smaller operators who are not in a financial position to sustain extended periods of non-payment.

The nature of the industry is such that payments lag behind work-in-progress. When a builder, owner, principal contractor, subcontractor or developer has financial problems and accounts go unpaid, these lags increase. Subcontractors and suppliers who continue to service a project, despite non-payment, can carry a large exposure to their clients. This has a flow-on domino effect as subcontractors also have debts to suppliers and their own workforce.

While subcontractors vary considerably in size and resources, the majority are small entities, and as with most other building industry participants, many subcontractors work on low margins. Consequently they do not have the resources, training or experience to absorb large debts or a series of losses.

Security of payments – progress payment claims

In 2015, MBA ACT conducted a survey of our members to better understand the potential problems that confront our industry. The results of this survey are summarised below.

The survey respondents were from various sectors of the industry and were both head contractors and subcontractors, as summarised below.

Question 1: What industry sector do you belong to?

Answer choices	Responses (%)	No.
Residential	36.84%	21
Commercial	40.35%	23
Civil	8.77%	5
Professional/Consultant	3.51%	2
Supplier	5.26%	3
Other	5.26%	3

Question 2: Are you predominately a:

Answer choices	Responses (%)	No.
Head contractor	40.35%	23
Subcontractor	56.14%	32
Other	3.51%	2

Question 3 asked “How often have you experienced payment issues (non-payment, delayed payment or disputed payment) in the construction industry?”

Around half (54%) of respondents reported non-payment, delayed payment or disputed payments were an issue for less than 25% of projects, or never. While around half (46%) of respondents reported they experienced payment issues on more than 25% of projects. While non-payment or delayed payment does not always lead to an insolvency event, and insolvency is not always caused by non-payment or delayed payment, there is obviously a connection between timely payment and solvency. Based on the results of this survey and consultation with members, payment issues in general are a significant issue for the whole of the construction industry.

Question 4 asked respondents “Have you ever pursued legal action through the ACT’s Security of Payment Act for a payment dispute?”

Only 12% of respondents answered Yes, and only one respondent reported the legislation was effective in resolving the payment dispute. Around two-thirds of respondents either had no experience using the Security of Payment Act, or believed it would be ineffective, unreasonable and/or too complicated.

Question 5 asked “Of the payment disputes you have been involved in, what was (in your opinion) the underlying source of the dispute?” (Respondents could indicate more than one reason)

Respondents reported a wide range of reasons why payments were not made or delayed, including (note respondents could indicate more than one response):

- Late payments from head contractors (49.09%)
- Unreasonable or low valuations against the contact works (23.64%)
- Non-payment of approved variations for works completed (32.73%)
- Payment disputes relating to building quality or defective work (16.36%)
- Contractual pre-condition issues (10.91%)
- Completion time or program issues (12.73%)
- Contract disputes over the meaning of written terms (29.09%)
- Other (34.55% generally relating to contract matters)

Subcontractor workshop

MBA held a workshop with subcontractor members to discuss the results of the member survey in greater detail. The key feedback received from this workshop was as follows:

- In general terms participants reported that the incidence of payment disputes in the ACT was much less than in other jurisdictions where ACT members were active. This was possibly due to the fact the ACT is a smaller jurisdiction where construction industry participants were well known to each other and have good working relationships, making communication easier.
- Participants reported that where there was a high degree of two-way communication between head contractors and subcontractors, payment disputes were generally less, were resolved quicker, and were more often resolved without litigation.
- Participants reported that industry associations (such as the MBA) played an important role in minimising the incidence of payment disputes. Industry associations play a role in educating members about security of payment legislation, act as a mediator to help resolve payment disputes, and provide advice to members to help resolve disputes. These services were seen as valuable for members.
- In regards to ACT Security of Payment legislation, most subcontractors preferred to only use legislation as a solution of last resort. Reasons for this include the costs and time involved, and

the relationship damage that would likely occur with the other party if payment was pursued through a legal process. Members that had attempted to use the ACT Security of Payment legislation to resolve payment disputes found definitions in the Act unclear and the legislative process complex and difficult to follow.

Participants also discussed the use of trust accounts as a possible solution which is discussed in the following section.

Retentions and building project accounts

The MBA NSW 2012 Submission to the “Inquiry into Construction Industry Insolvency in NSW”, considered in detail the use of project accounts and trust accounts as a potential solution to payment disputes. As the MBA NSW submission notes, in July 1996 a comprehensive analysis of the consequences attached to introducing trust arrangements into Australian construction contracts was undertaken by Price Waterhouse for the then National Public Works Council Inc, as part of proposed means to improve the flow of funds to subcontractors in particular (please see www.apcc.gov.au).

The conclusion at the time was that the complex commercial and administrative burdens and obligations of trusts would be likely to prevent their implementation on a widespread basis throughout the building and construction industry.

Based on specific feedback from MBA ACT members, while a small group of subcontractors have reported that they support the use of trusts, the overwhelming view from all sectors of our membership is that trusts will not help the payment of money throughout the contractual chain, for three main reasons.

Firstly, trusts place a significant administrative burden on builders and subcontractors. This additional cost will inflate the cost of building. An example that was discussed at our subcontractor workshop involved a series of trust accounts being setup for each subcontractor (one for progress payments, one for disputed amounts) working on a single project. For a typical small commercial project, the head contractor may employ many dozens of subcontractors, and those subcontractors would in turn employ sub-subcontractors. In this example more than 100 separate trust accounts may be required for one project, with each payment requiring approval from the subcontractor, the head contractors, and the financier. For a construction project that processes dozens of invoices on a weekly basis, the addition of trust accounts into the process would quickly strangle the project in administrative red tape, and most likely result in slower payments.

Secondly, the use of trust accounts assume that future progress payments can be accurately determined so that the next progress payment amount is paid in a trust account to be used to pay subcontractors and suppliers. This assumption does not recognise how building projects are actually priced and delivered. For example, not all contracts have fixed progress payments. Some works are completed on an agreed price per square metre (eg. of paving) or price per cubic metre (eg. of earthworks). It is simply not possible to accurately estimate the future progress payments to be paid into the trust, as assumed by proponents of trust accounts.

Thirdly (and probably of most importance), trust accounts will not result in contractors being paid any quicker. The assumption behind paying progress payments into trust accounts is that funds to pay contractors would otherwise not be available. However, as the MBA survey results suggest, there are a range of reasons that drive non-payment, including disputes about contractual terms, late payments issues and administrative and quality issues. Trust accounts would not resolve such disputes and may even prolong payment where there is no dispute.

For most contractors who pay claims on time, trust accounts only add an additional level of administration into the payment process before contractors are paid. This may in fact have the reverse

effect and lead to payments being further delayed because of the additional administrative process. Where there is a payment dispute and contractors are not immediately paid until the dispute is resolved, the same dispute resolution time frames will apply under existing legislation. MBA cannot find any evidence suggesting that the use of trust accounts will result in faster payments, fewer payment disputes, or fewer insolvency events.

Senate Inquiry Recommendations

The Senate Economics Reference Committee handed-down its report in December 2015, including 44 recommendations the committee believes would overcome many of the challenges the construction industry faces in dealing with its unacceptably high rate of business insolvency.

In relation to project trust accounts, the committee recommends:

Recommendation 29

10.55 The committee recommends that commencing as soon as practicable, but no later than 1 July 2016, the Government undertake a two year trial of Project Bank Accounts (PBAs) on no less than twenty construction projects where the Commonwealth's funding for the project exceeds \$10 million.

Given the recommendation of the committee and considerations by the Federal Parliament currently underway, we recommend the ACT government allow the Federal government to consider the committee's recommendations, before progressing with any ACT-specific proposals in relation to project trust accounts.

The committee also makes a number of other recommendations, including (but not limited to) additional training and education for industry participants in relation to business management and security of payment laws. We are supportive of these recommendations and suggest the ACT government further consult with industry on the full list of committee recommendations to identify which could be progressed within the ACT.

Other relevant matters – payments from home owners

An important issue affecting small subcontractors and residential builders is securing payments from home owners. Many of our members are small subcontracting businesses that work directly for home owners performing maintenance work, repairs, small renovations and the like, or are residential builders who work directly for home owners. Based on feedback from our Residential and Subcontractor/Supplier Sector Councils payment from home owners is a major issue for this sector of the industry. The current provisions in the ACT Security of Payment Act apply to owner/builders issued with a license under the Construction Occupations Licensing Act, however, these provisions do not extend to owner/occupiers.

We recommend any review of the ACT Security of Payment legislation should strongly consider including owner/occupiers being subject to the provisions of the Act where they enter into contracts with builders.

Market manipulation in the commercial industry

As detailed in the Final Report of the Royal Commission into Trade Union Governance and Corruption, there are significant levels of union-coordinated market manipulation in Canberra's commercial construction industry, a matter now being probed by the Australian Consumer and Competition Commission (ACCC).

In a market where builders are essentially management teams, with most physical construction undertaken by specialist contractors, the ACT CFMEU is extremely effective in determining the

allocation of work by builders. For fear of site disruption, builders tend to award contracts to those businesses which are nominated by the union, i.e. those contractors which have met union demands. Those demands include pattern ACT CFMEU enterprise agreements (EBAs) payment for union memberships, ‘donations’ to the union or related entities, or (in the case of one former ACT CFMEU official) even cash payments. Additional pressure is also placed on subcontractors through intimidation.

The evidence of these tactics cannot be denied. More than fifty witnesses gave evidence in Canberra about threats by the ACT CFMEU to exclude them from the commercial construction industry. Consider the testimony of a small formwork company-owner’s evidence before the Commission. He was told by a CFMEU union official to sign the union’s pattern EBA as “this is the way the industry is going... we will take control of the jobs. We will ... tell... you which ones you can and can’t go on”, before offering “other ways” to come to an “arrangement”, including “donations” or payment for memberships. When he said he couldn’t afford these demands, the official said he “didn’t give a f*\$k about small businesses” and ordered a builder to black-ban the company and engage a union-endorsed rival.

In an AFP phone tap played before the Commission, a union official told an employer that, if he didn’t pay for some more union memberships, the union would ensure that the company “won’t be doing any work on commercial sites” – effectively a threat to put the company and its employees out of work.

Following the Royal Commission, three ACT CFMEU officials have been referred to Fair Work Building and Construction for allegedly coercing employers to pay for union memberships, with one official referred for prosecution for allegedly taking adverse action against an employee because they did not want to join the union. An ex-ACT CFMEU official is also on criminal blackmail charges for allegedly extorting more than \$200,000 from contractors.

Research undertaken by MBA suggests that unlawful exclusion from the marketplace is widespread. In a 2014 survey of approximately 100 members:

- 58 per cent reported threats by the ACT CFMEU to exclude them from the market if they did not agree to the CFMEU’s pattern EBA;
- 32 per cent reported being asked to make ‘donations’ to the ACT CFMEU or related business entities in exchange for ‘industrial peace’, with 7 reporting being asked for what they considered to be bribes;
- 51 per cent reported being told by the ACT CFMEU that they could not perform work unless their employees / subcontractors joined the ACT CFMEU;
- 71 per cent reported verbal intimidation by the ACT CFMEU; and
- 41 per cent of approximately reported physical intimidation by the ACT CFMEU.

The effect of these behaviours of the solvency of companies which do not meet union demands is obvious – they are excluded from the commercial market. For those companies that ‘pay the price’ of entering the commercial market, the various on-costs associated with the pattern EBA (which requires payments to union entities and imposes a range of restrictive work practices) and other union demands diminishes their competitiveness.

Nevertheless, over the short-to-medium term, such contractors are able to prosper despite their higher costs, because competition from companies with lower costs is suppressed by the ACT CFMEU, at times with employers’ active cooperation.

In a series of text messages aired before the Royal Commission, a contractor informed a union official that a competitor (one without a pattern CFMEU EBA) had won a contract and that the official should

"hammer him". A phone tap revealed the union official as having told the competitor that he "can't be going around pricing", with the official saying: "I need to give you rates, I need to get you an EBA if you want to do commercial [work] ... we've ... got a system in place and can't have you f\$*kin' disrupting it."

The effect of the ACT CFMEU's industrial tactics over time leads to the creation of union-coordinated construction cartels, whereby the market is effectively shared amongst union-nominated contractors, who win the bulk of contracts from builders. This tends to entrench market dominance of larger businesses – those who can afford the union's demands. Emerging small-to-medium sized (and often more innovative) competitors are excluded from the market, unless they submit to labour costs that may be unaffordable at their economy of scale.

Over the longer term, the restricted competition in the sector pushes up construction costs and impedes growth. This is the established pattern of cartels: over the short to medium term, they produce super-profits, but over the long term, their inflated costs reduce demand. The suppressed competition resulting from such practices is a major factor in inflating construction costs, which is hard to calculate but has been estimated at between 20 to 30 per cent.

As prices reach 'breaking point' and consumers look to more affordable accommodation, office and retail space, competitors bearing artificially inflated costs become extremely exposed in the event of free-competition. Those companies with lower costs tend to increasingly win work as builders turn to cheaper alternatives in order to maintain their market share.

MBA considers that market manipulation is a significant factor restraining the growth of the commercial construction sector, with obvious impacts on the liquidity of those which are able to compete, as much as those which are excluded from the market. This operates vertically to reduce demand and drive insolvency events, while the distortions in the sector create an environment in which boom / bust cycles are exacerbated.

MBA welcomes the ACCC investigation into market-sharing arrangements and possible price-fixing in the commercial sector. Evidence of price-fixing is perhaps the clearest indication that unsustainable costs are being borne by competitors, who are effectively forced to pay a variety of rents in order to survive and must then cooperate to enforce price floors to win work.

Reforming the sector to eliminate these kinds of market distortion is 'low hanging fruit' for increasing economic activity in Canberra, which is one of the surest ways to reduce insolvency events.

Recommendations:

In relation to project funding and retentions, we recommend as follows:

- The ACT government working with other State and Territory governments and the Australian government to review the recommendations from the Senate committee, with a particular focus on the committee's two major recommendations on project trust accounts and nationally consistent security of payment laws.
- Subject to agreement by the Commonwealth and other States/Territories, the review focus on trust accounts for retention amounts only, where retention amounts could be held in a single trust account established by the builder (or subcontractor, for retentions held for their sub-subcontractors). The single trust account would be subject to regular audit by a regulator and amounts quarantined in the event of insolvency.

In relation to security of payment:

- MBA is supportive of establishing a maximum period in a contract for payment of a progress payment to a subcontractor once a claim has been made (question 10 of the survey). The maximum period for payment should be 45 days, allowing 15 days to make a claim and 30 days for payment.
- MBA is supportive of amending legislative so that any form of request for payment in writing is deemed to be payment claim. This will remove any discretion from subcontractors to decide if a request for payment is being made as a formal payment claim, or not. Criteria would need to be established to clarify that only one payment claim could be made for each progress payment, and the definition of “payment claim” would be needed to avoid confusion.
- Further investigation be undertaken into making requests for release of retention claims to be covered by Security of Payment laws.
- That security of payment legislation be expanded to make home owners subject to these laws in the event of a payment dispute between owner/occupiers and builders.

8. ALTERNATIVE DISPUTE RESOLUTION – RESIDENTIAL BUILDING

The MBA agrees with the Discussion Paper's analysis of the limitations of the existing processes. The main issues, from the MBA's perspective, are:

- One-way scope of complaints process: The licensing complaints process deals only with allegations of defective work and not the (often related) issue of an owner's failure to pay. There is presently no forum for builders to seek resolution of payment issues outside the courts⁵.
- Processes are slow: Both the complaints process and the litigious processes are slow. Ideally defects disputes ought to be resolved within weeks or months, not years. The longer the dispute brews, the more the parties become entrenched in their positions. Further, where the builder is in breach, the ultimate loss caused by these breaches is magnified due to delay in determining liability. For apartment complexes, the owners corporation has obligations to unit owners for damage caused to apartments, which may mean that instead of finding a solution to the underlying issue quickly, rectification 'band aids' are used to comply with demands of unit owners until the builder's liability is determined. For single dwelling construction, a dispute about defects during construction usually means that payment stops and work stops. The owner may be unwilling or unable to complete construction with another builder until the dispute is resolved, causing the owner to claim the cost of alternative accommodation, interest, and other costs whilst the site sits idle. These costs may be completely disproportionate to the cost of rectifying the original defect.
- Processes are expensive: Due to the need for expert evidence in defect disputes, and what are usually complex contractual interpretation arguments about defining the scope of work, the litigious process is difficult to navigate without legal advice. That advice is often prohibitively expensive on disputes of less than \$100,000. Whilst the ACAT is significantly more user-friendly, its jurisdiction is only \$10,000. Most building defect disputes exceed this jurisdiction. For disputes under \$10,000 the cost of preparing the necessary expert reports (even if no lawyer is engaged) can quickly outweigh the amount in dispute. Because ACAT is a no-costs jurisdiction, those costs cannot be recovered.

The MBA supports an ADR model (eg. arbitration, expert determination, neutral evaluation, conciliation or mediation). However, the MBA does not support the 'one size fits all' 'ABDR' model proposed by the Discussion Paper. Home building disputes, even if limited to only residential building disputes, can be as small as a \$2,000 dispute about uneven kitchen tiles in a home, or as large as multi-million dollar systemic waterproofing issue involving 300+ unit apartment owners. They may involve only two parties, or they may involve many parties with differing interests. They may be about technical specifications / building code issues, or statutory or contractual interpretation, or the legal effect of the representations made by (or conduct of) the parties during the course of the works.

To the extent that the proposed ABDR may be structured to allow access to different types of ADR for different disputes depending on the election of the parties, warring parties may never agree on the ADR type. To the extent that the proposed ABDR is a mediation model only, this is likely to be inadequate to deal with the significant category of disputes where the contract has been terminated and each party has a claim against the other for a significant amount: the builder for unpaid work and loss of profit; and the owner for alleged defects and cost of engaging another builder. Such disputes

⁵ Noting that extending security of payment regime to residential building may go some way towards ameliorating this.

are usually entrenched from the outset and require an independent binding determination of who is at fault (i.e. in breach of the contract) before a resolution on quantum or rectification can be achieved.

There are also issues if the specific type of ADR used is to be pre-determined by reference to a simple monetary limit. A monetary limit based on the amount in dispute would be difficult to administer because it is often the issue of the cost of rectification which is most hotly contested. A monetary limit based on the contract value would not be appropriate because it may mean small value disputes on large value contracts (or vice versa) are forced into an inappropriate form of ADR.

The MBA is of the view that the appropriate form of ADR is dependent on the dispute, and the body best placed to determine that (in the absence of agreement) is one of the existing judicial bodies. The increased adoption / incorporation of ADR into the existing justice system is supported by the findings of the Productivity Commission, Access to Justice Arrangements (Inquiry Report No 72, 5 September 2014)⁶. Bringing an ADR regime under the umbrella of the existing justice regime has the benefits of:

- Cost and educational savings – the courts will be the ‘one stop shop’ for the resolution of disputes.
- Early identification of the issues in dispute which are suitable for resolution by an ADR method, and selection of that method and appropriate ADR professional.
- Expert witness / expert decision-maker accountability – experts sign up to obligations to the court with respect to impartiality and can be personally liable for breaches.
- Swift resolution of any legal challenge to the validity of the ADR process or any problems caused by one party failing to cooperate with the process.
- Time savings – ADR can be incorporated as an early step into the court process rather than being a stand-alone preliminary step run by a separate organisation. Parties will not be required to have a pre-court mediation and then attend a further court-ordered mediation (which is increasingly being adopted).

The MBA supports an ADR model which:

- Allows for an initial site inspection by an appropriately qualified technical expert to provide a non-binding but independent view and offer solutions for resolving the issue, and provides information about next steps (similar to the regime implemented by the Office of Fair Trading in NSW, and similar to the role played by the MBA in resolving complaints against members).
- Creates a new division within ACAT specifically for residential building disputes, similar to the home building division within the NSW Civil & Administrative Tribunal which deals with applications lodged by home owners, traders and insurers concerning residential building work up to the value of \$500,000. This division would need to:
 - be user friendly such that it can be commenced without the need for lawyers (eg. simple forms, checklists, process diagrams).
 - be appropriately staffed with tribunal members and mediators who are skilled in resolution of building matters;
 - require the parties to attend an early mediation (unless the ACAT determines it is inappropriate) before significant costs are incurred;
 - adopt standard directions which require the parties progress the matter swiftly;
 - use a single court-appointed expert referee to determine technical elements of the dispute as early as possible to ensure issues are narrowed;

⁶ See also: Angela Browne SC ‘Reforms to civil justice: Alternative dispute resolution and the courts’ (2015) 39 Australian Bar Review 275; Lord Jackson, ‘The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review’ 11th Lecture in the Implementation Program, RICS Expert Witness Conference, 8 March 2012; Michael Legg, Madeleine Hakin, Jacqueline Cahill ‘ADR and the Federal Court of Australia’ (2014) 1(1) ADR 8, 10.

- allow costs orders at the discretion of the Tribunal.
- Alternatively (or perhaps additionally with respect to non-residential building disputes), creates new divisions in each of the courts with specific rules appropriate to building disputes (similar to Victorian Supreme Court Technology, Engineering & Construction list, and the NSW Supreme Court Technology and Construction List).

No matter which forum is chosen for the administration of ADR, the MBA supports facilitating increased use of ADR for building disputes.

Annexure D: Improving the ACT Building Regulatory System: Summary of Proposed Reforms 2016



ACT
Government

IMPROVING THE ACT BUILDING REGULATORY SYSTEM

SUMMARY OF PROPOSED REFORMS







MINISTER'S MESSAGE

Following public consultation, the ACT Government is taking action to strengthen the regulation and integrity of the ACT building industry with the announcement of a series of important reforms.

These reforms will set the parameters for quality design, building, certification, and training practices across the ACT, giving certainty to both property owners and industry. They will achieve this through:

- improving documentation at the building approval stage;
- implementing a more relevant and comprehensive building inspection and audit process;
- improving licensing requirements for builders and building surveyors;
- providing better information for consumers and practitioners; and
- establishing minimum standards for practice and contracting .

The first steps in the significant reforms designed to ensure buildings in the ACT remain effective and relevant to the industry and community are already underway.

The Building and Construction Legislation will take the crucial first steps in putting an end to ‘phoenixing’, used by only a few in the industry to avoid liabilities and responsibilities to employees and clients but with wide ranging and devastating impacts.

The ACT Government also remains committed to improving security of payments, but acknowledge there is more work to do in this area. There will be further opportunities for industry and the community to provide knowledge and experience to help shape these reforms.

The full consultation report and reform program are now available at
www.act.gov.au/buildingreform

I thank the industry and community for their interest and support for the ACT Government's commitment to improve our building regulatory system.



Mick Gentleman MLA
Minister for Planning and Land Management
June 2016

SUMMARY OF SHORT-TERM REFORMS

BY END 2016

DESIGN AND DOCUMENTATION

1. Develop guidelines for minimum design documentation for building approval applications:
 - commencing with initial design documentation, with a view to expanding to maintenance documentation at a later stage,
 - expanding to all classifications of building over time,
 - starting with voluntary compliance with a transition period for moving to mandatory within 6 months of release of the guidelines.
2. Consider including some aspects of advice on high-risk building elements (e.g. balconies over habitable spaces) in the existing pre-DA process to alert people to high-risk features and things that may be incompatible with building laws, with a view to expand the range of issues as resources and skills increase.

STAGE INSPECTION AND ON-SITE SUPERVISION

3. Develop guidelines for builders for supervision and critical hold points with the intention they will be adopted as codes of practice under the Building Act.
4. Develop new provisions in the Building Act outlining the functions of the certifier and the purpose and scope of stage inspections, and supporting codes of practice.
5. Enact regulations to require stage inspection information shortly after the inspection is complete.

BUILDERS AND BUILDING SURVEYORS LICENSING

6. Remove architectural and engineering qualifications from the mandatory qualifications schedule, with a transition period for applicants who have made an application prior to the commencement.
7. After further consultation, implement a conditioning system for applicants with insufficient experience on residential buildings and revise mandatory qualifications in relation to evidence, critical stages and external verification of experience.
8. Revise mandatory qualifications to specifically give the Registrar discretion not to consider references from builders with a poor compliance history or in relation to defective building work.
9. Expand the written assessment prepared for the pilot for class C licensees to incorporate additional subjects, and include random result validation, and create assessments for A and B class licence categories.
10. Consider interviews conducted by the regulator for applicants that either do not meet the mandatory qualifications or have marginal results in the assessment only.
11. Amend existing provisions for corporations, partnership and nominees eligibility in the Construction Occupations (Licensing) Act and Regulation to clarify their roles and obligations.
12. Expand the scope of the existing power to declare mandatory qualifications to include qualifications for all entities that may apply for a licence i.e. corporations and partnerships as well as individuals.
13. Require additional information in relation to the nominee and their understanding of their role and eligibility for appointment at the time of application.
14. Revise operational policies and educational materials to reflect the intention of the law in relation to the corporation/partnership's responsibility to supervise their nominees and the work under its licence.

15. Develop and implement a pre-application assessment for building surveyors licence applicants and for licensees who have transferred from other jurisdictions.
16. Develop and make available an online course for building surveyors operating or intending to operate under the ACT's building regulatory system.
17. Provide a new ground for occupational discipline that the licensee is, or has become, ineligible to hold a licence.
18. Amend provisions for automatic suspensions on loss of eligibility so that they do not end after 3 months but continue as long as the grounds for the suspension exist, if the licensee has not reported the circumstances to the Registrar.

CONTRACTS FOR RESIDENTIAL BUILDINGS AND BUILDING WORK

19. Expand the existing statutory warranties to all private residential buildings or parts of buildings, including those above three storeys.
20. Amend the Building Act to allow regulations to prescribe requirement for contracts for residential building work.
21. Enact a regulation to delineate agency agreements from a building contract for certain residential building work contracts.
22. Develop and consult on standard terms, and standard information for a building contract including explanations of common variation clauses and their meaning.
23. Consult further in relation to specific regulations for a progress payment model for certain residential building contracts based on payment only for work completed.
24. To further assist to reduce phoenixing:
 - Expand the capacity for the Registrar to consider an applicant or licensee's history, including the history of directors, partners and nominees, under other licences.
 - Introduce the ability for the Registrar and ACAT to consider whether a breach is relevant to multiple associated licences and take appropriate action in relation to those licences as well.
 - Increase reporting requirements for automatic suspension grounds.

PROJECT FUNDING, PAYMENT CLAIMS AND RETENTIONS

25. Increase reporting requirements for licensees in relation to insolvency.
26. Review the response to the recent federal inquiry on insolvency and results of trials of various models other jurisdictions and continue targeted consultation, with a view to either conducting an ACT trial to fill in any knowledge gaps if required, or implementing changes in the ACT if Commonwealth legislation is not supported/or has insufficient coverage.
27. Review the effectiveness of ACT procurement arrangements for security of retentions held by contractors and progress payments on government projects.

ALTERNATIVE DISPUTE RESOLUTION – RESIDENTIAL BUILDINGS

28. Refine the proposed alternative dispute resolution model based on consultation feedback and conduct a second round of consultation on the detailed model.
29. Consider adoption of new standards and tolerances for building-related disputes and complaints, including contractual disputes.

SUMMARY OF MEDIUM TERM REFORMS (DEPENDENT ON RESOURCES)

BY END 2017

STAGE INSPECTION AND ON-SITE SUPERVISION

30. Complete implementation of the risk-based auditing and inspection system for regulated building certification and building work.

BUILDERS AND BUILDING SURVEYORS LICENSING

31. Consider introduction of non-written forms of assessment after review of 6 months of operation of the written pre-licence assessment for licence applicants.
32. Implement mandatory qualifications for corporate and partnership licences, potentially including financial assessment.
33. Expand mandatory qualifications for new building surveyor licence categories to include completion of the online training course.
34. Expand licence renewal assessments for all licensees to include rechecking of eligibility and compliance history.
35. Consult on findings of the review of the ACT building regulatory system in relation to licensing, licensing categories and 'contracting' as a scope of work.
36. Consult on the findings of the review of the ACT building regulatory system in relation to insurance and practitioner accountability.

CONTRACTS FOR RESIDENTIAL BUILDINGS AND BUILDING WORK

37. Consider expansion of rectification and other relevant powers to allow orders to be issued to people closely associated with an insolvent or 'disappeared' corporate licensee.
38. Review federal inquiry findings on insolvencies in the construction industry and associated response, with a view to fill in any gaps in the system if required.
39. Consult on the findings of the review of the ACT building regulatory system in relation to building contracts and the residential building insurance system in the ACT.

PROJECT FUNDING, PAYMENT CLAIMS AND RETENTIONS

40. Conduct trial of project/retention account model (if agreed and required).
41. Review the Security of Payments system in the ACT.

OTHER

42. Consider issues raised by stakeholders during consultation where supported by the findings of the review of the ACT building regulatory system.

BY END 2017-18 ALTERNATIVE DISPUTE RESOLUTION – RESIDENTIAL BUILDINGS

43. Complete implementation of new dispute resolution model.

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Annexure E: Master Builders ACT Building Quality Policy Paper

Master Builders ACT

Building Quality Policy



MASTER BUILDERS
AUSTRALIAN CAPITAL TERRITORY

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POLICY DOCUMENT

Master Builders Association of the ACT

Building Quality is inherently important for the Master Builders Association and is an essential ongoing prerequisite to be upheld by builders to maintain privileged membership.

Master Builders ACT

Building Quality Policy

Master Builders ACT's Building Quality Key Policy Objectives

- 1.** Advocate to the ACT Government for the establishment of the Building Regulatory Advisory Committee
- 2.** Implement targeted professional development training for MBA members and the industry. Support the implementation of mandatory professional development training for all construction industry licensed practitioners.
- 3.** Advocate to the ACT Government for the establishment of a peer review of Class 2 buildings greater than two storeys
- 4.** Implement two-day annual training seminars delivered by industry professionals for members and industry practitioners
- 5.** Develop proforma checklists for MBA members using a technology based document management system for recording critical hold-point inspection stages on projects
- 6.** Advocate to the ACT Government for establishing a review of the current building certification and inspection system

Introduction

This policy document had its origins in the realisation by the MBA ACT Executive Committee that defect rectification at the end of projects often costs as much as the profits achieved on the project. The angst associated for all with defect occurrence and subsequent rectification is also undermining confidence within Government and the community. A report from the University of NSW stated that for every \$100M spent on construction, over \$5M is wasted as a result of poor building quality.

The MBA ACT has, over the years, developed a detailed study of defects and their causes and has worked with industry and its members in the development of a Defects Avoidance Strategy. This Defects Avoidance Strategy has incorporated specific training and the publication of technical and guidance material targeting deficiencies in specific construction techniques.

The Master Builders ACT Building Quality Policy strives to deliver buildings and building services that consistently meet and exceed customers' expectations.

Food, clothing and shelter are the basic commodities of life. Buildings are essential elements of all communities and play a major role in the planning and function of all communities. The planning and building development role further emphasises the need for MBA members to conduct business in an ethical manner. Members need to be cognisant of their responsibilities to uphold the social and environmental impacts of their actions on the community.

To achieve and maintain the MBA quality standards, critical evaluation, ongoing innovation and commitment to improve the building quality process and stakeholder management, is required to be continually reviewed and enhanced by the Master Builders Association.

Quality measures have been, traditionally, time, cost and aesthetic finish. Corporate Social Responsibility (CSR) and ethical service are factors commonly mentioned in recent years, but have in fact been associated for centuries with Master Builders' projects and their associations.

This Building Quality Policy document of the MBA ACT is part of an on-going quality review process. It provides a situation representation of the building quality issues facing the ACT industry and the MBA ACT's response to meet those requirements.

The MBA acknowledges that there needs to be a more co-operative approach by all parties involved in the construction process to address the issues before they manifest.



Building Quality and the MBA ACT

The Master Builders Association (MBA) was founded before the federation of Australian states and is the major Australian building and construction industry association. A primary role of the Association has always been to make sure that its members are in fact adhering to a superior building quality. The term Master Builder has historically been linked to building quality and control. The Master Builder can be defined as: a person with exceptional skill at building; a builder or craftsman fully qualified to practice a trade and to train others in it; a person who has complete control and mastery of the building project.



 Construction of the National Library of Australia. Photo courtesy of the National Archives

Today the MBA promotes the viewpoints and interests of the building and construction industry in general and provides services to members in a broad range of areas including training, legal services, industrial relations, building codes and standards, industry economics and international relations. Never lost to the MBA is the basic tenet to maintain building quality.

The Nation's Capital, Canberra, is home to some of Australia's most iconic buildings and civil projects such as Parliament House, The Australian War Memorial, The High Court of Australia, The National Library, The National Gallery, Telstra tower etc. Canberra will continue to grow and these magnificent examples of building quality will also need on-going quality maintenance. The MBA ACT has a very rich and distinct background in building quality and an on-going need to maintain the ACT building quality for the national best interest.

The aim of the MBA ACT's Building Quality Policy is to continue to lead the way in maintaining and enhancing the quality requirements associated with being a member of the MBA.

Current Practice

The impact of defects on some current ACT projects (multi-unit developments) is substantial, both in terms of how the astronomical remedial costs and damage that these reported defects are causing to the industry's reputation.

The projects that the MBA ACT have been familiar with have resulted in complex litigation and reports from experts, with varying opinions as to how these inherent defects should be rectified. In all of our observations, we have concluded that the rectification process is resource-intensive due to the requirements to investigate, check, record, coordinate, report and sign-off on the remediated work. Some of these costs have been borne by the principal contractors and some of these costs have been borne by the owners and occupiers.

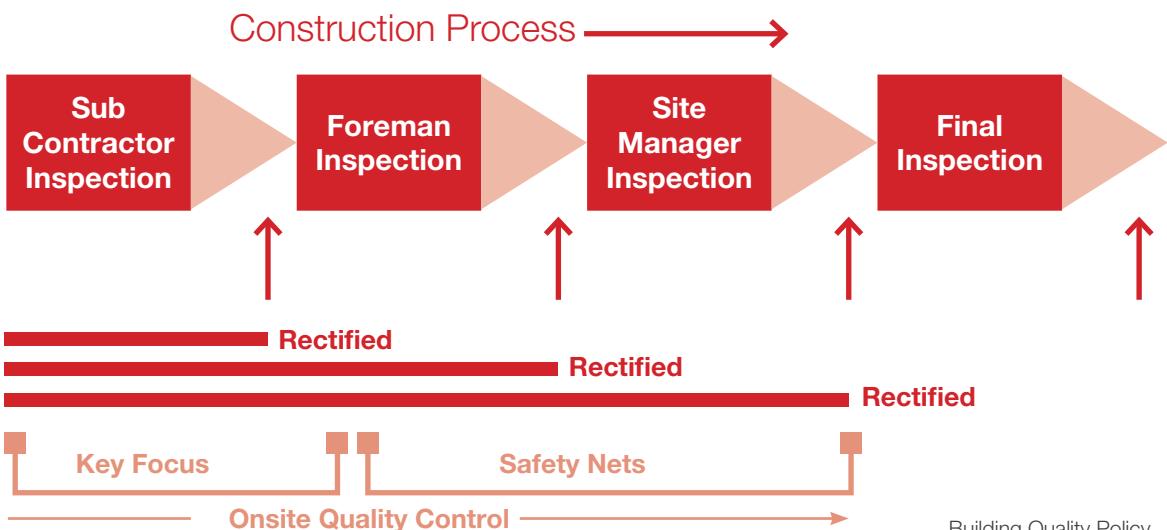
The majority of the defects identified have originated from either poorly specified design documentation, selection of sub-standard building products or a lack of skill by the contractors in completing their tasks to a satisfactory standard. In some instances specifications and plans have been ignored and approval and certification have also been questionable and found to be deficient in some form.

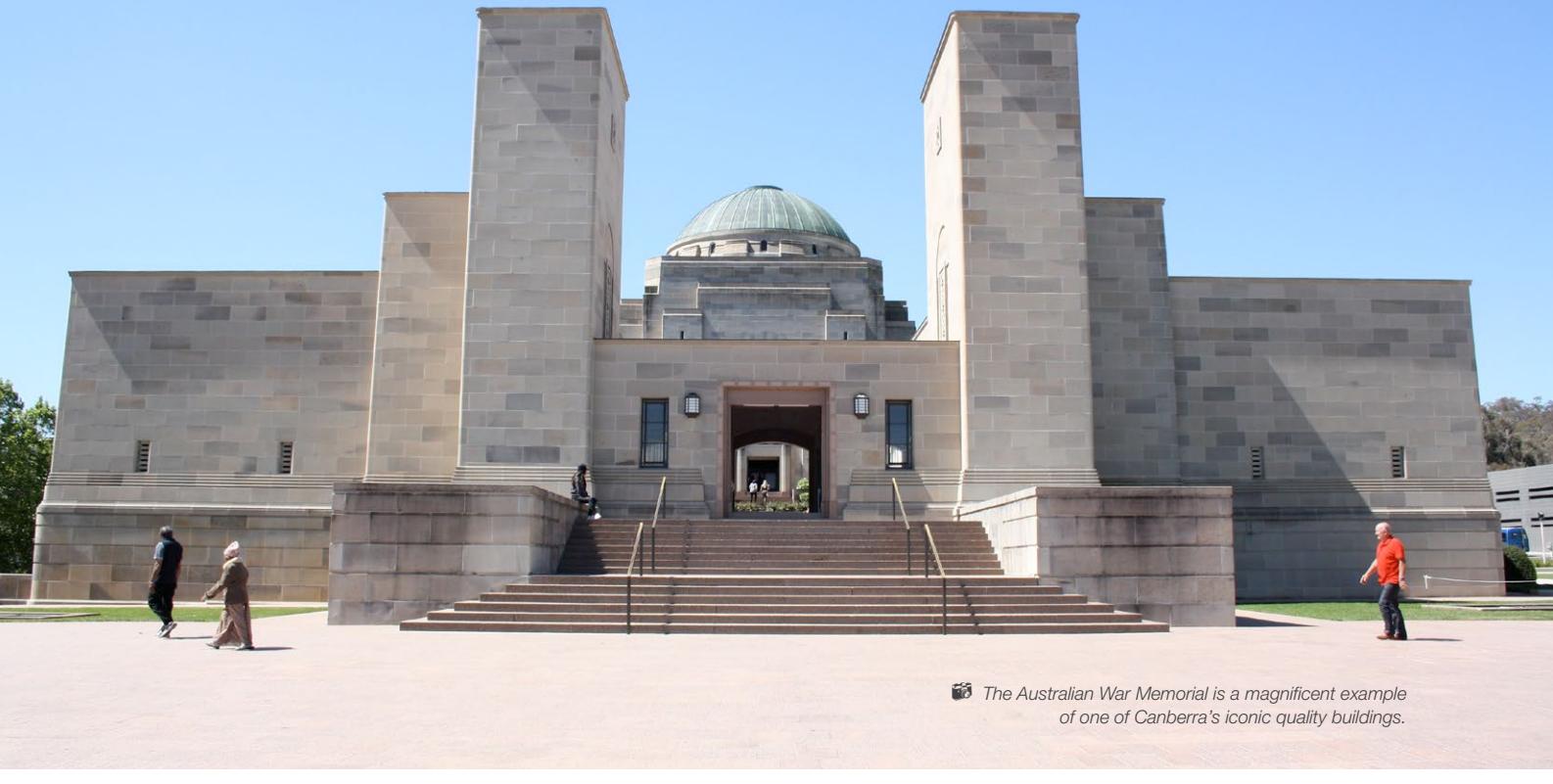
A substantial proportion of the inspection and quality control on some of these projects is inappropriately left to "somebody else" and checking of the completed work is viewed as someone else's responsibility. This in itself creates some fundamental flaws in the current system that need to be addressed to protect the reputation of our industry as well as clients.

There is also the view, especially within the community, that private certification has contributed to a deterioration in building quality. This is not the case as the building certifier does not perform a quality control function. Quality control needs to be focused at the work-face with contractors clear about expectations and armed with the tools and skills to assess and record at critical hold-points during the construction phase.

Focus on the front end – input costs vs remedial costs?

It is the view of the MBA that construction quality and defect mitigation practices would improve from adopting a process whereby a collective responsibility is taken by all of the key parties in the construction chain. Responsibility in the construction phase requires tighter control so that responsibility at the work-face is shared, thereby minimising cost implications and re-work further down the track. This diagram below shows a model whereby inspection and quality control are continued through the construction process





 The Australian War Memorial is a magnificent example of one of Canberra's iconic quality buildings.

How is the MBA continuing to maintain its quality standards?

To maintain quality standards, the MBA ACT will introduce a unique electronic checklist of critical construction items, similar to the stages of construction inspection requirements required by Building Certifiers and the certificates of appropriate standards and quality; also obligatory requirements to be furnished to the Building Certifiers.

The on-site verification checklist provides a simple format to aid on-site operatives of the critical quality stages of construction that will be required to be certified. The checklist will be made available to all on-site; from the site Foreman / Supervisor through to the sub-contract specialists undertaking the work to ensure that those critical stages of construction conform to best practice. The introduction of the compliance checklist will be the first introduced in Australia by an MBA.

The checklist can be used as an on-site quality control procedure as well as a member database, further serving as a quality reference, verifying to the public that MBA ACT members are meeting the quality performance level set by the MBA ACT.

Relevant quality staged construction documentation will be facilitated by on-site digital methods of providing a photographic record sent on a standard MBA ACT i-form, using mobile phone technology to reduce red tape. The system will provide a process and procedure that will adhere to the MBA ACT quality standards.

Building procedures or practices that fall outside of the MBA quality standard will be subject to MBA ACT expert panel review, assessment and determination.

The MBA ACT will develop a unique electronic checking and validation procedure. Non-compliance or problematic interpretation issues are to be referred an expert panel of the MBA ACT for clarification.

What are the Building Quality Issues in the ACT?

Building Quality in the ACT, Report to the ACT Legislative Assembly 2010

The Building Quality issues and resolution forums were initiated by the Minister for the Planning the Honourable Andrew Barr MLA who instigated the Building Quality Forums.

The Building Quality in the ACT report was developed after intensive consultation between July 2010 and September 2010 with building owners, industry and associated professions to investigate sub-standard building practices in the ACT and recommend ameliorative measures. The Building Quality Forums were mainly concerned with issues associated with class 2 buildings¹.

The scope of the Building Quality Report to the ACT Government included:

- a. the range and extent of problems related to building standards and certification in the ACT, taking into account:
 - how building-related complaints have been and are dealt with by the ACT Government
 - the role of the Unit Titles Act in addressing building faults and poor workmanship in unit plans in Canberra
 - public input, which is to be called for and detailed as part of the report;
- b. progress on reform, based on discussion with the Owners Corporation Network, the building industry, and other relevant professional bodies through the Building Quality Forum;
- c. recommendations relating to regulatory and legislative reform for the short and medium term; and
- d. measures that can be taken to assist owners and owners' corporations to address existing problems of building faults and poor workmanship

Some of the common building defects that have been identified and discussed in the Building Quality Forums relate to waterproofing and facade finishes such as rendering. Approved waterproofing and rendering requirements will be required to be verified by the MBA ACT checklist appraisal scheme.

In the MBA ACT's response to the Building Quality Forum 2011 we raised several factors that impact on the quality of building work. The MBA ACT put forward a number of recommendations in their policy paper response, some of these issues required a short term response with immediate impact and, some were longer term issues requiring changes to regulatory policy.

Some of the primary defects identified in the ACT Building Quality report related to skills deficiencies, unsatisfactory on-site supervision sub standard design documentation, lack of skills training by builders and questionable certification by building certifiers and other design professionals. The reinstatement of the Clerk of Works on the more complex projects must be a key policy consideration for the MBA ACT to support.

Under the current review of the ACT Building Act it is likely that a number of the issues that were raised in the MBA ACT's response will hopefully be addressed. The licensing or accreditation of the key industry practitioners including sub-trades is certainly one of the key areas in the ACT Building Act review that will require serious industry input and consideration. The MBA ACT including Master Builders Australia strongly supported National Builders Licensing Reforms including the licensing of key construction sub-trades.

¹ A building containing two or more sole occupancy units each being a separate dwelling. Building Code of Australia, volume 1, p.39. This does not include attached dwellings such as town-houses and duplexes which are classified as Class 1 buildings

Defining Building Quality

Building Quality is subjective and can be defined in many ways: aesthetics, durability, sustainability, craftsmanship etc. However, the MBA ACT believes that a good definition to **define a Quality Building outcome is; by obtaining the end user's full satisfaction with the completed buildings form and function.**

There is no doubt, to achieve this satisfaction, a good design is required, with the use of proper materials and a competent builder (Master Builder). It is essential to marry the design and materials to complete the project. As well as meeting the aesthetic expectations, buildings functioning to consumer expectation, verifying the design is performing to an as-built criteria, confirming the building's operation has met the designed functional targets are all other measures that can assess if a quality building outcome has been achieved.

Issues such as design, material choice and value for the dollar are all variables that will have a bearing on the resultant quality and those variables and the resultant building outcomes need to be made clear to the consumer at the design stage so expectations and building outcomes are clearly defined before a project commences. If rooms are too small or the building has inadequate heating due to poor design, these factors can also have an adverse effect on the perception of building quality.

Designers and Architects must incorporate proper specifications and critical design details in the drawings. Inappropriate selection of materials and lack of consideration to movement and expansion are areas of concern for the MBA ACT, especially given Canberra's extremes of climate. There also needs to be greater rigour in assessment of suitability and warranty to products specified by manufacturers and importers to ensure their products are indeed suitable for our region.

It is also critical that builders continually upgrade their skills and qualifications to ensure that they are up to date with the latest building techniques, including the Building Code of Australia, and the relevant Australian Standards.

Moving beyond the building industry itself, manufacturers need to place greater focus on appropriate specification. In some instances products are specified for particular project and it is later discovered they were not appropriate for that purpose. There needs to be more rigour and greater assessment and greater liability on manufacturers and importers of products.

Who does the Building Quality Policy document protect?

The quality document protects both the Builder and the consumer.

The Policy document will help to educate the consumers as to the validity of their expectations and help to expose early design and specification issues. Some consumers may have had overly high expectations and by clearly articulating design, specification and the complexity of the build at the early stages both the consumer and builder benefit.

Building Quality (full consumer satisfaction) must be achieved for the consumer as the purchase of a dwelling, Class 1 or 2 is usually the biggest financial commitment that most people will make in their lifetime and they have a right to achieve a quality outcome. The quality document in turn greatly assists both the Builder and the end consumer to achieve a high performing building outcome.



Master Builders ACT

Building Quality Policy

The MBA ACT's key Building Quality Policy objectives explained

1. Advocate to the ACT Government on the critical need to establish the Building Regulatory Advisory Committee (BRAC)

Why? We have multiple examples of policy being developed on the run, with little or no input from industry practitioners. A robust regulatory environment involves input from the industry and particularly practitioners who work within the industry.

There is currently a view that those who regulate the industry in the ACT do not have a satisfactory understanding of the industry and how it operates. The establishment of this peer review advisory committee (BRAC) would be the critical link between industry, Government and the responsible Minister and would act as a peer review to ensure that any regulation that was being considered would be subject to a thorough review.

This peer review advice committee would also review and establish guidelines for dealing with major defect disputes and also provide advice on the licensing of industry practitioners.

2. Implement targeted professional development training for MBA members and the industry

In an ever-changing industry, with new technology and materials, it is crucial that professional development training be constantly reviewed to ensure that it is relevant to the industry needs. Targeted professional development training should, ideally, follow on a yearly basis and be primarily targeted at defects that have been identified in the previous year with the primary objective of developing a suite of specific training, with professional input to address the most common defects and thereby provide acceptable solutions for industry. The MBA also supports the introduction of mandatory professional development training for all construction industry practitioners. This mandatory training must be developed in consultation with The Construction Occupations Registrar and The Building Regulatory Advisory Committee. This training would be delivered in partnership with MBA Group Training.

3. Advocate to the ACT Government for the establishment of a peer review of Class 2 buildings greater than two storeys

Multi-unit residential construction is now the most dominant form of construction in the ACT and this trend is likely to continue. The majority of defects have been associated with multi-unit developments and some of these defects have been attributed to poor design and documentation and, in some instances, deficient certification and deficient design. The objective of peer review would be to review the project documentation at the design stage, pre DA or BA, for compliance and for buildability and provide input for design revision as necessary.

4. Implement two-day annual training seminars delivered by industry professionals for members and industry practitioners

This forms a critical aspect of the MBA's response to providing targeted professional development training for its members and industry. The objective of this two-day session would be to provide training and mentoring from industry professionals to assist members in developing more profitable business models and also the skills and knowledge to deliver higher quality built form. The program content would be developed in consultation with MBA members and industry professionals.

5. Develop proforma checklists for MBA members using a technology based document management system for recording critical hold-point inspection stages on projects

The objective of this checklist is that this critical hold-point checklist is completed by the person doing the work and signed off by the next person in the onsite management structure. The checklist is project-specific in that it reflects the particular quality issues on the job and is changed on the job to include new quality problems as they are identified, e.g. the floor tiling cannot be completed until the waterproofing system has been inspected and signed off as compliant.

6. Advocate to the ACT Government for establishing a review of the current building certification and inspection system

The MBA in its response to the ACT Government's Building Quality Report of 2010 put forward a number of recommendations for consideration specifically addressing the building certification issues, which the MBA will continue to advocate for consideration and inclusion.

Our timetable for action

	Target Date
1. Advocate to the ACT Government for the establishment of the Building Regulatory Advisory Committee	2015-16 (included in MBA Budget submission. Implementation)
2. Implement targeted professional development training for MBA members and the industry	2015-16
3. Advocate to the ACT Government for the establishment of a peer review of Class 2 buildings greater than two storeys	2015-16
4. Implement two-day annual training seminars delivered by industry professionals for members and industry practitioners	2015 (commencing October)
5. Develop proforma checklists for MBA members using a technology based document management system for recording critical hold-point inspection stages on projects	2015
6. Advocate to the ACT Government for establishing a review of the current building certification and inspection system	2015-16



Pre-Waterproofing Inspection Checklist (example only)

(This checklist is not a substitute for the drawings, the contract and specifications.)

Master Builders ACT
Building Quality Policy

Date

Location of Application

Corrective Action

Responsible Person Signoff

Have the following items been checked?

Yes No N/A

- | | | | |
|---|------------------------------|------------------------------|------------------------------|
| 1. Sub-contractor / contractor approved | (<input type="checkbox"/>) | (<input type="checkbox"/>) | (<input type="checkbox"/>) |
| 2. Substrate suitable for application and correct grade | (<input type="checkbox"/>) | (<input type="checkbox"/>) | (<input type="checkbox"/>) |
| 3. Step downs and drainage provision as per approved plans | (<input type="checkbox"/>) | (<input type="checkbox"/>) | (<input type="checkbox"/>) |
| 4. Specified materials provided | (<input type="checkbox"/>) | (<input type="checkbox"/>) | (<input type="checkbox"/>) |
| 5. Have manufacturer's instructions and application procedure been reviewed | (<input type="checkbox"/>) | (<input type="checkbox"/>) | (<input type="checkbox"/>) |
| 6. Surfaces to receive Waterproofing smooth, dry and clean | (<input type="checkbox"/>) | (<input type="checkbox"/>) | (<input type="checkbox"/>) |
| 7. Temperature suitable for application | (<input type="checkbox"/>) | (<input type="checkbox"/>) | (<input type="checkbox"/>) |



MASTER BUILDERS
AUSTRALIAN CAPITAL TERRITORY

Who to contact regarding this policy

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Annexure F: Building Confidence Report, February 2018



Building Confidence

Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia

Peter Shergold and Bronwyn Weir

February 2018

About the Authors

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Professor Peter Shergold AC is Chancellor of Western Sydney University. A former Secretary of the Department of the Prime Minister and Cabinet, he now chairs a number of private, public and not-for-profit boards. He has undertaken a number of previous reviews for Commonwealth and state governments on matters as diverse as gambling, vocational education, community services, major project implementation and Medicare card security.

Ms Bronwyn Weir

Bronwyn Weir is a legal practitioner specialising in government regulation. She has had over 20 years' experience advising on building regulation for governments, councils, licensing bodies, fire authorities and building surveyors. Bronwyn was a member of Victoria's Building Regulations Advisory Committee for 12 years. She has also provided advice on regulatory practice in sectors including vocational education, early childhood education, food safety, the racing industry, health care and primary industries. Bronwyn is a director of Weir Legal and Consulting Pty Ltd.

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Foreword

Ministers

We have pleasure in providing you with our observations on the compliance and enforcement systems for the building and construction industry. It includes our recommendations for a national best practice model which will strengthen the effective implementation of the National Construction Code.

You commissioned our expert advice in August 2017. Throughout the process, you engaged with us openly. So did your regulators and departmental officials. Industry, too, has been candid in sharing with us its views and suggestions for better systems.

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

Many governments are already taking remedial action. Continuing collaborative work will be required by all jurisdictions, however, in order to deliver the reforms that we propose.

We recognise with sincere thanks the support that a range of stakeholders have provided to us during the course of our inquiry. We also acknowledge the capable support provided by our secretariat team and sincerely thank them for their input, responsiveness and dedication: Mr Alan Coleman, Ms Kate Maher, Ms Caroline Pulis and Mrs Kathleen Streat.



Peter Shergold



Bronwyn Weir

Executive Summary

In mid-2017 the Building Ministers' Forum (BMF) asked us to undertake an assessment of the effectiveness of compliance and enforcement systems for the building and construction industry across Australia. Whilst our assessment has been thorough, this report focusses in a succinct way on shortcomings in the implementation of the National Construction Code (NCC). They will not come as a surprise to the BMF or building industry stakeholders as most have been considered in detail in a number recent government reports. We are confident that, assisted by this report, jurisdictions, working cooperatively, can address these shortcomings.

Our goal is to enhance public trust through effective implementation of building and construction standards that protect the interests of those who own, work, live, or conduct their business in Australian buildings. We make 24 recommendations. We believe that compliance and enforcement systems that incorporate our recommendations represent a national best practice model that will strengthen the effective implementation of the NCC.

A wide range of problems were set out in the Terms of Reference for us to examine, namely:

- a. roles, responsibilities and accountabilities of different parties;
- b. education and training;
- c. licensing and accreditation;
- d. accuracy of design and documentation;
- e. quality control and assurance;
- f. competencies of practitioners;
- g. integrity of private certification;
- h. inspection regimes;
- i. auditing and enforcement practices; and
- j. product importation and chain of custody.

We were asked to assess the compliance and enforcement systems in place across Australia having regard to these problems. In doing so, we have given careful consideration to the opinions of various experts that have undertaken reviews of the building and construction industry on behalf of state and territory governments in recent years.

Our work was commissioned by the BMF. The BMF is the group of Australian Government, State and Territory Ministers that has responsibility for building and construction. The BMF is created under a series of intergovernmental agreements that establish and maintain the Australian Building Codes Board (ABCB) which is responsible for the development of the NCC.

The NCC contains the technical requirements and standards for the construction of buildings and for plumbing work. The NCC is adopted by each jurisdiction in its own building legislation. The goal is to have nationally consistent technical standards applying across Australia. Whilst our country has a national technical standard for buildings, our federation provides for each state and territory to have its own laws governing the implementation of the NCC.

Jurisdictions have been very open in identifying the growing challenges they have faced in ensuring effective compliance with, and enforcement of, the NCC. So have industry bodies. Criticisms have been delivered in a constructive manner with an emphasis on finding solutions.

After having examined the matters put to us, we have concluded that their nature and extent are significant and concerning. The problems have led to diminishing public confidence that the building and construction industry can deliver compliant, safe buildings which will perform to the expected standards over the long term.

We have read numerous reports which identify the prevalence of serious compliance failures in recently constructed buildings. These include non-compliant cladding, water ingress leading to mould and structural compromise, structurally unsound roof construction and poorly constructed fire resisting elements.

We have heard suggestions that large numbers of practitioners operating in the industry either lack competence, do not properly understand the NCC and/or have never had proper training on its implementation.

We have consistently heard that the adequacy of design documentation is generally poor and that, on occasion, builders improvise, making decisions on matters which affect safety without independent oversight. This exacerbates disputes about the quality and compliance of building work. It also results in inadequate information to guide the future maintenance of safety systems in buildings. These issues undermine public accountability in building approvals processes.

We have been told that oversight by licensing bodies, state and territory regulators and local governments can be weak due either to inadequate funding or a lack of skills and resources to undertake effective enforcement. We found that, until relatively recently, there has been almost no effective regulatory oversight of the commercial building industry by regulators. Those involved in high-rise construction have been left largely to their own devices. Where there has been supervision, this has generally been by private building surveyors whom critics argue are not independent from builders and/or designers.

The compliance and enforcement systems have not been adequate to prevent these problems from emerging and they need to change as a matter of priority. There is no panacea or 'silver bullet' to resolve these problems. Our 24 recommendations are intended to operate as a suite of solutions which will address weaknesses in a comprehensive manner. We have taken a pragmatic, risk-based approach to formulate a package of recommendations. Together they address the issues of highest priority that jurisdictions should focus on over the short to medium term.

In formulating the recommendations, we have been keenly aware of the significant effort that is being expended by each jurisdiction to continue to improve their enforcement and compliance systems. We have been encouraged by the strong recognition of the need for change. Many of our recommendations are informed by the work already underway.

We do not espouse a one-size-fits-all approach to regulation. Each jurisdiction can meet its governance responsibilities in its own manner, under the cooperative oversight of the BMF. Jurisdictions should work in partnership to reach agreement on how best to implement our proposed framework. We envisage the BMF taking collective responsibility for its implementation and, in the process, strengthening its collaborative resolve and capability.

Some jurisdictions already have in place some of the things that we recommend. But all jurisdictions will have work to do to deliver the national best practice model proposed. That work program will include legislative reform, but perhaps the more challenging task will be to make changes that can shift industry culture and improve regulatory practice.

The work required to bring positive change cannot be done by governments alone. Industry has a keen self-awareness of the problems that exist. Whilst there are many participants who display competency and integrity, this is not universal. The building and construction industry needs to actively participate in lifting standards, competency and integrity if it is to produce safe and reliable buildings and continue to be an important driver of infrastructure development and economic growth.

Our recommendations represent an ambitious package, but we believe that the required shift can be achieved with a cooperative approach to change.

Of course, change takes time. We are not proposing that each jurisdiction adopt the recommendations overnight. Realistically, the recommendations should be implemented over a three year period. Resources will need to be dedicated to oversight of that task by the BMF. Transparency is crucial. We believe that public confidence will be enhanced by annual reports being issued on progress with those recommendations that are accepted, in full or in part, by the BMF.

Summary of Recommendations

Recommendations 1 to 4 focus on the **registration and training of practitioners**.

We recommend a nationally consistent approach to the registration of certain categories of building practitioners and compulsory Continuing Professional Development, which includes mandatory hours/units dedicated to training on the NCC and the establishment of supervised training schemes which provide better defined career paths for building surveyors.

Recommendations 5 to 7 address the **roles and responsibilities of regulators**.

We recommend a focus on collaboration between state and local government and (where applicable) private building surveyors to improve regulatory oversight. We also recommend the provision of broad powers to audit building work and take effective compliance and enforcement action. We recommend that each jurisdiction implement a proactive audit strategy for regulatory oversight of the Commercial building sector.

Recommendation 8 goes to the **role of fire authorities** in the building design and approvals process.

We recommend that, consistent with the International Fire Engineering Guidelines, jurisdictions require early engagement with fire authorities on designs which include performance solutions on fire safety matters.

Recommendations 9 to 11 focus on the **integrity of private building surveyors**.

We recommend minimum statutory requirements for the engagement, and role, of private building surveyors, a code of conduct with legislative status and enhanced supervisory powers and reporting obligations.

Recommendation 12 addresses the issue of **collecting and sharing building information and intelligence**.

We recommend the creation of a central database by each jurisdiction and collaboration to develop a platform that can provide for information sharing to inform regulatory activities and the work of the BMF. Information in the databases would also be accessible as appropriate, by authorised persons including owners or purchasers of buildings.

Recommendations 13 to 17 focus on the issues of **adequacy of documentation and record keeping**.

We recommend that there be a statutory duty on design practitioners to prepare documentation that demonstrates that proposed buildings will comply with the NCC. We recommend a more robust approach to third party review of designs and to the documentation and approval of performance solutions and variations.

Recommendations 18 to 19 emphasise the importance of **inspection regimes**.

We recommend that jurisdictions require on-site inspections for all building works and that there be greater oversight of the installation and certification of fire safety systems in Commercial buildings.

Recommendation 20 addresses the issue of **post-construction information management**.

We recommend that for Commercial buildings, a comprehensive digital building manual be created for owners which can be passed on to successive owners. This would include all relevant documents for the ongoing management of the building, such as as-built construction documentation, fire safety system details and maintenance requirements.

Recommendation 21 relates to **building product safety**.

We recommend that the BMF agrees its position on the establishment of a compulsory product certification system for high-risk building products.

Recommendations 22 to 24 deal with **the implementation of the recommendations** laid out above.

We recommend commitment to a three year timetable for the implementation of the recommendations. We recommend that the BMF establish a plan for implementation which is reported against by each jurisdiction annually. We also recommend that, to deal with the issue of differing terminology across jurisdictions, the BMF develops a national dictionary of terminology.

A consolidated list of the recommendations is set out in [Attachment A](#).

Background

The Terms of Reference

On 30 June 2017, the BMF agreed to commission an independent expert examination of the broader compliance and enforcement problems within the building and construction systems affecting the implementation of the NCC. On 24 August 2017, Professor Peter Shergold AC and Ms Bronwyn Weir were appointed as the independent experts to undertake the inquiry.

Based on the outcome of the Assessment, Professor Shergold and Ms Weir were asked to consider strategies for improving compliance and enforcement practices and to make recommendations for a national best practice model for compliance and enforcement to strengthen the effective implementation of the NCC.

The Terms of Reference for our inquiry is at [Attachment B](#).

Consultation

Professor Shergold and Ms Weir were asked to consult with the Commonwealth, state and territory governments, the ABCB and key industry stakeholders.

Consultation has occurred with Ministers, departmental officials and regulators in all jurisdictions. The BMF was briefed on progress on two occasions. Separate meetings were conducted with each building Minister, their advisors and/or their senior public servants. Meetings were also held with key industry bodies and other stakeholders.

A total of 55 consultation meetings were held (see [Attachment C](#)). Interested parties were encouraged to provide brief written submissions to the Assessment by 15 December 2017. Twelve submissions and two supplementary submissions were received (see Attachment D). Documentary material was also provided at a number of the meetings. Unless otherwise stated, the quotations highlighted in this report are taken from submissions received.

Review of previous reports and other material

We were asked to take into account the impact of recent building regulatory reviews and reforms undertaken and implemented by state and territory governments, some of which are identified in the Terms of Reference. We also considered numerous reports, news articles and submissions to other inquiries and reviews.

Regard was had to reports that considered the benefits of harmonising building regulation such as the report on the 1991 Model Building Act, the 2004 Productivity Commission report and the 2012 report by The Centre for International Economics.¹ These reports have concluded that greater harmonisation of building regulation across Australia can bring significant productivity gains to the sector and economic benefit to the community.

Most jurisdictions have commissioned reviews of their building regulation systems, undertaken reforms or have been the subject of review by Auditors-General. The Assessment looked at the more recent of these including the 2014 Wallace Report, the 2015 Lambert Report, and two pertinent Victorian Auditor-General reports.² Beyond findings specific to each jurisdiction's systems, these reports identified similar overarching problems and made similar recommendations for reform.

In 2017, the Senate Economics References Committee Inquiry released its interim report on aluminium composite cladding. Queensland also released updates to its building plan and new legislation relating to non-conforming building products. NSW and Tasmania have also made laws relating to high-risk building products. The Victorian Cladding Taskforce released its interim report in 2017 and the Tasmanian Aluminium Composite Panel Audit report was released in 2018.³

¹ L. Dix and K. Lovegrove, *Model Legislative Provisions and Commentary*, Sydney, Federation Press, 1991; Productivity Commission 2004, *Reform of Building Regulation*, Research Report, Productivity Commission, November; The Centre for International Economics, *Benefits of building regulation reform*, Canberra, The Centre for International Economics, 2012.

² A. Wallace, *Review of the Building Act 1975 and building certification in Queensland*, Brisbane, Queensland Building and Construction Commission, 2014; M. Lambert, *Independent Review of the Building Professionals Act 2005-Final Report*, Sydney, NSW Government, 2015; Victorian Auditor-General, *Compliance with Building Permits*, Melbourne, Victorian Government Printer, 2011; Victorian Auditor-General, *Victoria's Consumer Protection Framework for Building Construction*, Melbourne, Victorian Government Printer, 2015.

³ The Senate Economics References Committee, *Non-conforming building products/Interim Report: aluminium composite cladding*, Canberra, Senate Printing Unit, 2017; Department of Housing and Public Works, *Queensland Building Plan 2017*, Brisbane, Queensland Government, 2017; *Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017 (Qld)*; *Building Products (Safety) Act 2017 (NSW)*; *Building Act 2016 Director's Determination - Building Product Accreditation - High Risk Building Products 2017 (Tas)*; Victorian Cladding Taskforce, *Interim Report*, Melbourne, Department of Environment, Land, Water and Planning, 2017; Consumer, Building and Occupational Services, *Tasmanian Aluminium Composite Panel Audit Summary: Regulatory Compliance*, Hobart, Tasmanian Government, 2018.

Across the globe, in the wake of the Grenfell Tower fire, the UK is undertaking a review of its building regulation system. In December 2017, Dame Judith Hackitt released an interim report of her independent review of building regulations and fire safety.⁴ She found “that the whole [UK] system of regulation, covering what is written down and the way in which it is enacted in practice, is not fit for purpose, leaving room for those who want to take shortcuts to do so”⁵.

Some of the problems addressed by Dame Judith are strikingly similar to those in the Australian building and construction industry. She identified ineffective enforcement, low levels of competency across the sector, lack of clear accountability and inadequate documentation throughout the building approvals process worsened by poor change control and quality assurance. She concluded that these manifold deficiencies have contributed to a mindset which is willing to do things as cheaply as possible and pass on responsibility for problems and shortcomings to others.

Terminology used in this report

Throughout the report a distinction is made between Commercial and Domestic buildings. These are defined as follows:

‘Commercial buildings’ refers to class 2–9 buildings, which includes **multi-storey residential buildings** and **public buildings**.⁶ The term captures both public and privately-owned buildings, including those intended to be occupied by vulnerable people, such as **aged care facilities, hospitals, childcare centres and low-cost accommodation**.

‘Domestic buildings’ refers to class 1 and 10 buildings which includes **dwellings**, whether detached or attached (such as **terrace houses** and **villas**), **sheds, swimming pools and other non-habitable structures**.

It is appreciated that in the implementation of the recommendations, jurisdictions will decide that for some matters, the appropriate distinction between the types of buildings should be more nuanced, such as considering building heights and floor areas.

As the report makes clear, one of the challenges for implementation of the NCC is that different jurisdictions use different terminology in their building legislation. To avoid ambiguity, it is important to be clear on the language that is used in this report.

The terms ‘registration’, ‘licensing’ and ‘accreditation’ are used across jurisdictions in relation to occupational licensing regimes. Whilst there are differences in the meaning of these terms, for simplicity, this report uses the term **‘registration’**.

This report uses the term **‘building surveyors’**, rather than ‘building certifiers’.

When using the term **‘private certification’** the report refers to a statutory process for certification by privately appointed building surveyors. Under this process, a private building surveyor is appointed to review documentation and/or building work and determine whether it is compliant with the NCC and any other legislative requirements present in each jurisdiction.

For building approvals, such as building permits, certificates of construction and the like, the report uses the terms **‘building approvals’** or **‘building approvals process’**.

For occupancy permits, occupancy certificates, certificates of occupancy and the like, the report uses the term **‘occupancy certificate’**.

When using the term **‘third party review’**, the report refers to the review of a proposed design, in particular a design which includes performance solutions, by a peer or specialist. Third party review might be required by statute or might be requested by a building surveyor or other authority. A third party review can also be recommended by the designer or proactively undertaken for complex designs as part of good design practice.

A number of acronyms, abbreviations and contractions are used in this report. A glossary of key terms follows:

ABCB Intergovernmental Agreement (ABCB IGA) is An Agreement between the Governments of Commonwealth of Australia, the States and the Territories to continue in existence and provide for the operation of the Australian Building Codes Board 2017.

Australian Building Codes Board (ABCB) is a standards writing body that is responsible for the development of the NCC. It is established by the ABCB Intergovernmental Agreement (ABCB IGA).

⁴ Dame Judith Hackitt, *Building a Safer Future—Independent Review of Building Regulations and Fire Safety: Interim Report*, London, Controller of Her Majesty’s Stationery Office, 2017.

⁵ Hackitt, *Building a Safer Future*, p. 5.

⁶ Building classifications are prescribed in the NCC—Class 2 to 9 buildings are mostly covered by Volume One of the NCC and Class 1 and 10 buildings are mostly covered by Volume Two, <https://www.abcb.gov.au/-/media/Files/Resources/..../Building-classifications.pdf>, (accessed 9 February 2018).

Building Code of Australia (BCA) comprises Volumes One and Two of the NCC and prescribes the technical provisions for the design and construction of buildings and other structures.

Building Ministers' Forum (BMF) comprises the group of Australian Government, State and Territory Ministers with responsibility for building and construction. It sets the strategic direction for the ABCB, SOG and BRF.

Building Regulators' Forum (BRF) comprises the senior building regulator or their delegate from each jurisdiction and a senior representative from the Australian Government. The BRF provides an intergovernmental forum for state and territory building regulators to work cooperatively and efficiently on regulatory responses to issues of national significance impacting building and construction in Australia.

Continuing Professional Development (CPD) involves maintaining and enhancing the knowledge, skills and experience related to professional activities following completion of formal training.

Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia. It comprises the Prime Minister, state and territory First Ministers and the President of the Australian Local Government Association.

National Construction Code (NCC) comprises the Building Code of Australia (Volumes One and Two), the Plumbing Code of Australia (Volume Three) and other on-site construction requirements as directed by the BMF.

Senior Officers' Group (SOG) comprises two senior building and construction policy officers from each jurisdiction and a senior representative from the Commonwealth. It supports the BMF by providing enhanced national policy development, collaboration and coordination amongst jurisdictions.

Introduction

A performance-based approach to building regulation

The NCC is one of the most important initiatives of the Council of Australian Governments (COAG). Many have described it as world-class. It sets minimum requirements for the design, construction and performance of buildings throughout Australia. It incorporates on-site construction standards in a systematic way. It is intended to enable all those involved in building and its regulation to understand the minimum requirements for health, safety and amenity in buildings.

The minimum requirements are based on a performance-based approach to building design and construction. Rather than set out how a building is to be constructed, the NCC states how a building or building element is required to perform. The code sets out explicit objectives, listed as a hierarchy of requirements. It is not intended to be overly prescriptive. Designers and builders have the capacity to find creative solutions to meet the performance requirements.

This is to be contrasted with traditional prescribed building codes that mandate specific construction practices. There are clear economic and aesthetic benefits to a performance-based approach: new techniques can be introduced to increase productivity; new products and innovative technologies can be applied to reduce costs or widen choice; and new creative architectural design is encouraged.

Since its adoption, there have been several reports which have identified the positive impacts of the introduction of the NCC, most notably the PC report in 2004 and the CIE report in 2012.⁷ Others have argued that there is a need for a greater level of prescription in the articulation of the NCC.

“...our building regulatory regime has rushed headlong into embracing a performance based paradigm, whilst at the same time propping up and promoting a prescriptive based building administration eco-system.”

Building Products Innovation Council.

There seems to be agreement that the NCC requires continual review and improvement and that the capability of industry to apply the code is a work in progress. Nevertheless, there is a strongly held industry view that the benefits of the NCC have outweighed any negative impacts.

It is apparent to us that deriving the maximum benefit from a performance-based approach to building regulation depends on two fundamental requirements. First, there needs to be a high level of awareness and understanding across the building and construction industry of how compliance can be achieved by incorporating the performance requirements within the design process. Second, there needs to be strong public trust that the performance requirements are being met and, in particular, that health and safety is assured. At present, as this report elaborates, neither of these requirements are being fully met.

Without clear, visible and accountable compliance procedures, public confidence in the ability of governments to oversee a performance-based building and construction industry will be eroded. People need to be persuaded that the NCC is being administered to a high standard. Effective implementation is crucial. That, in essence, is what the recommendations in the report seek to address. Acceptance of the recommendations will require not just the collaborative commitment of all governments to harmonising a strengthened regulatory environment but also the active participation of all sectors of the building and construction industry.

The NCC has the capacity to instil public faith in government oversight of building activity. But this will require the public (including building owners and occupiers) to be assured that it is being effectively implemented by each jurisdiction, working harmoniously. The public is entitled to a presumption that the buildings in which they live, work and receive services are safe.

That level of trust depends upon transparency. The great American litigator and jurist, Louis Brandeis, writing in 1913 on how banks use other people's money, mused that "Sunlight is said to be the best of disinfectants".⁸ If the actions of individuals, organisations or government are visible, then pro-social behaviours are more assured and the need for legal or regulatory intervention is lessened.

⁷ Productivity Commission, *Reform of Building Regulation*, Research Paper, Canberra, Productivity Commission, 2004; The Centre for International Economics, 2012, *Benefits of building regulation reform*, Canberra.

⁸ L.D. Brandeis, 'What Publicity Can Do', *Harper's Weekly*, 20 December 1913, p. 10.

We strongly espouse that ethos. Confidence in the NCC requires an effective disclosure regime. It needs to incorporate a number of elements. The public should be able to see how governments enforce the NCC. Decisions made during the design and construction of a building need to become an accessible record. Scrutiny is vital to public accountability. Those responsible for making and certifying decisions under the NCC need to be identified so that they can be held accountable for their decisions.

People require assurance that the products used in a building are appropriate and that they are employed to an agreed performance standard. They need to know that those who are registered to certify the standards are suitably trained and qualified, that they perform their tasks diligently during the process of construction and they cannot be perceived to have any conflict of interest with developers, builders or owners.

"The "Deemed to Satisfy" provisions of the Code have long been standard practice. However, in the "Performance Based" solutions provisions there is great latitude and propensity for misunderstanding and the divergence of opinions on what is meant and what are acceptable alternatives. This requires much clarification."

Australian Construction Industry Forum.

There is ongoing debate about the best ways to improve the NCC. During our consultations, many expressed the view that the content of the NCC lacks clarity and that this should be acknowledged as a barrier to effective implementation. At the request of the BMF, the ABCB is well progressed on its 'Improved Usability' project which is intended to simplify the NCC. It also has a project on 'Performance' which includes the quantification of performance requirements to improve productivity and building outcomes. Industry continues to offer feedback on these projects.

We have not been asked to make recommendations about the NCC itself. We fully support the work that the ABCB has been tasked with and are confident that the BMF is aware of the issues that have been raised. However, the effectiveness of the implementation of the NCC will at least, in part, depend on it being a document that is able to be understood and its intentions comprehended by practitioners across the sector. The code needs to be easy to access and written in language that is readily comprehensible. Those who use it need to be able to receive clear advice from sources of authority on matters of interpretive ambiguity.

Modern construction practices for multi-storey residential buildings

A significant change in the building and construction industry over the past 30 years has been the increase in construction of multi-storey buildings, particularly for residential living. According to the Australian Bureau of Statistics the number of apartments being built in high-rise buildings (that is, buildings of four or more storeys) in Australia each year has almost tripled in less than a decade.⁹ In 2007, 30,000 apartments were built in high-rise buildings, increasing to almost 90,000 in 2015. By comparison, the number of apartments being constructed in low-rise and semi-detached dwellings over the same period was steady with approximately 10,000 new apartments in low-rise buildings and 20,000 new apartments in semi-detached buildings per year.

Contractual arrangements for multi-storey projects differ, but commonly developers engage a builder to undertake a design-and-construct project. This means the builder is responsible both for the development of the design and the construction of the building. Whilst the developer might initially engage architects and engineers to prepare early designs to obtain planning approvals, these consultants then become subcontractors. It is the builder who is responsible for the delivery of a completed building at an agreed price. Once contracted, the builder will work to find efficiencies and cost savings in the development of the design and construction of the building.

A significant percentage of apartments are sold off the plan to fund the development. However, purchasers of apartments have no rights to oversee the construction phase of the project. They must rely on the regulatory controls and competence of practitioners to deliver a compliant, safe building.

Although building approvals are required, the nature of a design-and-construct project means that many aspects of the design change after the initial approval is obtained. This often leads to just-in-time supply of documentation and squeezes the compliance checking processes.

Staged building approvals are contemplated in most building approvals systems. They are intended to allow for ongoing approvals as the design is developed and before work commences. However, regulatory controls over this process are often very limited. As a consequence, there is often a significant difference between the as-designed building documentation and the as-built building.

⁹ Australian Bureau of Statistics, 8752.0 *Building Activity*, Australia, 2017.

Some, but not all, jurisdictions require lodgement of as-built plans. Where as-built plans are lodged there are consistent reports that the adequacy of documentation is poor. In practice, building surveyors insist, to different degrees, on amended plans when the building work has departed from the approved plans. However, many approve, allow, or are not aware of, variations that have been made. The result is that changes to approved design occur frequently, at the discretion of the builder, project manager and/or contractors and without independent certification.

The implementation of NCC has failed to keep pace with these developments. Most compliance and enforcement systems do not account for the modern construction practices described above.

It is for that reason that several of the recommendations seek to address the issue of adequacy of documentation (Recommendations 13, 14 and 17), ongoing approval of design by independent certification (Recommendations 16, 18 and 19) and increased auditing and regulatory oversight by the state or territory regulator (Recommendations 5, 6 and 7). Each jurisdiction will need to look critically at their legislation to determine whether the statutory controls recommended are strong enough. They will also need to develop effective enforcement programs to overcome the culture of complacency that has emerged as a result of the modern construction practices described above.

“...our current system is nationally fragmented, needlessly complex and based on an old regulatory model which is increasingly incapable of dealing with modern industry issues and rapid change. It often fails to facilitate identification of defective work, fails to hold those responsible for building defects where these are detected, and fails to support innocent victims who inherit responsibility for resolving defective work.”

Building Products Innovation Council.

The role of the private building surveyor

Contemporary building and construction laws derive from the 1991 Model Building Act (MB Act), elements of which have since been variously adopted by the states and territories.¹⁰ A number of major reforms were embodied in the MB Act, including:

- providing a choice of either engaging a private building surveyor to certify all aspects of construction requiring approval (including the issue of an occupancy certificate) or to opt for the ‘traditional’ route in which approval was facilitated by the local authority;
- mandating professional indemnity cover for prescribed classes of building practitioners (such as engineers, architects and surveyors);
- providing for the setting of minimum qualifications for building practitioners;
- providing certainty in respect of time limitations for law suits;
- requiring judges to apportion liability for damages so that a party found liable for a given proportion of the total amount of the damages for economic loss and rectification costs resulting from the defective work would need to pay no more than the given proportion; and
- providing for “one-stop-shops” for resolving building approval disagreements.

For liability reasons, the model proposed did not have a role for local government if a private surveyor was engaged, other than to perform a document registry function. In four jurisdictions (including three with the highest volumes of building and construction work) this model has been adopted. In the other four jurisdictions, variations on the model have been adopted. In each case the private building surveyors have a certification role and either the local or territory government can accept their certification without the need to form their own opinion or take on liability for the work of the private building surveyor.

In short, in all jurisdictions across Australia private certification now occurs as part of the vast majority of building approvals process. The increase in private certification has resulted in a significant decline in the resources and capacity of most local government building authorities.

A building regulatory model that includes private certification carries with it an inherent potential for conflict of interest. That is not to say that a model where only a government official certifies building design and construction is entirely free from potential conflict. There is evidence that government processes can be open to poor practices. However, the private certification model will always have a significant potential for conflict of interest given the commercial relationship that must necessarily exist between the designer/builder and building surveyor. Even if the building surveyor is appointed by the owner, this appointment will be influenced by the builder and/or designer.

¹⁰ Dix and Lovegrove, *Model Legislative Provisions and Commentary*.

"The private building surveyor regime has led to a culture of complacency and an element of not rocking the boat or biting the hand that feeds you. The level of independence we originally had with municipal building surveyors has been lost."¹¹

FM Global

In the face of the shift to private certification across the country since 1993, regulatory oversight of the role of private surveyors by governments around the country has been patchy. Most of the regulators we consulted advised us that proactive audits of private building surveyors were not done or had only commenced in the past three or four years. In most jurisdictions, to the extent that auditing is undertaken, these audits are largely administrative, although there is work presently underway to develop more substantive audit programs. Intervention is rare. State licensing bodies have cancelled the registration of a relatively small number of private building surveyors in only two jurisdictions. In many jurisdictions there have been very few disciplinary inquiries into the conduct of private building surveyors.

A common complaint from local government associations around the country is that they are expected to undertake enforcement related to the poor practices of private building surveyors without being adequately resourced. They also argue that state and territory licensing bodies have been ineffective in dealing with incompetent and unprofessional practitioners. For example, the Local Government NSW has argued that the Building Professionals Board (NSW) is slow to act on non-compliance matters, requiring councils having to take on a greater enforcement role.¹²

There are two sides to this story. From private building surveyors we heard that sometimes when they try to undertake enforcement and refer unresolved matters to the state, territory or local government, they are ignored. Worse, on occasion, attention turns to their own conduct and they find themselves the subject of complaint and criticism.

Notwithstanding the very strongly and consistently held perception that private certification is tainted with conflicts of interest and poor practice, a range of stakeholders expressed sympathy for the difficult role of the private building surveyor. Many private certifiers are individuals of high integrity. They often experience considerable pressure from the conflicting demands they face from their clients, the regulators and the insurers. Too few in the building industry are attracted by a career as a surveyor. The profession is ageing and there are limited pathways or incentives for people to become building surveyors.

Some of those consulted have told us that the move to private certification over the past 25 years has compounded many of the problems that we have been asked to examine. We tend to agree. However, it is not just the conduct of private building surveyors that contributes to the problems but also the lack of regulatory oversight of their conduct and, more importantly, the absence of a cohesive and collaborative relationship between state and local government and private building surveyors. In the building and construction environment that has developed since the early 1990s, the governance of private building surveyors needs to be recalibrated.

There should be a tightening of government oversight of the building approvals process in order to effectively minimise the conflict of interest that is inherent in a privatised building surveying model. Some jurisdictions are considering options such as a 'cab-rank' or 'chocolate-wheel' model in which government makes the decision on the allocation of private surveyors to projects. Some jurisdictions are considering limiting the involvement of private building surveyors to issuing the building approval or conducting inspections or issuing the occupancy certificate, but not all three. Another model is to allow private building surveyors to perform all three stages of the building approvals process but only for approvals relating to Domestic and lower risk Commercial building work.

The allocation of roles between government and private building surveyors is for each jurisdiction to determine. The recommendations can be implemented regardless of the public versus private certification model in place in any given jurisdiction. They would complement any other restrictions that a jurisdiction might wish to set in place.

Our focus has been to ensure the integrity of private building surveyors. We believe that can be achieved through statutory controls to mitigate conflict of interest (Recommendation 9), a code of conduct (Recommendation 10) and mandatory reporting obligations (Recommendation 11). The recommendations also call for increased collaboration between state and local governments and private surveyors in their enforcement role (Recommendation 5).

Such interventions do not represent imposition of unnecessary red tape or bureaucratic overreach. There is a significant danger that without increased auditing and enforcement, the privatised building approvals process will lead to an ongoing decline in compliance standards. That is why we propose enhanced regulatory oversight. Improved governance of private building surveyors is necessary in order to win over vocal industry critics and, crucially, to restore public confidence that safety is paramount.

¹¹ Comments provided to the BMF Assessment by FM Global.

¹² Local Government NSW, *Submission to the Building Professionals Board Report on "Building Certification and Regulation – Serving a New Planning System for NSW"*, [website], 2014, p.15, <http://www.lgnsw.org.au/files/imce-uploads/127/LGNSW-submission-to-bpb-maltabarow-report-march-2014.pdf>, (accessed 3 February 2018).

The responsibility of builders

The quality of buildings depends heavily on the competency and integrity of builders. There are many builders that have high standards of competency and integrity. However, the rates of disputes, alleged defects and reports of high levels of illegal phoenix activity are evidence that there are shortcomings in the performance of some builders. These need to be addressed.

Independent inspections of building work are required in most jurisdictions as a mechanism for overseeing the work of builders. However, the majority of building work is constructed without oversight. Mandatory inspections are limited in their ability to detect non-compliance. Some of the most important safety elements are hidden from view and a point-in-time inspection cannot properly assess essential construction processes. Whilst inspections during building work have merit, the competency of builders will always be a critical factor in the effective implementation of the NCC.

The recommendations are intended to strengthen the competency of builders by requiring consistent requirements not only for the registration of all builders but also for sub-categories that limit the scope of work that can be performed based on skills and competencies (Recommendations 1 and 2). It is also recommended that builders receive compulsory education on the NCC. The content of that education should be based on intelligence about common forms of non-compliance detected by regulators and insurers (Recommendation 3).

The integrity of private certification has been questioned, largely because of the relationships between builders and private building surveyors. The recommendations provide for a strengthening of the independence between builders and building surveyors (Recommendations 9, 10 and 11). They include placing obligations on private building surveyors to report builders who do the wrong thing. It is imperative that builders play their part in helping to redefine the role of private building surveyors. Builders need to recognise that inappropriate relationships with private building surveyors undermine the whole system.

The recommendations call for improvements to the quality of documentation and to increased controls over design-and-construct approaches to building (Recommendations 13 to 17). These changes should give greater protection to builders. For these changes to be effective, builders must ensure that they build to approved documentation and that where a design is unclear or not practical they call for variations to be documented before proceeding with work. For design-and-construct projects, builders must resist proceeding with work beyond the approved design. When products are being selected or substituted, the builder needs to know when to seek permission from the building surveyor.

The question of cladding

Our appointment to undertake this inquiry was one of several actions taken by the BMF following the tragic deaths of 71 people in the Grenfell Tower fire in London on 14 June 2017. The circumstances of that fire continue to be investigated, but it is widely accepted that a key contributor to the ferocious nature of the fire was the presence of highly combustible polyethylene cladding that had been installed on the external walls of the tower as part of recent refurbishment works.

The BMF was considering the use of cladding containing polyethylene on buildings in Australia before the Grenfell Tower fire. In November 2014, in Melbourne's Docklands, the Lacrosse building caught fire. Over 400 occupants were evacuated as the fire raced up 13 storeys via the external facade of the building within minutes of igniting. The Lacrosse building was completed in 2012 and was clad in combustible aluminium composite cladding containing polyethylene.

Since the Lacrosse building fire, the BMF has taken a number of specific actions including reviewing the NCC and forming the SOG to advise it on issues relating to combustible cladding and building product accreditation generally. Each jurisdiction has commenced work to conduct audits of high-rise buildings. Many have initiated, or are considering, reforms to address the use of aluminium composite cladding and other high-risk building products.

The report does not make recommendations about cladding audits and rectification works. More generally, we do support the BMF seeking to reach a position on the establishment of a compulsory product certification system for high-risk building products (Recommendation 21).

Our Terms of Reference do not specifically refer to the concerns regarding combustible cladding. However, this issue has been a dominant underlying theme of the consultations we have held. As we have developed the recommendations we have asked ourselves a simple question: "would our recommendations significantly reduce the likelihood of the misuse of cladding occurring in the future?". We believe we can answer in the affirmative.

A better system of harmonisation

A common theme in our consultations was the call for greater harmonisation in compliance and enforcement systems. This issue has been raised time and time again. In considering this matter the Productivity Commission concluded that “While there may be benefits from some alignment across jurisdictions of administrative processes, it is not clear that net benefits would arise from harmonisation of all aspects. A progressive approach, advancing harmonisation in those areas with the largest net benefits, may be appropriate. Effective compliance and enforcement is a higher priority than full national consistency at this stage”.¹³ We agree with this finding.

“If there was one area of focus that could be immediately sought to pursue improvement, it should be seeking a commitment to develop a model NCC Administrative Code to harmonise expectations regarding the aspects identified in the terms of reference for this assessment.”

Fire Protection Association Australia.

Our appointment demonstrates a willingness by the BMF to consider consistent ways to achieve the most effective implementation of the NCC across Australia. The recommendations, if adopted by all jurisdictions, will lead to a degree of harmonisation which does not presently exist. Further, because many of the recommendations call for a national approach, the implementation process will continue to strengthen the relationships between jurisdictions and their appreciation for each other’s systems. The dissemination of good practice will be enhanced.

Under the most recent ABCB Intergovernmental Agreement (ABCB IGA), the BMF has further defined the roles of the ABCB and the SOG. The Ministers have also sought assistance on regulatory matters from a forum of building regulators (the Building Regulators’ Forum (BRF)). All three will provide the BMF with support in its work. This new governance arrangement strengthens existing efforts for collaboration and will encourage ongoing partnerships between jurisdictions on a wide range of issues. We strongly support its development.

“AIBS supports a single national legislative approach, or at least for each State and Territory to adopt a model version in its legislative scheme.

AIBS believes that eliminating the differences in administrative provisions would lead to a reduction in compliance cost to industry and therefore to the consumer.”¹⁴

Australian Institute of Building Surveyors

Given this context, we have been mindful to respect the autonomy of each jurisdiction to make their own legislative and administrative arrangements for building and construction compliance and enforcement systems. Crucial elements of the systems such as the public versus private certification model, the role of local government and fire authorities, the interface with planning controls, consumer protection mechanisms and funding models, remain matters for each jurisdiction to determine.

“The NCC must be enforced and policed in a way that is nationally consistent.”

Master Builders Australia.

¹³ Productivity Commission 2004, *Reform of Building Regulation*, p. 243.

¹⁴ Australian Institute of Building Surveyors, *AIBS Policy - Building Regulatory reform in Australia*, Version:001/18-Sep-17, 2017, https://aibs.com.au/Public/Public/AIBS_Policies.aspx, (accessed 13 February 2018), p. 8.

Recommendations

Recommendation 1—Registration of building practitioners

The problem identified

Registration of practitioners is a regulatory mechanism for providing public accountability. Whilst all jurisdictions register building practitioners as part of their compliance and enforcement systems, the categories that are registered differ. This affects the mobility of participants and creates complexity in applying mutual recognition. More importantly, there are gaps in the accountability of practitioners with key responsibilities for compliance with the NCC across Australia.

“All registration systems have the same basic characteristics in that standards must be set, courses accredited, candidates examined or assessed, and a register maintained. Performance must be monitored and failures disciplined. A register has greater effect if supported by licensing arms of government.”

Engineers Australia.

Whilst there is some crossover, the skills required for the design and construction of Commercial buildings differ significantly from the skills required for the design and construction of Domestic buildings. Many practitioners specialise in, or have capabilities limited to, either the commercial or domestic sector. Unfortunately, in many jurisdictions the scope of work that can be performed by some categories of registered practitioner is not limited to the type of design or construction work they have the capability to perform. This results in registered practitioners taking on building work for which they are not fully competent.

Although fire safety systems are a critical component of Commercial buildings and occupy a significant part of the NCC, most jurisdictions do not register the practitioners who have expertise in fire safety system design, installation or maintenance. Similarly, the design of a multi-storey building relies on the expertise of structural engineers, but three jurisdictions do not register that occupation. Builders are responsible for building work and the supervision of contractors but not all jurisdictions register builders for all types of Commercial building work.

Most Commercial buildings include complex fire safety systems that require maintenance and testing to ensure that they will operate as intended in the event of fire. Many key stakeholders believe that the standard of maintenance of fire safety systems post-occupancy is poor. However, most jurisdictions do not require fire safety system maintenance contractors to be registered.

Recommendation 1:

That each jurisdiction requires the registration of the following categories of building practitioners involved in the design, construction and maintenance of buildings:

- **Builder**
- **Site or Project Manager**
- **Building Surveyor**
- **Building Inspector**
- **Architect**
- **Engineer**
- **Designer/Draftsperson**
- **Plumber**
- **Fire Safety Practitioner**

Implementing the recommendation

Each jurisdiction will need to have complementary provisions which provide that only registered practitioners can perform the work for which they hold registration. This should extend to ensuring that only appropriately qualified and registered practitioners can prepare performance solutions. Exemptions for owner-builders performing building work on Domestic buildings may be appropriate.

It is important that each category of regulation have defined sub-categories which limit the scope of work that can be performed by reference to classifications of buildings and/or building heights and floor areas. At a minimum, sub-categories referable to Commercial and Domestic buildings should be applied to each category.

For the categories of Engineers, Plumbers and Fire Safety Practitioners, there should be categories for various disciplines. The following are proposed:

- Engineers
 - civil
 - structural
 - hydraulic
 - mechanical
 - geotechnical
- Plumbers
 - water
 - drainage
 - sanitary
 - gas
- Fire safety system installers
 - fire safety engineers
 - fire protection system engineers
 - fire safety system installers
 - fire safety system maintenance contractors

Further consultation should be undertaken with industry with a view to reaching agreement on the full range of appropriate disciplines to be included.

Each jurisdiction has specific legislation for the registration of architects. Whilst this need not change, the accountability and regulatory oversight of architects should be consistent with other categories of building practitioner and aligned with the recommendations in this report. This will mean that changes are required to legislation regulating architects to provide for the following:

- the introduction of sub-categories which limit the scope of work that can be performed by architects by reference to classifications or types of buildings (Recommendation 1);
- nationally consistent requirements for registration of architects (Recommendation 2);
- mandatory CPD for architects (Recommendation 3);
- appropriate powers for the architects' licensing bodies to audit the performance of architects (Recommendations 6 and 7); and
- a statutory duty on architects to prepare documentation which demonstrates that proposed buildings will comply with the NCC (Recommendation 13).

Further observations

In identifying the categories referred to in the recommendation, we have had close regard to the Terms of Reference and the fact that the recommendations are to be directed to strengthening the effective implementation of the NCC.

Jurisdictions can and do register other practitioners operating within the building and construction industry, such as demolishers and electricians. Registration of such trades can be worthwhile. The recommendation is not intended to exclude other categories of work that jurisdictions may choose to register.

The building and construction industry is evolving fast. As the technology of building construction changes and innovative practices are introduced, new forms of expertise are emerging. There may be justification in the future for other categories of practitioner to be included in a nationally consistent approach if evidence emerges that the work performed is sufficiently complex and relates to areas of high-risk building design, construction or maintenance.

In some jurisdictions, various trade contractors are required to hold registration when contracting directly with owners. These trade contractors do not require registration if they are sub-contracting to a builder. We have not made recommendations for a nationally consistent approach to registration of trade contractors as this is likely to impose a significant regulatory burden on the building and construction industry and on regulators nationally, particularly in smaller jurisdictions. We have been unable to conclude with certainty that such a burden would be warranted. Jurisdictions that do choose to require trade contractor registration as part of their warranty or consumer protection regimes should work together to harmonise the categories of trade contractors they register.

When a builder contracts directly with an owner, it is the role of the builder to undertake building work using employees and subcontractors. It is recommended that the builder remains the primary person accountable for the proper construction of building work. Where necessary, this role should be set out in legislation. An exception to this position is fire safety system installers. The fire safety systems in buildings can be based on complex fire engineering designs and performance solutions. The installation and proper functioning of these systems is a critical building safety feature that warrants registration of specialist contractors.

Recommendation 2—Consistent requirements for registration

The problem identified

Currently, where the same category of practitioner is registered in two or more jurisdictions, there are often different requirements for registration. Nationally consistent training packages are limited. Each jurisdiction recognises different levels of qualification and experience when assessing applications for registration. This makes the operation of mutual recognition burdensome.

“Although the general roles of design, approval of design, installation, approval to occupy and ongoing maintenance exist in every jurisdiction, there is no consistency in terminology or the extent of roles or the subsets within them. This makes accountability difficult as well as mutual recognition of transportable workforces.”

Fire Protection Association Australia.

Some states and territories have been reluctant to register practitioners registered in other jurisdictions on the basis that they believe the registration standards set by other jurisdictions are of a lower level. Unnecessary impediments to the movement of skilled practitioners imposes an economic cost on the industry, limits competition, and reduces choice.

A nationally consistent approach to the requirements for registration of building practitioners (Recommendation 1) would facilitate the development of appropriate training packages for those practitioners. This should lead to nationally recognised qualifications for each category and sub-category of registered practitioner, greater labour mobility and a more comprehensive national market for appropriate insurance products.

The public needs to be assured that practitioners are trained and experienced in applying the NCC. They also need confidence that they are people of integrity and that where possible they are covered by insurance.

Recommendation 2:

That each jurisdiction prescribes consistent requirements for the registration of building practitioners including:

- certificated training which includes compulsory training on the operation and use of the NCC as it applies to each category of registration;
- additional competency and experience requirements;
- where it is available, compulsory insurance in the form of professional indemnity and/or warranty insurance together with financial viability requirements where appropriate; and
- evidence of practitioner integrity, based on an assessment of fit-and-proper person requirements.

Implementing the recommendation

A nationally consistent approach to regulating building practitioners is vital. However, these expanded requirements could be implemented progressively based on categories of practitioners. Given the significance of their role, priority should be given to building surveyors.

An essential element of training packages must be training on the NCC and the manner in which it needs to be applied. This is not presently a compulsory unit of study for all qualifications which are required for registration. It should be. Effective implementation of the NCC depends upon it.

Fit-and-proper person requirements are the foundation of public trust in the integrity of practitioners. These include such matters as bankruptcy and criminal checks. In the first instance, financial viability requirements are most relevant for builders. There may be justification for other categories of practitioner to be subject to similar requirements.

Further observations

Presently, some jurisdictions rely on accreditation by industry bodies as a basis for registration. There is merit in this approach. Well-run industry accreditation can ensure that the competencies of practitioners are tailored to their area of work and can alleviate state or territory regulators from the detailed assessment of applications. If this approach is taken, the state or territory licensing body should have clear statutory responsibility for auditing performance and disciplining registered practitioners. Of course, industry associations should still take responsibility for holding their members to account and cancelling accreditation. A collaborative approach to disciplinary oversight would be beneficial.

It is important that as many practitioners as possible hold professional indemnity and/or warranty insurance in order to support accountability. It is acknowledged that insurance is not currently available for the range of practitioners proposed to be registered. This weakness needs to be addressed. There should be ongoing discussion between governments and the insurance industry to ensure that the best possible insurance is available to all categories of registered practitioner.

Recommendation 3—Continuing Professional Development

The problem identified

Building practitioners operate in a dynamic environment. New products, technologies and practices are actively encouraged through the performance-based NCC which, itself, is amended every three years. The introduction of nationally consistent mandatory registration requirements provides a mechanism to ensure currency of competencies. Those already practising need to have up-to-date knowledge of the current edition of the NCC.

“The NCC references over 100 Australian Standards and other technical documents. These documents commonly reference other technical standards (secondary and tertiary references) meaning that through the NCC alone, well over a thousand detailed standards form part of the regulatory requirements that apply to building work. No one person can possibly be required to have a comprehensive understanding of all these requirements, it is not practical or realistic. Governments and the Building Ministers need to acknowledge this reality in forming a view on any future changes to the administration framework for building work.”

Housing Industry Association Limited.

Many stakeholders report that building practitioners across the industry do not have a sufficient understanding of the NCC or its revisions. This has led to non-compliance or poor quality documentation of compliance. Misinterpretation or ignorance of the requirements of the NCC is not uncommon. Indeed, this failure has been offered as one explanation for the prevalence of non-compliant cladding on buildings across Australia.

Recommendation 3:

That each jurisdiction requires all practitioners to undertake compulsory Continuing Professional Development on the National Construction Code.

Implementing the recommendation

Regulators need to have mechanisms to identify common non-compliances which may indicate systemic misunderstanding of the requirements of the NCC. Insurers may also have data they would be willing to share. This intelligence should be collected, shared nationally and fed back to the industry promptly. It should also inform compulsory topics for CPD relevant to each category of registration.

“...CPD must become a mandatory consideration for all state jurisdictions that register building practitioners. This mandatory CPD consideration should ensure that practitioners will maintain a level of currency within their specialist disciplines, which should also promote aspects of consumer confidence in the overall built environment.”

Metropolitan Fire and Emergency Services Board.

Some of those consulted have been critical of CPD. Reservations have been expressed that CPD schemes can leave the content of training up to the discretion of participants which reduces the relevance and effectiveness of learning. Compulsory CPD schemes should provide for targeted learning on topics of genuine relevance to improve the competence of practitioners. Such topics should be focused on improving the understanding of the NCC and ensuring its effective implementation.

Further observations

Industry associations can play a key role in the delivery of CPD provided that there is collaboration with regulators to ensure that the content of training is appropriate. They may be willing to assist with the administrative oversight of CPD schemes through their accreditation schemes.

Governments may wish to consider incentives to support compulsory training on the NCC.

Recommendation 4—Career paths for building surveyors

The problem identified

The role of the building surveyors is critical to the building approvals process. Unfortunately, there may not be an adequate supply to meet future needs. The average age of building surveyors is now over 50 and there are ill-defined and inadequate career pathways to becoming a registered building surveyor.

For many other categories of building practitioner, careers are established through apprenticeships, certificated training or other education pathways. Given the criticality of building surveyors to ensuring NCC compliance, more needs to be done to encourage new entrants to this profession, especially for those who have experience in the building and construction industry.

Recommendation 4:

That each jurisdiction establishes a supervised training scheme which provides a defined pathway for becoming a registered building surveyor.

Implementing the recommendation

A nationally consistent supervised training scheme for building surveyors, designed in collaboration with industry, would be most effective. Such a scheme should provide for comprehensive training on regulatory obligations, ethical conduct and the operation of the NCC.

Further observations

Clarity is needed on the extent to which trainees must be supervised and how trainees can attain experience to achieve the necessary requirements for registration over a set period. The legal requirements for physical supervision of trainees needs to be pragmatic so that it is commercially viable for businesses to invest in trainees.

Governments may wish to consider incentives to support the development of, and/or participation in, a supervised training scheme.

Recommendation 5—Improving collaboration between regulators

The problem identified

In each state, multiple state government bodies and local councils have a role in building regulation. Private building surveyors may also have enforcement powers in relation to building work for which they have been appointed. This results in a fragmented system of regulatory oversight which is prone to duplication, confusion, unclear lines of responsibility and a lack of information sharing. This can be exacerbated in cases if some authorities believe that they have received inadequate funding. To the public, especially when things go wrong, this often looks like a game of buck-passing.

“Proper enforcement requires a full and detailed expression of how the enforcement activities are to be undertaken, when, and by whom.”¹⁵

Australian Institute of Building Surveyors

¹⁵ AIBS, *Building Regulatory Reform*, p. 11.

With the introduction of private certification, some local governments have taken the position that they should no longer have responsibility to respond to complaints about building work because a private building surveyor has been appointed. This can lead to complaints being characterised as a disciplinary issue and referred to the state building regulator. The state regulator might direct the complainant back to local government to use its power to order work (a power which the state may not have). Alternatively, the state might characterise the same matter as a consumer affairs matter and refer it to its dispute resolution body.

In six jurisdictions, private building surveyors have powers to initiate enforcement action. Private building surveyors are sometimes reluctant to use these powers because of their commercial relationship with the builder and/or designer or because they do not receive support from local or state governments when they refer unresolved matters to them for further action.

For there to be effective regulatory oversight, all authorities and private building surveyors with enforcement powers need to collaborate closely on the performance of their functions, the timing and nature of referrals, and the sharing of information.

Recommendation 5:

That each state establishes formal mechanisms for a more collaborative and effective partnership between those with responsibility for regulatory oversight, including relevant state government bodies, local governments and private building surveyors (if they have an enforcement role).

Implementing the recommendation

Our aim is not to prescribe how each jurisdiction should institute these partnerships. Implementation could be achieved through enhancements to an existing panel or committee. Alternatively, a new body could be established which would be dedicated to the task of enhancing regulatory practices. Some jurisdictions may wish to establish a regulatory practice panel.

It is emphasised that the body proposed by the recommendation is not intended to be another advisory committee. Rather, the intention is to have a body that will focus on improving regulatory practice with a view to its members working together to effectively monitor building practitioners and building work. It needs to possess the authority to improve regulatory oversight.

With this in mind, the new or existing body should be made up of representatives from relevant state government bodies, local governments and private surveyors (if they have an enforcement role). It might usefully be chaired by an independent person. The body could be formalised by administrative means or be a statutory body. Either way, it should report to the relevant Minister/s in its jurisdiction. The body should meet regularly to discuss collaborative regulatory practices and procedures.

To support implementation of the recommendation, each jurisdiction will, as a first priority, wish to ensure that its legislation provides clear statements of responsibility for each authority. This will be essential to provide the necessary mandate for participation and to ensure clarity in the roles, responsibility and powers of each of the authorities. Any reforms needed should be developed having regard to how the various authorities will ‘together’ provide effective oversight of the building and construction regulatory systems.

The body should have terms of reference which include:

- the establishment and maintenance of written information sharing agreements that deal with matters such as:
 - shared risk assessment practices;
 - procedures for referrals; and
 - content and procedures for information sharing;
- monitoring and advising the relevant Minister/s on the effectiveness of the regulatory oversight of the industry and providing advice to the Minister/s as required;
- agreeing on the content of publications or joint websites which give clarity to both the industry and the public on complaint management processes and regulatory practices; and
- mechanisms for engagement with consumers and/or industry associations.

It might also be appropriate for fire authorities and building dispute resolution bodies to be part of the body.

Further observations

The territories work closely with private building surveyors and as there is only one level of government involved, formal structures are unlikely to be necessary. It is a matter for the NT and the ACT to decide whether to implement this recommendation.

Recommendation 6—Effective regulatory powers

The problem identified

Audits of cladding on high-rise buildings have raised wider questions about whether authorities have the necessary powers to require rectification, recall products or issue warnings about products.

Recommendation 6:

That each jurisdiction give regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action.

Implementing the recommendation

Whilst it is not necessary to have nationally consistent powers, it is envisaged that all jurisdictions will need to have a minimum range of legislated powers, including:

- powers of entry for monitoring compliance;
- powers of entry where there is a reasonable belief of the commission of an offence or grounds for disciplinary inquiry;
- powers to require the production of documents or information;
- powers to investigate following a complaint or proactively;
- powers to seize documents and test and seize materials;
- powers to evacuate, make all necessary orders, or stop works;
- powers to negotiate voluntary undertakings;
- powers to undertake disciplinary processes;
- performance audit powers over all registered practitioners (including architects); and
- infringement notice and prosecution powers.

The question of which authorities (state, territory or local government or private building surveyors) should have which powers is a matter for each individual jurisdiction. However, where the same or similar powers are to be given to more than one regulator, it will be helpful to have a clearly identified lead regulator.

Further observations

Regulation of the building product supply chain is warranted, and product recall and/or prohibition powers should exist for high-risk building products. However, it has not been recommended that all building regulators be given such powers. It is a matter for governments to decide whether such powers should sit with building or consumer affairs regulators. On one matter we are clear: if building regulators are to be given powers to regulate the supply chain, this work should not detract from their primary role.

Recommendation 7—Strategy for the proactive regulation of Commercial buildings

The problem identified

The construction of Commercial buildings is generally commissioned by developers that are in the business of building, even though they are not builders themselves and are not required to be registered. The end users of these buildings will not usually participate in the building process at all. The ability of a purchaser to assess the building's compliance with the NCC is limited. Consumers generally assume that the building regulatory system has delivered a building that is compliant with the NCC. That is not always the case and, as that is recognised, public confidence is undermined.

Building approvals processes across Australia generally provide for a very high level of self-certification of the design and construction of Commercial buildings. Until now there has been very limited proactive auditing by regulatory authorities of building work or of the registered practitioners involved in the construction of Commercial buildings.

"As a result of weak enforcement, parties – especially builders, building surveyors and fire engineers – are incentivised to reduce costs and they take risks doing so. These parties reap the benefits of the risky activity, but without a 'cop on the beat' they do not bear the consequences when things go wrong. This creates moral hazard."

Enright Consulting.

Proactive auditing is imperative to restore public trust. Governments need to be able to detect and regulate inadequate practices. A strategy for the proactive auditing of the construction of Commercial buildings is required in each jurisdiction.

Recommendation 7:

That each jurisdiction makes public its audit strategy for regulatory oversight of the construction of Commercial buildings, with annual reporting on audit findings and outcomes.

Implementing the recommendation

It is essential that each jurisdiction have a public strategy for proactively auditing the design, certification and construction of Commercial buildings with a view to improving regulatory oversight, education and enforcement. State regulators may collaborate with relevant councils for this work, but the responsibility for the strategy should rest with the relevant state or territory regulator in each jurisdiction.

The strategy should include targeted audits of:

- the documentation for Commercial building projects, including the standard of documentation and quality of decision making in relation to performance solutions;
- the conduct of building surveyors to ensure adherence to regulatory requirements intended to mitigate against conflict of interest; and
- the work of builders, including their management of approvals for design development, variations and product substitution.

Statutory powers to support such a strategy should include:

- performance audit powers applying to registered practitioners;
- powers to take immediate disciplinary action in high-risk cases;
- the ability to issue rectification orders or order the appointed building surveyor to take reasonable actions;
- infringement and disciplinary powers including requiring additional training, undertakings, fines, and the suspension or cancellation of registration; and
- the ability to disqualify directors in order to prohibit them from being involved in other building companies.

A public register of any enforcement action taken against any registered practitioners by the state or territory regulator should be established and maintained.

Transparency is essential. Public feedback should be encouraged. To these ends, each jurisdiction should report annually on its strategy and on the outcomes and learnings from its audits. This will enhance public accountability, spread good practice across jurisdictions and encourage collaboration with industry bodies.

Further observations

Whilst the recommendation refers to auditing and oversight of the construction of Commercial buildings, this should not be taken to mean that auditing and oversight of the construction of Domestic buildings is not necessary. The recommendation is intended to prioritise the development of audit programs for Commercial buildings. Auditing might be extended to Domestic buildings in the future.

Recommendation 8—Collaboration with fire authorities in the development of fire safety design

The problem identified

Fire authorities play a role in the building approvals process in all jurisdictions. However, the triggers for their involvement differ. The resourcing of fire authorities to perform their role and approaches to the approvals process differs across jurisdictions. This results in similar buildings in different jurisdictions having different requirements imposed by the fire authorities.

There is consensus that, at a minimum, fire authorities should provide comment on, or consent to, performance solutions that involve fire performance requirements that relate to fire brigade intervention. However, fire authorities will sometimes want to consider, and may object to, broader aspects of the fire engineering design. The mechanisms for fire authorities to object to fire engineering designs differ across jurisdictions. In many, fire authorities have limited or no appeal rights. As a consequence, differences of opinion often remain unresolved.

“A more collaborative and respectful relationship is needed where the fire brigade is proactively sought to comment on areas that relate to their expertise, and designers and approval authorities are forced to consider this and better document and justify their position. ...the fire brigades have an important role to play in the design/approval process.”

Fire Protection Association Australia.

Fire authorities lack confidence that buildings will comply with the minimum fire safety requirements of the NCC. This concern seems justified given the prevalence of non-compliant combustible cladding on Commercial buildings. Measures need to be taken to improve compliance levels and to ensure a suitable level of engagement with fire authorities in the fire engineering design process.

The International Fire Engineering Guidelines (IFEG) has been endorsed by the fire safety industry and is published by the ABCB.¹⁶ It contains best practice for the development of fire engineering designs and includes an obligation to engage with fire authorities as part of the design process. It has been reported to us that if the IFEG was closely followed, the quality of fire engineering designs would improve and fire authorities would be consulted early on all designs involving performance solutions as part of the fire engineering design process. This would help fire authorities gain confidence in the capability of fire safety engineers to design acceptable fire safety solutions. Unfortunately, the IFEG is not consistently followed by fire engineers across Australia and its status is limited given that fire engineers are not registered practitioners in most jurisdictions.

Recommendation 8:

That, consistent with the International Fire Engineering Guidelines, each jurisdiction requires developers, architects, builders, engineers and building surveyors to engage with fire authorities as part of the design process.

Implementing the recommendation

The present edition of the IFEG was published in 2005. However, the IFEG is scheduled to be updated this year. The most effective means of establishing best practice for fire engineers and building surveyors would be to formulate a nationally consistent code of conduct for fire engineers and building surveyors based on the IFEG. A failure to comply with the code would establish a ground for disciplinary inquiry and regulatory oversight would be required to audit compliance. The development of such a code should be undertaken in collaboration with fire authorities and the fire safety industry.

Further observations

As noted above, the role of the fire authorities in building approvals differs across jurisdictions. In some cases, the involvement of fire authorities is a source of frustration because of their lack of resourcing for this role. There are complaints that some fire authorities oppose designs on issues which are beyond their expertise. Furthermore, there is a lack consistency in interpretation of the NCC. These matters impact on the effective implementation of the NCC.

Given the diversity of opinion within the industry, the BMF may wish to consider whether a separate review of the role of fire authorities in building approvals across Australia should be undertaken with a view to addressing the issues raised.

¹⁶ Australian Building Codes Board, *International Fire Engineering Guidelines Edition 2005*, Canberra, ABCB, 2005, <http://abcb.gov.au/Resources/Publications/Education-Training/International-Fire-Engineering-Guidelines>. (accessed on 7 February 2018).

Recommendation 9—Integrity of private building surveyors

The problem identified

Building approval systems in all jurisdictions rely on certification by private building surveyors. Even in jurisdictions in which building approvals are issued by local government, private building surveyors or other registered practitioners can issue certificates. Legally, they can be relied on by local government without the need for substantive review when issuing the final approval.

Consequently, in all jurisdictions, private building surveyors have a direct commercial relationship with designers, owners and builders. They depend on them for their financial viability. This makes them susceptible to the interests of their client in ways which may not always align with the public interest. They make decisions independent of government with limited substantive review. As a result, conflicts of interest are inherent in all compliance and enforcement systems across Australia.

Most jurisdictions have legislated controls to mitigate conflicts of interest. However, there is substantial variation across jurisdictions. In some instances, the controls are open to broad interpretation, making them difficult to enforce.

Some jurisdictions prohibit the appointed building surveyor to issue the building approval from participating in the design process. This is because a building surveyor who has a substantial involvement in the preparation of the design may not be independent in certifying that design. In practice, it is common that a designer will seek the views of a building surveyor about how compliance may be achieved, and it is generally accepted that the building surveyor will assist with those queries. However, the interpretation of how much advice can be given before the surveyor is seen to be participating in the design differs markedly.

Recommendation 9:

That each jurisdiction establishes minimum statutory controls to mitigate conflicts of interest and increase transparency of the engagement and responsibilities of private building surveyors.

Implementing the recommendation

Conflicts of interest need to be addressed comprehensively. The following matters should be legislated as a minimum:

- that it is the owner who appoints a building surveyor personally or through an agent;
- that where an agent is used, the arrangement should be subject to a requirement that the owner be given information throughout the building approvals process;
- that the engagement of a building surveyor be documented, and that termination of that engagement must not occur without the approval of a regulator or unless a mandatory process is followed;
- that the acceptance of an appointment of a building surveyor and the carrying out of any functions be prohibited where:
 - the building surveyor has participated in the design of the building; or
 - there is a direct or indirect pecuniary interest in the designer or builder or work; or
 - the building surveyor is related to a person with any of the above interests;
- that the obligations relating to the acceptance of certificates from other registered practitioners are clearly set out (that is, the checks that the surveyor must make and document when accepting certificates from others);
- that the owner and builder are required to be sent key documents directly from the building surveyor throughout the building approval process including:
 - an approved fact sheet on the role and responsibility of their building surveyor;
 - information about the surveyor's complaints management procedures;
 - all approved documents forming part of the building approvals;
 - any approved variations to documents or new design documents approved during the works;
 - results of all mandatory inspections as they occur;
 - any directions issued following mandatory inspections;
 - any enforcement actions taken by the surveyor;
 - any occupancy certificate or final inspection certificate; and
- that the owner has a right of appeal against decisions of the building surveyor.

Further observations

Not all jurisdictions place a prohibition on building surveyors participating in design and development. Some see it as critical to mitigating perceived conflict of interest. Other jurisdictions have a variety of different controls. Minimum statutory controls need to be clearly defined and applied consistently across Australia. Audit and enforcement of such requirements need to be priorities for regulators. On complex projects, the design team should be required to include a building surveyor who is genuinely independent from the building surveyor appointed to issue the approval. This already happens for some projects. It needs to be universal practice.

“Building surveyors engaged to provide advice during the design stage, particularly on how to achieve compliance, cannot then accept an engagement in a statutory role for the same project without being in conflict because they would essentially be assessing and approving their own design input. ...Once engaged, there should be a legislated process of disengagement. This will ensure that the highest standards of probity are upheld which will, in turn, prevent owners and developers from seeking to corrupt the assessment system.”¹⁷

Australian Institute of Building Surveyors

Recommendation 10—Codes of conduct for building surveyors

The problem identified

The compliance and enforcement systems of five jurisdictions do not have a code of conduct for building surveyors. This is a weakness. Codes of conduct can be an effective means of documenting the clear standards of behaviour expected of professionals who have statutory responsibilities. They also provide a reference against which auditing can be carried out and disciplinary action taken where the code is not met.

Without a clear code of conduct, it is sometimes difficult for regulators to question the behaviour of private building surveyors. As a result, oversight and disciplinary action can be challenging. We found only two jurisdictions in which the licensing bodies had suspended or cancelled the registration of private building surveyors. This suggests that the regulatory oversight of building surveyors across Australia has been limited and ineffective. Unprofessional behaviour needs to be exposed and appropriate action taken.

Recommendation 10:

That each jurisdiction put in place a code of conduct for building surveyors which addresses the key matters which, if contravened, would be a ground for a disciplinary inquiry.

Implementing the recommendation

Although the role of private building surveyors in the building approvals process differs across jurisdictions, the kinds of services they offer are similar as is the inherent potential for conflict of interest. Agreement should be reached on the core content to create a nationally consistent code of conduct.

The code of conduct should have statutory authority. Key issues need to be addressed. At a minimum, each jurisdiction’s code of conduct should include the following:

- the primary obligation of the building surveyor is to ensure compliance with legislation and to act in the public interest;
- building surveyors must not prepare performance solutions (but may assess and approve performance solutions prepared by others);
- building surveyors must not participate in the development of the design (the code must set out clearly and unambiguously what this means in practice);
- building surveyors must act within their area of skill and expertise (regardless of the scope of their registration);
- building surveyors must have mechanisms in place to encourage owners to advise of any concerns about non-compliant work; and
- building surveyors must have policies and procedures for the proper management of complaints from owners, adjoining owners, builders and the regulator.

¹⁷ AIBS, *Building Regulatory Reform*, p. 8 and p. 15.

"The message that needs to be continually promoted amongst building certifiers is that they must remain independent and impartial. ...The private certifiers' clients are the broader...community, not just the person or entities who pay their fees."

Metropolitan Fire and Emergency Services Board.

Recommendation 11—Role of building surveyors in enforcement

The problem identified

In most jurisdictions, private building surveyors have a statutory responsibility to inspect work during the construction phase and determine whether it accords with the building approvals and the NCC. As part of this oversight role, private building surveyors are well placed to detect fraudulent conduct and non-compliant building work. They scrutinise what is happening on a day-to-day basis and have reliable intelligence on the performance of practitioners. Establishing ways to work with private building surveyors in order to collect this information in a collaborative way would lead to more effective enforcement processes.

When certifying building approval documentation, building surveyors have on occasions been presented with fraudulent documentation to support the proposed use of products. In some instances, products are substituted by builders without notice to the building surveyor. When the building surveyor becomes aware of this, they do not necessarily notify regulators. Whether or not these instances are widespread, there is a general perception that such failures can occur within the existing procedures for checking compliance.

When private building surveyors conduct mandatory inspections and/or issue occupancy certificates, they are sometimes asked to approve work that is inconsistent with the building approval or the NCC. In these situations, it is an essential part of the private building surveyor's role to issue directions to the builder and to ensure that those directions are complied with. If they are not, the matter should be escalated to a building regulator, the works stopped, and/or the occupancy certificate refused. There needs to be a robust response in these circumstances. Otherwise, non-compliance will remain unresolved, and builders will not be persuaded to improve their practices. Most importantly, the system of oversight would be grievously compromised.

Builders may depart from approved plans or fail to call for inspections as required. Whilst the building surveyor is obliged to take the necessary steps to confirm that the work is compliant, they should also be required to report builders when this behaviour occurs. Regulators who receive this intelligence about builders need to take appropriate risk-based action.

It is consistently reported that many private building surveyors are not inclined to take enforcement action against their 'clients'. Further, it has been suggested that when a private building surveyor refers an unresolved matter to the government authority, appropriate follow-up action is not taken. Such concerns are routinely expressed in the industry although it is difficult to gauge the prevalence or scale of the behaviours identified. It is imperative that these matters are addressed.

Recommendation 11:

That each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations.

Implementing the recommendation

It is recommended that:

- where private building surveyors conduct inspections or issue occupancy certificates, they be given powers to issue directions to fix or to stop work where noncompliance is detected. If the directions are not complied with within a fixed timeframe, the building surveyor must refer the matter to the government;
- there be mandatory reporting obligations on building surveyors to report suspicions of fraudulent practices and significant departures from approved documentation to the government;
- there be training, help desks and other support for building surveyors to assist them with drafting directions and notices; and
- a matter referred by a private building surveyor should be prioritised for action by the receiving authority so that a reliable system of regulatory support is given and the matter is resolved.

Further observations

Building surveyors have a duty to ensure that non-compliance is detected and documented. They must give clear directions to the builders for rectification. If the builder does not comply with the directions, the owner should be notified and the matter escalated to a resourced local, state or territory government that can respond expeditiously.

A mandatory reporting regime could include giving private building surveyors the ability to anonymously report problem designers and builders to the regulator or to submit ratings on the performance of the practitioners with whom they engage.

If information about these referrals was sent to a state or territory government, the information would be a source of intelligence about problem practitioners and common non-compliances. It could inform education and audit activity. It would also be easier to detect patterns of non-compliance by particular builders or designers which may support disciplinary action.

Recommendation 12—Collecting and sharing data and intelligence

The problem identified

The building approvals process in each jurisdiction requires documentation to be created before, during and on completion of building work. The systems provide for documentation and other notifications to be lodged with the relevant council or territory at various stages of building work. In some jurisdictions, there is also some form of mandatory reporting to a state or territory authority.

Unfortunately, despite requirements for record creation and keeping, key information is not readily accessible or auditable. The recent cladding audits have demonstrated that the ability to identify buildings for audit and to examine building approvals documentation in a comprehensive manner has been challenging for some jurisdictions.

It is frequently difficult to access all the relevant documents about the construction of a building, especially when the building has been sold. Important assumptions and requirements that underpin the design and performance solutions for the building are not always available to subsequent owners. This has become a bigger issue as the complexity of buildings and their fire safety systems have increased, especially where performance solutions have been used.

The insurance industry suggests that Commercial building owners who have access to, and are able to maintain, detailed building construction and maintenance documentation for buildings are likely to benefit from lower premiums.

If a consistent approach to the recording of information was taken by each jurisdiction, information sharing and data analysis to inform regulatory decision-making would be enabled. This would also enable authorised persons to access key information about the construction and approval of buildings, leading to greater transparency and auditability. It would strengthen public accountability.

Recommendation 12:

That each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation.

Implementing the recommendation

It is imperative that jurisdictions collaborate with a view to ensuring that their central database enables intelligence sharing. This will inform each other's compliance and enforcement activities and the work of the BMF. At a minimum, there needs to be agreement on the key data points that are congruent across all jurisdictions and upon which reliable information can be shared.

It is proposed that information about the construction of buildings should be lodged on a progressive basis during construction and that post-occupation fire safety system maintenance reports should also be lodged. The databases should have information about all Commercial buildings as a priority but could also contain information about Domestic buildings. Preferably, the information would be collected and stored in a digital form using emerging technologies.

Information collected should include:

- the name of the appointed building surveyor or issuing authority;
- a description of the proposed building work;
- details of all practitioners engaged;
- details of design certificates relied on and any information about third party review;
- details of any performance solutions and any information about third party review;

- inspection records;
- enforcement actions taken;
- final approval information, including details of certificates relied on and fire safety maintenance requirements and any design assumptions that must be maintained or considered in future changes to the building; and
- details of compliance inspections/certificates issued in relation to ongoing maintenance obligations through the life of the building.

A number of the recommendations relate to the relevant documentation that should be included in central databases in order to improve transparency, auditability and accountability (Recommendations 13, 14, 15, 16 and 20).

Further observations

New digital technologies provide efficient ways for collecting and analysing information and providing ready access for regulators and building owners. With developing technology it is now becoming feasible to have all building approvals documentation recorded electronically. Jurisdictions have realised that the lodgement of documents across dozens of local councils is problematic when information is needed for auditing and enforcement actions. Consequently, most jurisdictions are in the process of developing centralised data platforms.

Jurisdictions should collaborate with each other on these projects. They need to reach agreement on the types of information collected so that it can be readily shared and analysed on a national basis in order to inform regulatory activity and the work of the BMF.

To implement this recommendation, further work could usefully be undertaken by the BMF to identify the most appropriate technology to interface with each jurisdiction's data platforms. Emerging technologies, such as blockchain, should be considered for suitability. Potentially, it might provide a virtual ledger of all regulatory 'transactions' in a verifiable and auditable format. It is recommended that further work examine how the Building Information Management (BIM), data procurement frameworks, the Buildoffsite Property Assurance Scheme (BOPAS) and other similar emerging digital solutions could be relevant to the establishment of these databases.

Access to the information in these central databases would need to be limited to authorised persons. The extent of such access would need to take into account considerations of privacy, national security and the protection of intellectual property in design. However, it will be important to give owners and potential purchasers of buildings a suitable level of access to provide a level of transparency about the building approvals process. At a minimum the public needs to be assured that the compliance mechanisms involved in the construction process can easily be accessed and verified by authorised persons.

Recommendation 13—Responsibility of design practitioners

The problem identified

The adequacy of documentation prepared and approved as part of the building approvals process is often poor. The tendency for inadequate documentation to be prepared and accepted by building surveyors at the building approvals stage has increased, in part because of owners and developers endeavouring to minimise costs on documentation. This issue needs to be addressed as a matter of priority.

Documentation to support applications for building approvals is prepared by various practitioners including architects, designers/draftspersons, engineers, builders and owner-builders. There is no nationally consistent registration of design professionals.

In some jurisdictions, the preparation of performance solutions must be done by prescribed registered practitioners but in most there are no express restrictions on who can prepare a performance solution.

Very few jurisdictions expressly state in their legislation that the duty of the designer is to prepare documentation that demonstrates that the proposed building will comply with the NCC. Schemes regulating architects do not expressly require architects to prepare documentation which demonstrates that the proposed building will comply with the NCC.

Poor quality documentation leads to builders improvising or making decisions which may not be compliant with the NCC. Performance solutions can, in some instances, be post facto rationalisations intended to address design that is not in accordance with NCC requirements. Inadequate documentation can also result in hidden costs or allow builders to cut costs without owners being aware of it.

The integrity of documentation for future use is also compromised when the approval documents do not reflect the as-built building, or when they contain insufficient detail to properly inform building risk and maintenance requirements.

“...there has been a steady decline in compliant design and documentation. A lack of clear and complete design documentation increases the potential for disputes and non-compliance on any project.”

Fire Protection Association Australia.

Recommendation 13:

That each jurisdiction requires building approval documentation to be prepared by appropriate categories of registered practitioners, demonstrating that the proposed building complies with the National Construction Code.

Implementing the recommendation

For some jurisdictions this recommendation will present a significant shift in their regulatory systems as they do not currently register all design practitioners and instead rely on the building surveyor to exercise a high level of discretion over the standard of design. In some jurisdictions, the building surveyor is able to participate in the design development and carries the responsibility for competent design. This approach is not consistent with Recommendations 9, 10 and 11 and severely undermines the role of the surveyor as an independent certifier. At a minimum, this recommendation should be implemented in relation to building approvals for higher risk buildings, such as many Commercial buildings.

Each jurisdiction's legislation should expressly state that design documentation presented for building approval must:

- adequately demonstrate compliance with the NCC;
- include any relevant certificates of conformity, accreditations and other prescribed material; and
- require a declaration by each registered practitioner responsible that he/she reasonably believes that documentation demonstrates compliance with the NCC.

This requirement should apply to the work of all registered architects, engineers and designers.

Further observations

Such a declaration would not remove responsibility from the building surveyor to undertake a substantive review of the documentation. It is intended to clarify that designers are accountable for producing an adequate standard of documentation to support the building approvals process. It should also assist designers and building surveyors to resist pressure from owners and builders to prepare less than the bare minimum required.

Some jurisdictions have already taken steps to develop checklists or practice notes on the documentation that must be included for building approvals. Without clear guidance on the documentation required, there is a tendency for documentation to be limited as owners will prefer to reduce costs. Conversely, if the requirements are too high, there will be unnecessary costs imposed and initial approval may take longer. Owners might also be tempted to avoid the building approvals process altogether.

Design development needs to be allowed for during the construction process in order to accommodate innovation and flexibility. The development of guidance on the documentation required to support applications for Domestic building approvals would be beneficial. Even though it may be more difficult, guidance should include Commercial buildings.

In relation to the design of plumbing work, only some jurisdictions require that complex work be documented by a registered engineer before approval. In others, there is no regulatory requirement for documentation. This leaves the plumber responsible for both the design and installation even though they may not have the engineering skills to design the system. This weakness should be addressed in the implementation of this recommendation.

“Certification and compliance of hydraulic design across Australia is inconsistent and not regulated under any jurisdiction, this fragmentation negates the responsibility of hydraulic consultants which forces the plumbing installer to be accountable and responsible for the design concept.”

Master Plumbers Australia.

Recommendation 14—Adequate documentation for performance solutions

The problem identified

It is widely reported that the standard of documentation supporting performance solutions is poor. There is a lack of basic information on matters such as the relevant performance requirements and the assessment methods applied. It is common for the person preparing the performance solution to rely on their own ‘expert judgement’ that the performance solution complies and on that basis they proceed to self-certify the design.

Performance solutions can, in some instances, be post facto rationalisations made to address design or construction that was not built in accordance with NCC requirements. This is not their purpose. Performance solutions require project stakeholders to collaborate and develop an agreed pathway. Each requires empirical analysis, modelling and/or testing.

Recommendation 14:

That each jurisdiction sets out the information which must be included in performance solutions, specifying in occupancy certificates the circumstances in which performance solutions have been used and for what purpose.

Implementing the recommendation

Several jurisdictions already have legislation consistent with this recommendation. There should be a national best practice guide for documenting performance solutions that could be adopted by jurisdictions and given legislative force.

Recommendation 15—Approval of performance solutions for constructed building work

The problem identified

Performance solutions are sometimes approved in relation to works that are non-compliant with Deemed-to-Satisfy (DtS) provisions. This might occur where the builder has not followed documentation or where documentation has been lacking in detail. For example, performance solutions are currently being offered to justify combustible cladding remaining on buildings.

Where performance solutions are accepted for constructed work on Domestic buildings, the owner of the building may not know that this has occurred. Often their agent, the builder, deals directly with the building surveyor to resolve the issue. The owner may have preferred that the works be rectified to comply with the DtS requirements.

Performance solutions are an essential feature of the NCC. Provided that the process for preparing and assessing the performance solution is sound and that third party review is undertaken as appropriate, the approval of a performance solution for constructed work may be justified. However, the integrity and transparency of the process must be at its highest in these situations to avoid perceptions of conflict of interest and lack of confidence in the systems by the public.

“I have seen many examples of fire engineering alternative solutions being developed in the days leading up to the issue of an Occupancy permit. In other words, problems are found at the last minute and solutions are reverse engineered.”

Enright Consulting.

Recommendation 15:

That each jurisdiction provides a transparent and robust process for the approval of performance solutions for constructed building work.

Implementing the recommendation

It is important the flexibility that is allowed through performance solutions be maintained. However, there needs to be a transparent and robust process to understand the basis on which performance solutions have been established.

Requirements should include:

- that the documented performance solution refers to the fact that it was developed in relation to constructed building work and indicates the reason why the performance solution was sought for that work;

- that the building surveyor prepares a written statement of reasons for accepting a performance solution;
- that notification of the request for the approval of a performance solution and the outcome of that request be given to the owner;
- that the owner must consent or have an appeal right if they object to the use of the performance solution; and
- that the occupancy certificate lists all performance solutions relating to the work and the date of their approval.

Further observations

In circumstances in which performance solutions are agreed retrospectively, the justification for third party review is strong. This recommendation is related to Recommendation 17 in that retrospective performance solutions could be a trigger for the requirement for third party review.

Recommendation 16—Approval of documentation throughout the construction process

The problem identified

It is common for Commercial buildings to be constructed under a design-and-construct contract which means that limited documentation is prepared at the time building work commences. Documentation is produced and developed throughout the project, allowing for innovation and flexibility and avoiding the need to amend detailed design documentation as decisions are made during the project. Even for Domestic building work, variations may occur as decisions are made during construction, particularly for renovations.

Various industry bodies have reported that for Commercial buildings, specialist practitioners may be engaged for complex design work early when detailed specifications have not yet been prepared. Often the design will contain assumptions or will be qualified. Later, when products are specified, the original designer may not be consulted to consider their effect.

This shortcoming has been reported in relation to the use of combustible cladding. Fire safety engineers are engaged to prepare a design early in the project when cladding materials have not yet been selected. Their design is subject to cladding being compliant with the NCC. Later, combustible cladding is chosen for use but there is no review of the fire engineering design.

Similarly, architects and engineers have indicated that they may be engaged early in a project to prepare initial documentation but that their engagement then ends. Detailed construction documentation is prepared by others who may not possess the relevant skills. When products specified are substituted, architects, engineers and building surveyors may not be consulted.

The building approval systems in many jurisdictions do not adequately address a design-and-construct approach. Some systems have no clear requirement for building surveyors to approve design development and variations. Others have statutory controls but there is no auditing and enforcement to ensure they are being complied with. Some jurisdictions recognise the use of staged building approvals but it is generally left to the discretion of the building surveyor to manage and document the staged process.

Recommendation 16:

That each jurisdiction provides for a building compliance process which incorporates clear obligations for the approval of amended documentation by the appointed building surveyor throughout a project.

Implementing the recommendation

Design development, variations and product substitutions should be approved by the building surveyor prior to associated work being carried out.

Where a project involves staged building approvals, the application for building approval should set out the proposed stages and the proposed design schedule. Notification points should be agreed to ensure that the design for each stage is properly documented and presented to the building surveyor for approval before any work for that stage commences. There should be offence provisions for builders who do not notify the building surveyor or provide the necessary documentation in advance of building work progressing.

Further observations

In general, building surveyors need to insist on approving proposed variations before they are undertaken. If variations are discovered, building surveyors need to insist on being provided with explanatory documentation promptly.

Building surveyors should have the competence to determine when variations and substitutions might adversely impact on earlier designs and when an appropriate engineer or architect needs to be consulted before work proceeds further.

Documentation lodged with the relevant government authority should reflect what is built rather than what was proposed to be built.

Implementation of this recommendation will be challenging. It requires designers, building surveyors and builders to work to properly documented design and construction specifications. This is the lynchpin of a best practice building approvals system and considerable effort will be required to effectively bring about systemic change in this area.

Recommendation 17—Independent third party review

The problem identified

Building surveyors do not hold expertise in all aspects of building design. They often rely on engineers or other experts to design components of work. Where this occurs, the building surveyor will rely on the work of the engineer or expert as being compliant and no substantive review will be undertaken. This practice is supported in most jurisdictions by providing for statutory certificates to be issued by certain practitioners or persons considered to be technical experts, often engineers. Legislation provides that when issued and relied on in good faith, these certificates provide immunity to the building surveyor. This means that the building surveyor will not substantively review the design or inspect the work.

Except for one jurisdiction, there is no mandatory obligation for independent third party review of any component of the design. It is at the discretion of the building surveyor whether they accept a self-certification or require the design to be independently certified by another qualified practitioner. In many cases, self-certification is accepted, which means that large parts of the design are not substantively reviewed by another qualified practitioner.

Even when third party review is undertaken, many jurisdictions do not require the third party reviewer and the designer to be independent. This does not pass the public interest test.

“Peer review is an important, regular and accepted process associated with many building design disciplines such as structural engineering or energy efficiency. However, nationally there is not a consistent culture of peer review for fire safety performance solutions. This is likely to contribute to the acceptance and implementation of poor design solutions overall.”

Fire Protection Association Australia.

In some jurisdictions, fire authorities conduct the third party reviews of fire engineering designs which provide the necessary independent oversight. However, in many jurisdictions, consultation with the fire authority is limited to seeking comment on fire performance solutions that involve fire brigade intervention. In these circumstances, third party review should be undertaken as a separate requirement.

“Also there has been a tendency for performance solutions (alternative solutions) developed for one project suddenly being replicated for many other projects, sometimes in totally different circumstances that may not be justified. ...Fire Safety Engineering designs for major buildings should undergo the rigor of Peer Review to ensure that critical judgement calls or expert opinions are valid, in line with current guidelines.”¹⁸

FM Global

¹⁸ Comments provided to the BMF Assessment by FM Global.

Recommendation 17:

That each jurisdiction requires genuine independent third party review for specified components of designs and/or certain types of buildings.

Implementing the recommendation

The concept underpinning this recommendation is that legislation would prescribe what types of designs and/or buildings must be subject to independent third party review. Depending on the level of risk, independence should be assured through one of the following mechanisms:

- the third party review being conducted by a panel of experts sitting on a statutory board or panel; or
- the third party reviewer being appointed from a list of approved third party reviewers with the process administered by government; or
- third party review by other registered practitioners in appropriate categories of registration with independence based on guidance (for example in a code of conduct).

Further observations

Many jurisdictions already make use of an expert technical panel. There is considerable merit in this approach.

There may also be value in jurisdictions placing an express prohibition on building surveyors assessing and approving performance solutions on fire safety performance requirements unless they hold requisite qualifications in fire safety performance requirements or unless the design has been approved by the fire authority.

"The challenge with peer reviews is to develop a scheme that adds value without becoming overly burdensome. There would need to be strict protocols around when a peer review would be required. Some issues that will require greater investigation are: who could conduct peer reviews, how the reviews would be conducted, the frequency and timing of reviews, and commercial in confidence arrangements."

Engineers Australia.

Recommendation 18—Mandatory inspections

The problem identified

All jurisdictions have building compliance and enforcement systems that provide for inspections of some types of building work during construction. The builder is required to notify the building surveyor or council once a prescribed stage is reached. This triggers an inspection or, at least, an opportunity for an inspection.

There are significant differences across jurisdictions in the number of inspections required and the notification stages. In some jurisdictions very few inspections occur and for certain types of buildings there are no inspections required at all. Inspections are carried out by a range of persons. Very few jurisdictions require registration of inspectors. It has been reported that in some jurisdictions, inspections are carried out by builders or unqualified council officers who send photos of works to the building surveyor for review.

Increased requirements for inspections are necessary. Unfortunately, there are doubts about whether there are sufficient numbers of suitably qualified persons to conduct them. Reservations have been expressed about the conflict of interest that arises when the private building surveyor who has certified the building documentation then inspects the building work. Some question whether the inspections will be thorough and whether surveyors will be willing to act if they discover non-compliant building works.

For Commercial buildings, many jurisdictions leave it to the building surveyor to determine what inspections are appropriate. This makes it difficult for regulators to know what level of oversight is occurring and whether it is adequate.

Recommendation 18:

That each jurisdiction requires on-site inspections of building work at identified notification stages.

Implementing the recommendation

A mandatory inspections process must be supported by registration of inspectors and clear directions to building surveyors about what enforcement action is required to be taken where non-compliance is detected. The enforcement actions of building surveyors need to be coordinated with the regulatory powers and functions of the state or territory government and local governments.

Inspection stages need to be proportionate to risk. They should be aligned to checks of work involving structural elements and safety. They should also cover work which would be difficult to view at a later stage, such as in situ reinforcement in footings and framing work.

For Domestic building work the following requirements are suggested:

- minimum mandatory inspections of:
 - in situ reinforcement in footings/slabs;
 - frames, including roof constructions;
 - fire-rated wall systems;
 - pool barriers; and
 - final, post-completion of all work;
- the ability for building surveyors to require additional inspections identified at the time of approval and guidance about when this might occur, such as additional inspections of work which has been the subject of a performance solution;
- in addition, there could be a mandatory notifications process, where the building surveyor is notified at a defined stage of work, and the building surveyor applies a risk-based approach to determining whether to inspect these stages; and
- all on-site inspections should be carried out by, or be under the supervision of, registered surveyors or inspectors or by, or under the supervision of, registered engineers for prescribed types of work.

For Commercial building work the following requirements are suggested:

- provide guidance which must be used by building surveyors to determine inspections required for Commercial buildings. Ideally a national guideline would be issued and called-up in each jurisdiction's legislation as a code of conduct, or the like, with which building surveyors must comply. It would require the surveyor to set out the inspections required at the time of the initial approval and to consult with engineers about appropriate inspection points. Some jurisdictions have already developed guidance on these issues which could be used to create a national document on best practice; and
- on-site inspections to be carried out by, or under the supervision of, building surveyors or inspectors or by, or under the supervision of, registered engineers for prescribed types of works.

Recommendation 19—Inspection and certification of fire safety system installation

The problem identified

The use of performance solutions has led to fire safety systems becoming more complex in Commercial buildings. Active fire protection systems are being favoured over passive fire systems. Proper installation and maintenance of these systems is critical to occupant safety.

For Commercial buildings, fire safety engineers are often engaged to prepare fire safety engineering designs which include complex performance solutions on critical safety matters. Their involvement often ends early in the project before product specifications have been finalised. This may affect their design.

Until very recently, no jurisdiction required a registered fire engineer to inspect building work to ensure that the fire engineering design had been constructed as intended.

Fire safety system installers are not registered in most jurisdictions, but it is recommended that they be so (Recommendation 1).

Although it is common for building surveyors to require commissioning certificates from fire safety installers or the builder, only two jurisdictions mandate that these certificates be provided as part of the final sign-off of a Commercial building.

Controls required over the design, installation and certification of fire safety systems in Commercial buildings are not sufficiently strict.

“...there [should] be mandatory inspections for fire safety in buildings during the construction process, especially where an alternative solution has been provided. Such inspections should be undertaken by registered fire safety engineers.”

Engineers Australia.

Recommendation 19:

That each jurisdiction requires registered fire safety practitioners to design, install and certify the fire safety systems necessary in Commercial buildings.

Implementing the recommendation

The requirements necessary to implement this recommendation would include mandatory certification of the testing and commissioning of fire safety systems by registered fire safety system practitioners. To avoid any conflict of interest, the certification of testing and commissioning should not be performed by the system installer.

Where there are performance solutions on fire safety performance requirements, a registered fire engineer should be required to certify that the work complies with the fire safety engineering design. The registered fire engineer may need to inspect the building at various stages in order to be able to issue a final certificate. At the time that the fire safety engineering design is prepared, the building surveyor should be advised of the required notification stages for inspection by the fire engineer.

Recommendation 20—A building manual for Commercial buildings

The problem identified

A full set of final documents for a Commercial building which includes all relevant documents for the ongoing management of the building is not usually collated and passed on to the owner or subsequent purchaser. This makes it difficult for owners to verify how decisions were made and to adequately ensure that safety systems are properly maintained over the life of the building.

“The often overlooked importance of design and documentation is its role in the life cycle of the building beyond occupancy approval. Poor design documentation makes verification that essential safety systems and equipment continue to perform to the standard expected throughout the life of the building extremely difficult.”

Fire Protection Association Australia.

Recommendation 20:

That each jurisdiction requires that there be a comprehensive building manual for Commercial buildings that should be lodged with the building owners and made available to successive purchasers of the buildings.

Implementing the recommendation

The building manual should be in a digital format and be required to have prescribed information such as:

- as-built construction documentation;
- fire safety system details and maintenance requirements;
- assumptions made in any performance solution (for example, occupant characteristics);
- building product information, including certificates and details of maintenance or safety requirements; and
- conditions of use—such as occupant numbers, loads, replacement of products after certain periods (for example, glass after 25 years).

There should be a requirement for the manual to be provided to successive purchasers of the building.

“Ready access to the history of a building site can be an invaluable information source in all phases of the life cycle of the building.”¹⁹

Australian Institute of Building Surveyors

Recommendation 21—Building product safety

The problem identified

We have heard that there is a high incidence of building products in the market that are not compliant with the standards set out in the NCC, resulting in inferior and sometimes dangerous products being used in the construction of buildings. We have also been told about products being used in a non-compliant manner which can result in unacceptable risks to safety.

There is already a CodeMark certification system for building products. This is a voluntary certification scheme referenced in the NCC. There have been criticisms of the CodeMark system. The BMF has been aware of these issues for some time. Indeed it has already tasked the ABCB with making recommendations to address shortcomings with the CodeMark system.

Building on this work, in July 2015 the BMF tasked the SOG to investigate options for a possible mandatory scheme for high-risk building products with life safety implications. In October 2017, the BMF subsequently tasked the SOG to provide further advice on the introduction of a compulsory third party product certification scheme for high-risk building products, a national register of those products and compulsory labelling for aluminium composite panels with a polyethylene core.

The requirement for labelling of aluminium composite panels has been a priority for the BMF to address reports of product substitution, particularly in the light of cladding audits where it has been difficult to identify the type of aluminium cladding products currently on buildings.

In December 2017, NSW and the Commonwealth announced a pilot program to track the supply and installation of aluminium cladding products with assistance from suppliers and manufacturers, using import data from the Department of Home Affairs.²⁰ The program is intended to improve the capacity of the NSW Government to monitor the future installation of aluminium composite panels.

Moreover, since our assessment commenced, Queensland, NSW and Tasmania have taken steps to enhance powers to prohibit and/or restrict the use of high-risk building products and/or non-conforming building products.

The regulation of building product safety is closely related to existing consumer protection regulation administered by the Australian Competition and Consumer Commission and relevant state and territory consumer affairs regulators. There continues to be considerable dialogue between these authorities and building regulators on the most appropriate way to regulate building product safety. The jurisdictions are tending toward regulating these issues by vesting powers in the building regulator.

The collaboration between jurisdictions on these issues under the direction of the BMF is to be applauded. Further work is encouraged. There is a risk that this will be another area of growing inconsistency between jurisdictions. It is imperative that the respective roles of consumer affairs and building regulators be clarified and consistently applied across jurisdictions. It is hoped that this will lead to the regulation of building product safety consistently across Australia.

Recommendation 21:

That the Building Ministers’ Forum agrees its position on the establishment of a compulsory product certification system for high-risk building products.

Implementing the recommendation

This process is already underway. The BMF has tasked the SOG to report to it on this matter.²¹ The product certification systems will need to include mandatory permanent product labelling and prohibitions against the installation of high-risk building products that are not certified. Once a common position is reached by the BMF, it should make it a priority to implement this through amendments to the NCC and/or through consistent reforms to each jurisdiction’s legislation.

¹⁹ AIBS, *Building Regulatory Reform*, p. 14.

²⁰ Assistant Minister Laundry, Minister Dominello, Minister Kean, Media Release, *Tracking Aluminium Composite Panels across NSW*, 18 December 2017, <http://minister.industry.gov.au/ministers/craiglaundy/media-releases/tracking-aluminium-composite-panels-across-nsw>, (accessed 9 February 2018).

²¹ Senior Officers’ Group, *Implementation Plan: Strategies to address risks related to non-conforming building products*, 2017, <https://industry.gov.au/industry/IndustrySectors/buildingandconstruction/Documents/SOG-Implementation-Plan.pdf>, (accessed 9 February 2018).

Further observations

In relation to plumbing products, the NCC provides for WaterMark, which is a compulsory certification scheme for specified plumbing products. Under the WaterMark scheme, plumbers are prohibited from installing plumbing products which are not WaterMark certified. Queensland has recently amended its legislation to also prohibit the supply of plumbing products which are not certified under the WaterMark scheme. Plumbing industry stakeholders are calling for other states and territories to follow. The BMF tasked the ABCB with reporting to it on the introduction of a prohibition against the supply of plumbing products that are not certified under WaterMark. That work is ongoing and forms part of the ABCB's 2017–2018 work plan.²²

"The biggest challenge from the PPI Group's perspective is that plumbing and drainage products can be sold regardless of whether or not the product has been certified under Watermark or any other scheme creating significant confusion in the market through the supply chain."

Plumbing Products Industry Group (PPI Group)

The regulation of supply chains has merit. However, the resourcing required for regulatory oversight is significant and should not detract from core regulatory activities of building regulators.

Recommendation 22—Dictionary of terminology

The problem identified

Each jurisdiction has developed different ways of describing the same or similar terms or processes. This is not just a semantic issue. Different terminology makes it very confusing to understand and compare the legal requirements in each jurisdiction. It also makes it difficult for industry to operate across jurisdictions and for jurisdictions to understand each other's systems when working together at a national level.

Recommendation 22:

That the Building Ministers' Forum develop a national dictionary of terminology to assist jurisdictions, industry and consumers to understand the range of terminology used to describe the same or similar terms and processes in different jurisdictions.

Implementing the recommendation

The national dictionary of terminology should be published on the ABCB's website. Ideally, the dictionary would identify preferred language based on the most commonly used terms, or some other agreed approach. Harmonisation of language is a crucial part of ensuring that there is a national approach to implementation. It enhances comparative reporting, facilitates the sharing of good practice, and assists those in the building and construction industry who work in a number of jurisdictions. Jurisdictions should then have regard to the dictionary and the preferred terms when considering reforms with a view to adopting more consistent language over time.

Recommendation 23—Implementation of the recommendations

The problem identified

The implementation of the recommendations will require legislative reform and changes to regulatory practice. Each jurisdiction will already have reform priorities in place for building regulation and aligning them with our recommendations will take time. On some matters, jurisdictions will want to undertake further consultation and cost-benefit analysis. Whilst we are mindful that these processes take time, it is important to recommend a timeframe for implementation. Without a clear timetable there is a risk that the impetus for change may fall away and the necessary reforms will not occur.

Recommendation 23:

That the Building Ministers' Forum acknowledges that the above recommendations are designed to form a coherent package and that they be implemented by all jurisdictions progressively over the next three years.

22 Australian Building Codes Board, 2017–18 Annual Business Plan, <http://www.abcb.gov.au/ABCB/Business-Plan>, (accessed 9 February 2018).

Implementing the recommendation

The recommendations have been designed to form a holistic and structured framework to improve the compliance and enforcement systems of the NCC across the country. They form a coherent package. They would best be implemented in their entirety.

As a first task, the BMF may wish to identify which recommendations to prioritise at a national level. Of course, every jurisdiction already meets some of these recommendations and thus each would have a different program of reform activity to achieve full implementation.

Further observations

Feedback from jurisdictions has indicated that setting an implementation timetable is essential to ensuring that the recommendations are actioned in an expeditious manner. Most have agreed that a three-year timeframe is ambitious, but possible. All have agreed that significant progress should be able to be made in this period.

Recommendation 24—Implementation plan

The problem identified

In a cross-jurisdictional exercise, in which many senior officials and advisors have a wide range of policy and regulatory responsibilities, good intentions often falter. Actioning the recommendations will require ongoing and committed focus. The history of legislative harmonisation is littered with examples of fine rhetoric on national consistency not being matched by effective action at an administrative level. Implementation of good intentions is often slow.

Recommendation 24:

That the Building Ministers' Forum prioritise the preparation of a plan for the implementation of the recommendations against which each jurisdiction will report annually.

Implementing the recommendation

Transparency is crucial to effective implementation. The preparation of an agreed plan, including prioritisation of effort, will provide the basis against which to measure progress. A full list of agreed actions should be prepared, with jurisdictional performance against each one to be reported annually. This will allow the BMF to monitor achievement. The plan should be flexible enough for it to be amended over time.

It is appropriate that each jurisdiction exercises a significant degree of autonomy on how it will implement the recommendations. However, several recommendations call for jurisdictions to work together to develop a common position and/or the common content of legislation, codes of conduct or guidelines. Further engagement with industry will be necessary for the implementation of other recommendations. This will need to be prioritised and resourced. Each jurisdiction will need to commit to providing input in a timely manner.

We do not think it appropriate to propose governance arrangements for implementation of the recommendations. The BMF has recently formalised improved governance arrangements to support its ongoing work. This has included redefining the roles assigned to the SOG and the BRF. The work to implement our recommendations appears to be consistent with the role of the SOG, but with input from the BRF and ABCB, as appropriate.

Further observations

Jurisdictions made suggestions on how to ensure the recommendations could be implemented nationally in a committed manner. A number provided us with feedback on the most appropriate governance arrangements for the BMF to action the framework. Taking into account those suggestions, matters that the BMF may wish to consider in the preparation of an implementation plan include:

- the establishment of a small dedicated implementation team, at least for the first 12 months;
- the appointment of an independent chair (not representing any one jurisdiction) to oversight the work identified in the implementation plan;
- the setting of priorities for implementation activities to be carried out on behalf of the BMF under the implementation plan;
- allocation of any specified tasks to the SOG, BRF and/or the ABCB;
- an indication from each jurisdiction on the manner in which it intends to proceed with implementation; and
- an intention to seek further independent expert assessment of the effectiveness of compliance and enforcement systems at the end of the implementation period or within another defined period.

Attachment A—List of recommendations

Recommendation 1:

That each jurisdiction requires the registration of the following categories of building practitioners involved in the design, construction and maintenance of buildings:

- Builder
- Site or Project Manager
- Building Surveyor
- Building Inspector
- Architect
- Engineer
- Designer/Draftsperson
- Plumber
- Fire Safety Practitioner

Recommendation 2:

That each jurisdiction prescribes consistent requirements for the registration of building practitioners including:

- certificated training which includes compulsory training on the operation and use of the NCC as it applies to each category of registration;
- additional competency and experience requirements;
- where it is available, compulsory insurance in the form of professional indemnity and/or warranty insurance together with financial viability requirements where appropriate; and
- evidence of practitioner integrity, based on an assessment of fit-and-proper person requirements.

Recommendation 3:

That each jurisdiction requires all practitioners to undertake compulsory Continuing Professional Development on the National Construction Code.

Recommendation 4:

That each jurisdiction establishes a supervised training scheme which provides a defined pathway for becoming a registered building surveyor.

Recommendation 5:

That each state establishes formal mechanisms for a more collaborative and effective partnership between those with responsibility for regulatory oversight, including relevant state government bodies, local governments and private building surveyors (if they have an enforcement role).

Recommendation 6:

That each jurisdiction give regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action.

Recommendation 7:

That each jurisdiction makes public its audit strategy for regulatory oversight of the construction of Commercial buildings, with annual reporting on audit findings and outcomes.

Recommendation 8:

That, consistent with the International Fire Engineering Guidelines, each jurisdiction requires developers, architects, builders, engineers and building surveyors to engage with fire authorities as part of the design process.

Recommendation 9:

That each jurisdiction establishes minimum statutory controls to mitigate conflicts of interest and increase transparency of the engagement and responsibilities of private building surveyors.

Recommendation 10:

That each jurisdiction put in place a code of conduct for building surveyors which addresses the key matters which, if contravened, would be a ground for a disciplinary inquiry.

Recommendation 11:

That each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations.

Recommendation 12:

That each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation.

Recommendation 13:

That each jurisdiction requires building approval documentation to be prepared by appropriate categories of registered practitioners, demonstrating that the proposed building complies with the National Construction Code.

Recommendation 14:

That each jurisdiction sets out the information which must be included in performance solutions, specifying in occupancy certificates the circumstances in which performance solutions have been used and for what purpose.

Recommendation 15:

That each jurisdiction provides a transparent and robust process for the approval of performance solutions for constructed building work.

Recommendation 16:

That each jurisdiction provides for a building compliance process which incorporates clear obligations for the ongoing approval of amended documentation by the appointed building surveyor throughout a project.

Recommendation 17:

That each jurisdiction requires genuine independent third party review for specified components of designs and/or certain types of buildings.

Recommendation 18:

That each jurisdiction requires on-site inspections of building work at identified notification stages.

Recommendation 19:

That each jurisdiction requires registered fire safety practitioners to design, install and certify the fire safety systems necessary in Commercial buildings.

Recommendation 20:

That each jurisdiction requires that there be a comprehensive building manual for Commercial buildings that should be lodged with the building owners and made available to successive purchasers of the building.

Recommendation 21:

That the Building Ministers' Forum agree its position on the establishment of a compulsory product certification system for high-risk building products.

Recommendation 22:

That the Building Ministers' Forum develop a national dictionary of terminology to assist jurisdictions, industry and consumers to understand the range of terminology used to describe the same or similar terms and processes in different jurisdictions.

Recommendation 23:

That the Building Ministers' Forum acknowledges that the above recommendations are designed to form a coherent package and that they be implemented by all jurisdictions progressively over the next three years.

Recommendation 24:

That the Building Ministers' Forum prioritise the preparation of a plan for the implementation of the recommendations against which each jurisdiction will report annually.

Attachment B—Terms of Reference

BUILDING MINISTERS' FORUM

Assessment of the Effectiveness of Compliance and Enforcement Systems for the Building and Construction Industry across Australia

Terms of Reference

The independent experts, Professor Peter Shergold and Ms Bronwyn Weir, have been appointed by the Building Ministers' Forum (BMF) to undertake an external assessment of the compliance and enforcement systems for the Building and Construction Industry across Australia and the potential for further or additional reforms. Professor Shergold and Ms Weir will provide an initial report to the BMF at its meeting in October 2017. A final report will be provided to the BMF as soon as possible after the October 2017 meeting.

Compliance systems are the legislated processes in each jurisdiction intended to ensure that buildings are designed and constructed to comply with the National Construction Code (NCC) and are maintained (as appropriate) in accordance with legislated Australian Standards.

Enforcement systems are the legislated processes in each jurisdiction that allow a regulator to detect and remedy non-compliance with the NCC.

Professor Shergold and Ms Weir are engaged to, in consultation with the Commonwealth, State and Territory Governments, the Australian Building Codes Board and key industry stakeholders:

1. Examine compliance and enforcement problems within the building and construction systems across Australia that are affecting the implementation of the NCC, as they relate to:
 - a. roles, responsibilities and accountabilities of different parties;
 - b. education and training;
 - c. licensing and accreditation;
 - d. accuracy of design and documentation;
 - e. quality control and assurance;
 - f. competencies of practitioners;
 - g. integrity of private certification;
 - h. inspection regimes;
 - i. auditing and enforcement practices; and
 - j. product importation and chain of custody.
2. In undertaking the assessment, Professor Shergold and Ms Weir are to take into account the impact of recent building regulatory reviews and reforms undertaken and implemented by state and territory governments, including but not limited to:
 - a. Australian Capital Territory – Improving the ACT Building Regulatory System Review;
 - b. New South Wales – 2016 Response to the Independent Review of the Buildings Professionals ACT 2005;
 - c. Queensland – 2016 Building Plan Review;
 - d. Tasmania – 2017 Building Regulatory Framework;
 - e. Victoria – 2017 Building Regulations Sunset Review;
 - f. Western Australia – 2016 Auditor General Report on Regulation of Builders and Building Surveyors; and
 - g. Senate Economics Committee Inquiry into Non-Conforming Building Products.
3. Based on the outcome of the assessment, consider strategies for improving compliance and enforcement practices and make recommendations for a national best practice model for compliance and enforcement to strengthen the effective implementation of the NCC.

Attachment C—Consultations

1.	Building Regulators' Forum	13 September 2017
2.	The Hon Richard Wynne MP, Victorian Minister for Planning	14 September 2017
3.	Senior Officers' Group	20 September 2017
4.	The Hon Craig Laundy MP, Commonwealth Minister for Small and Family Business, the Workplace and Deregulation	21 September 2017
5.	The Hon Guy Barnett MP, Tasmanian Minister for Building and Construction	26 September 2017
6.	Mr Mick Gentleman MLA, ACT Minister for Planning and Land Management	26 September 2017
7.	The Hon Nicole Manison MLA, NT Deputy Chief Minister and Minister for Infrastructure, Planning and Logistics	28 September 2017
8.	Workshop: Building Ministers' Forum Secretariat, Building Regulators' Forum Secretariat and the Office of the Australian Building Codes Board	2 October 2017
9.	The Hon Bill Johnston MLA, WA Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement	3 October 2017
10.	Office of the Hon Matthew Kean, NSW Minister for Innovation and Better Regulation	4 October 2017
11.	Queensland Building and Construction Commission	11 October 2017
12.	Queensland Department of Housing and Public Works	12 October 2017
13.	The Hon Mick de Brenni MP, Minister for Housing and Public Works	12 October 2017
14.	Victorian Department of Environment, Land, Water and Planning	19 October 2017
15.	Victorian Building Authority	19 October 2017
16.	Australian Institute of Building Surveyors	24 October 2017
17.	NSW Fair Trading	25 October 2017
18.	Data 61	25 October 2017
19.	Standards Australia	25 October 2017
20.	Association of Accredited Certifiers	25 October 2017
21.	Master Builders Australia	26 October 2017
22.	Construction, Forestry, Mining and Energy Union	26 October 2017
23.	NSW Department of Planning & Environment	26 October 2017
24.	Insurance Council of Australia	27 October 2017
25.	NT Department of Infrastructure Planning and Logistics	30 October 2017
26.	Dr Brian Ashe, Fire Engineer, ABCB	8 November 2017
27.	Housing Industry Association	8 November 2017
28.	Department of Industry, Innovation and Science	8 November 2017
29.	ACT Environment, Planning and Sustainable Development Directorate	8 November 2017
30.	Engineers Australia	9 November 2017
31.	Fire Protection Association Australia	13 November 2017
32.	Australasian Fire and Emergency Service Authorities Council	13 November 2017
33.	Master Plumbers Australia Ltd	13 November 2017
34.	Australian Institute of Architects	14 November 2017
35.	Australian Local Government Association	14 November 2017
36.	SA Department of Planning, Transport and Infrastructure	15 November 2017
37.	FM Global	16 November 2017

38.	WA Building Commission	16 November 2017
39.	Tasmanian Department of Justice	20 November 2017
40.	Property Council of Australia (ACT Division)	21 November 2017
41.	Australian Building Codes Board	23 November 2017
42.	Professor John Thwaites	5 December 2017
43.	Property Council of Australia	8 December 2017
44.	Australian Local Government Association	18 December 2017
45.	Office of the Hon Matthew Kean MP, NSW Minister for Innovation and Better Regulation	18 December 2017
46.	Office of the Hon Bill Johnston MLA, WA Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement	9 January 2018
47.	Office of the Hon Nicole Manison MLA, NT Deputy Chief Minister and Minister for Infrastructure, Planning and Logistics	9 January 2018
48.	Mr Mick Gentleman MLA, ACT Minister for Planning and Land Management	9 January 2018
49.	Office of the Hon Richard Wynne MP, Victorian Minister for Planning	11 January 2018
50.	Centre of Smart Modern Construction (c4SMC)	12 January 2018
51.	The Warren Centre for Advanced Engineering Ltd	12 January 2018
52.	Office of the Hon Guy Barnett MP, Tasmanian Minister for Building and Construction	17 January 2018
53.	The Hon John Rau MP, SA Deputy Premier and Minister for Planning	17 January 2018
54.	The Hon Mick de Brenni MP, Queensland Minister for Housing and Public Works	17 January 2018
55.	The Hon Craig Laundy MP, Commonwealth Minister for Small and Family Business, the Workplace and Deregulation	1 February 2018

Attachment D—Submissions

Submissions

1.	The Warren Centre for Advanced Engineering Ltd	24 October 2017
2.	Enright Consulting	8 November 2017
3.	<i>Confidential</i> Submission	24 November 2017
4.	Plumbing Products Industry Group	30 November 2017
5.	Master Plumbers Australia Ltd	11 December 2017
6.	Engineers Australia	12 December 2017
7.	Building Products Innovation Council	15 December 2017
8.	Fire Protection Association Australia	15 December 2017
9.	Master Builders Australia	15 December 2017
10.	Australian Construction Industry Forum	15 December 2017
11.	Housing Industry Association Ltd	15 December 2017
12.	Metropolitan Fire & Emergency Services Board	21 December 2017

Supplementary submissions

1.	Fire Protection Association Australia	8 January 2018
2.	The Warren Centre for Advanced Engineering Ltd	15 January 2018



Annexure G: MBA Australia Response to Building Confidence Report 2018

24 August 2018



The Hon Craig Laundy MP
Chair, Building Ministers Forum
Minister for Small and Family Business
The Workplace and Deregulation
Parliament House
CANBERRA ACT 2600

MASTER BUILDERS
A U S T R A L I A

Dear Minister,

Building Confidence Report: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia

Master Builders is writing to you as Chair of the Building Ministers Forum (BMF) to provide initial feedback on recommendations in the *Building Confidence Report*. Master Builders also welcomes BMF agreement on establishing an industry forum on implementation of the *Building Confidence Report* and Master Builders looks forward to participating and future forums.

The *Building Confidence* report provides a pragmatic response on options for best practice whilst acknowledging one size does not fit all. Builders need consistency and clarity and not a never ending cycle of regulatory reform. To this end, articulating broad objectives and options for jurisdictions to cooperatively work towards implementing, in conjunction with the reform pathways they have already embarked on, is a sensible way forward.

Master Builders has several key areas that it considers jurisdictions could work towards implementing as a priority. These include:

- recognition of the whole value chain in the regulatory process;
- a focus on best practice in building inspection, education and training;
- adequate project documentation; and a
- centralised information source for product information.

Master Builders recommends BMF develop a matrix that shows consistencies and gaps across jurisdictions against recommendations in the *Building Confidence* report that can be shared with industry. This might be a good starting point for government and industry to contemplate the scale of implementing recommendations, what recommendations could be implemented faster than others and where there is shared support for measures to be implemented.

Some areas that Master Builders considers should be a focus to progress as a priority include the following:

- Recommendations 2, 3 and 4 regarding compulsory training on the NCC, continuing professional development opportunities and supporting career paths for building surveyors:

This should be a priority for jurisdictions to address training quality and support increasing demand for training in the sector.

- Recommendations 13, 14 and 15 regarding responsibility for design practitioners and project documentation for performance solutions: Recommendation 13 recognises and makes accountable other parties in the value chain which Master Builders has long advocated for; and with a number of states already requiring documentation of performance solutions, a national best practice guide could be developed to support consistent application across jurisdictions.
- Recommendation 18 regarding mandatory inspection: A key objective of any response should be enabling the building inspection process to provide best practice advice to industry with a focus on avoiding issues of non-compliance.
- Recommendation 21 regarding product information: the information along the product supply chain needs to be significantly improved if the construction industry is to be able to choose the right products for use in the right place. A number of processes are underway that should continue as a priority, be reviewed and considered in the implementation of this recommendation.
- Recommendation 22 regarding a dictionary of terminology: This work has already been started, could be fast tracked and provide an easy win on the use of consistent terminology across jurisdictions.

We note Master Builders Queensland and Victoria have provided written feedback to their respective building ministers. This document draws on material from these submissions whilst reflecting a national perspective. Both are attached for reference.

I have also copied this letter to all members of the Building Ministers Forum.

Master Builders has outlined in more detail responses against each of the recommendations.

Registration and training of practitioners (Recommendations 1 to 4)

Recommendation 1: Registration of Building Practitioners

That each jurisdiction requires the registration of the following categories of building practitioners involved in the design, construction and maintenance of buildings. Proposed defined categories of building practitioners include: builder, site manager, engineer, surveyor, inspector, architect, designer/draftsperson, plumber, fire safety practitioner.

Master Builders notes that on the modern construction site the majority of work is completed by trade contractors and supports a system that captures key categories of trades as well as categories defined in the recommendation. We note the report does not exclude the additional categories and leaves the option for jurisdictions to choose to register. Master Builders Victoria and ACT will continue advocacy on this front with their respective jurisdictions.

Master Builders acknowledges that national consistency is a sensible goal but is realistic about its limitations given previous attempts to introduce national consistency have failed. Further consultation with industry would be a welcome step to assist reaching a view on the full range of appropriate disciplines.

Recommendation 2: Consistent requirements for registration

That each jurisdiction prescribes consistent requirements for the registration of building practitioners including:

- *Certified training which include compulsory training on the operation and use of the NCC as it applies to each category of registration;*
- *Additional competency and experience requirement*
- *Where available, compulsory insurance in the form of profession indemnity and/or warranty insurance together with financial viability requirement where appropriate; and*
- *Evidence of practitioner integrity, based on an assessment of fit and proper person requirements,*

Master Builders supports national consistency as a sensible goal but is realistic about its limitations given previous attempts to introduce national consistency have failed. Further consultation with industry would be a welcome step to assist reaching a view on and developing best practice requirements to support disciplines.

Master Builders supports the NCC being compulsory for each category of licensing and registration; expanded competency and experience requirements; addressing training quality to support the enormous increase in Certificate IV in Building and Construction; and insurance arrangements already in place.

Master Builders welcomes other building practitioners such as architects, engineers and building surveyors being held to the same standard as builders and provision of a statutory government role in auditing and disciplining of these professions.

Recommendation 3: Continuing Professional Development

That each jurisdiction requires all practitioners to undertake compulsory Continuing Professional Development on the National Construction Code.

Master Builders supports targeted, mandatory continuing professional development. Master Builders member jurisdictions are already working to develop CPD products for builders and tradespeople. Targeted learning of genuine products to improve competence is required and should be extended beyond the NCC to other areas such as business management skills and security of payment.

Master Builders would be interested in being part of further industry consultation on the development of this recommendation.

Recommendation 4: Career paths for building surveyors

That each jurisdiction establishes a supervised training scheme which provides a defined pathway for becoming a registered building surveyor.

Master Builders supports this recommendation because declining numbers of building surveyors is a concern shared by industry. This problem is currently being compounded by insurance uncertainty and pressure.

Master Builders would be interested in being part of further industry consultation on the development of this recommendation.

Roles and responsibilities of regulators (Recommendations 5 to 7)

Recommendation 5: Improving collaboration between regulators

That each state establishes formal mechanisms for a more collaborative and effective partnership between those with responsibility for regulatory oversight, including relevant state government bodies, local governments and private building surveyors (if they have an enforcement role).

Master Builders supports clear roles and responsibilities for state government, local governments and private building surveyors in providing regulatory oversight. It is also important that each regulator is appropriately resourced.

While there is a collaborative relationship amongst regulators for the oversight of the building and construction industry, there is an opportunity to achieve better outcomes through improved collaboration across all industry stakeholders.

The building inspection process could play a role in the provision of best practice advice to industry through information sharing and education, with a greater focus on avoiding issues of non-compliance.

Recommendation 6: Effective regulatory powers

That each jurisdiction give regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action.

States and territories are strengthening powers to monitor buildings and building work. The exception is the power to audit the performance of practitioners registered by other bodies such as engineers and architects. Master Builders believes that all building professionals should be held to the same high standard and in support of this we note that the *Building Confidence Report* has recommended performance audit powers over all registered practitioners.

Master Builders has advocated for more powers to regulate the supply chain which has been adopted in Queensland. Given it's early days for the Queensland legislation, it's appropriate that the legislation is given time to be tested before other states and territories consider similar reforms. Master Builders supports a broader adoption being a matter for respective governments to decide.

Master Builders consider regulators could improve the quality of their communication with industry on technical and operational knowledge. The building inspection process could play a role in the provision of best practice advice to industry through information sharing and education, with a greater focus on avoiding issues of non-compliance.

Recommendation 7: Strategy for the proactive regulation of Commercial buildings

That each jurisdiction makes public its audit strategy for regulatory oversight of the construction of Commercial buildings, with annual reporting on audit findings and outcomes.

Master Builders supports a more transparent audit process and strategic reporting on inspection outcomes that's available to industry and regulators. The formation of the Building Regulators Forum that reports to BMF is a step in the right direction in terms of coordinating action and exchanging experiences.

States are already making information publicly available on audit strategies and on high risk products. More coordination across jurisdictions, a centralised point with key information and annual reporting by regulators of outcomes and learnings would assist in sharing critical information.

Master Builders considers regulators could improve the quality of their communication with industry on technical and operational knowledge. The building inspection process could play a role in the provision of best practice advice to industry through information sharing and education, with a greater focus on avoiding issues of non-compliance.

Master Builders considers commercial and multi-storey residential should be the focus of any work going forward.

Role of fire authorities in the building design and approvals process (Recommendation 8)

Recommendation 8: Collaboration with fire authorities in the development of fire safety design

That, consistent with the International Fire Engineering Guidelines, each jurisdiction requires developers, architects, builders, engineers and building surveyors to engage with fire authorities as part of the design process.

Master Builders supports fire authorities having an input in the building approval process. It is important that the involvement is appropriate to the project. There is particular value in their role as an advice agency.

Master Builders supports, in principle, a Code of Conduct for fire engineers based on the updated International Fire Engineering Guidelines and would welcome the opportunity to be consulted further.

Integrity of private building surveyors (Recommendations 9 to 11)

Recommendation 9: Integrity of private building surveyors

That each jurisdiction establishes minimum statutory controls to mitigate conflicts of interest and increase transparency of the engagement and responsibilities of private building surveyors.

Controls intended to manage conflict of interest must be carefully considered as the potential for unintended consequences is great.

Building surveyors (certifiers) perform an important and clearly defined regulatory function. Any reform should allow builders to continue to have authority to make a recommendation and to engage.

Reform options introduced in Victoria require the owner to engage the building surveyor whilst the builder has the right to coordinate the surveyor for building works undertaken. There might be benefit in testing how this reform applies before other jurisdictions consider adopting similar reforms.

Master Builders agrees that the certifier cannot have another interest in the project and support some limits being put in place. At the same time there is value in the certifier advising early in the process on how to achieve compliance and this should be allowed to continue.

Education programs targeting improved industry knowledge and understanding could form part of a targeted CPD program. This might be linked to a Code of Conduct as per recommendation 10.

Owners should receive copies of the final documents.

Recommendation 10: Code of Conduct for building surveyors

That each jurisdiction put in place a code of conduct for building surveyors which addresses the key matters which, if contravened, would be a ground for a disciplinary inquiry.

Master Builders supports a Code of Conduct for building surveyors and would welcome the opportunity to be engaged in the process. Forms of this already exist in some jurisdictions and could be better coordinated in a nationally consistent code. Industry needs to be central to the development of the code.

Recommendation 11: Role of building surveyors in enforcement

That each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations.

Master Builders is opposed to broad supervision powers for building surveyors because surveyors are not appointed to act as a site supervisor and should not carry out duties akin to a project manager.

There is scope to strengthen requirements regarding mandatory reporting but this needs careful consideration given the complexity of commercial building. Mandatory reporting requirements also need to be matched by the regulators' capacity to investigate and take action once a report is made. This must be achieved in a cost effective way, without adding to licensing and insurance costs borne by the contractor.

Master Builders supports efforts to assist building surveyors in carrying out their regulatory role, including training, help desks and other support.

Collecting and sharing building information and intelligence (Recommendation 12)

Recommendation 12: Collecting and sharing data and intelligence

That each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation.

Master Builders supports better processes for collection and sharing of building design and construction documentation.

Master Builders recommends that if this data is collected, the intellectual property of businesses should be protected and not made broadly available and the cost-benefit of this should be taken into account in any outcomes from this recommendation.

While there is value in a centralised building information database, we expect that it can only be achieved at a significant cost. Building manuals (Recommendation 20), along with advancing the quality of project documentation (Recommendation 13) and the take up of Building Information Modelling would be more realistic steps towards the goal of better building information.

Databases to assist building practitioners in their decision making would be a more proactive response and help mistakes not to be made in the first place. To this end, Master Builders and other industry stakeholders have long advocated for a product certification database to help in the selection and appropriate use of compliant building products (Recommendation 21).

In addition to this Master Builders NSW is piloting with JAS-ANZ and QualityTrade, a certified products business to business online market place with funding from the NSW Government Building Partnerships Program. The pilot is seeking to resolve the lack of digital infrastructure and a central, trusted means of confirming accredited certification of businesses and building products.

Adequacy of documentation and record keeping (Recommendations 13 to 17)

Recommendation 13: Responsibility of design practitioners

That each jurisdiction requires building approval documentation to be prepared by appropriate categories of registered practitioners, demonstrating that the proposed building complies with the National Construction Code.

Master Builders in its submission to the expert panel called for increased attention on the role played by those who supply and specify building products (importers, distributors and wholesalers, architects, building designers and engineers).

Master Builders has long been an advocate for quality project documentation. Quality documentation goes to the heart of build quality. We believe that if we are to get buildings right that the investment needs to be made in getting it right up front. Documentation also needs to be practical and appropriate to the project.

Designers, architects and engineers must have a legislated duty to prepare documentation which demonstrates that the proposed building will comply with the NCC. To this end Master Builders welcomes recommendations for jurisdictions to require design documentation that adequately demonstrates compliance with the NCC; includes relevant certificates of conformity, accreditation and other prescribed material; requires a declaration of NCC compliance from each registered practitioner responsible.

Recommendation 14: Adequate documentation for performance solutions

That each jurisdiction sets out the information which must be included in performance solutions, specifying in an occupancy certificate the circumstances in which performance solutions have been used and for what purpose.

It is imperative that we get the documentation of performance solutions right, if we are to address non-compliance. Master Builders supports the development of a national best-practice guide for documenting performance solutions that is given legislative force.

This recommendation should be given a high priority for implementation by all states and territories. While some states already require this for example in Victoria in a certificate of occupancy and

Queensland in a certificate of classification, there is more that needs to be done to ensure that the information is robust and transparent.

Master Builders would welcome the opportunity to assist in the implementation of this recommendation.

Recommendation 15: Approval of performance solutions for construction building work

That each jurisdiction provides a transparent and robust process for the approval of performance solutions for constructed building work.

In the majority of cases an alternative solution is likely to have implications for how the building is to be used and maintained and for insurance contracts. It is also likely to be a variation on the original scope of works. It is therefore important that the owner be notified.

Master Builders supports this recommendation. Answers to recommendation 14 are also applicable to this recommendation.

Recommendation 16: Approval of documentation throughout the construction process

That each jurisdiction provides for a building compliance process which incorporates clear obligations for the approval of amended documentation by the appointed building surveyor throughout a project.

Master Builders agrees that there needs to be a process for any changes to an approved performance solution to be properly checked. This should be supported by better education for industry professionals on the documentation throughout the building process. Apportioning legislative responsibility to design practitioners (recommendation 13) and collective responsibility for certification throughout the building process also enhances outcomes for this recommendation.

Recommendation 17: Independent third party review

That each jurisdiction requires genuine independent third party review for specified components of designs and/or certain types of buildings.

Master Builders is opposed to mandatory third party review. This is the responsibility of the certifier and should be left to their professional judgment. A better response would be to strengthen and improve the chain of responsibility rather than add mandatory review onto the surveyor certification process. Any code of conduct developed for building surveyors as an outcome of recommendation 10 might provide guidance on when to seek and parties to consider for third party review.

Inspection Regimes (Recommendation 18-19)

Recommendation 18: Mandatory inspections

That each jurisdiction requires on-site inspections of building work at identified notification stages.

Master Builders supports this recommendation and encourages further engagement with industry on implementation.

Of particular importance, will be further developing a building inspection process that provides best practice advice to industry with a focus on avoiding issues of compliance.

The Building Regulator Forum established to support the work of the BMF should continue to share information on approaches adopted by states and territories. Documenting the approaches adopted across jurisdictions, tracking outcomes and sharing this with industry could advance best practice for inspections.

Recommendation 19: Inspection and certification of fire safety installation

That each jurisdiction requires registered fire safety practitioners to design, install and certify the fire safety systems necessary in Commercial buildings.

Master Builders supports this recommendation.

Post-construction information management (Recommendation 20)

Recommendation 20: A building manual for commercial buildings

That each jurisdiction requires that there be a comprehensive building manual for commercial buildings that should be lodged with the building owners and made available to successive purchasers of the building.

Master Builders supports comprehensive building manuals being provided to the owner at the end of the project. This will be a more effective mechanism for ensuring a safe building for occupants than providing piecemeal information throughout the construction process.

We have concerns with the potential cost impact of this recommendation. This would be mitigated by the increased uptake of BIM. We therefore recommend government assistance with increasing take-up of this technology.

We note that some jurisdictions already require Council to retain copies of approved documentation as part of the building permit/occupancy process. Manuals might build on and be consistent with these requirements that detail for example information on performance requirements.

Building product safety (Recommendation 21)

Recommendation 21: Building product safety

That the Building Ministers' Forum agrees its position on the establishment of a compulsory products certification system for high-risk products.

Master Builders has long advocated for improved product certification across all product types and strongly supports this recommendation and acknowledges a number of processes underway to deliver on this recommendation.

Databases to assist building practitioners in their decision making would be a more proactive response and help mistakes not to be made in the first place.

Master Builders in its submission to the expert panel process recommended the development of a centralised building product certification system that provides a central store of product compliance

information and registry of building products to ensure there is certainty when establishing evidence of product suitability.

Master Builders also encourages the use of Product Technical Statements across all building products. It is a tool that can provide consistent, easy to understand information on the use of products in regulated building work. We recommend that builders and contractors request them from suppliers before accepting or installing building products. We are also working with manufacturers and suppliers to encourage their use.

In addition to this Master Builders NSW is piloting with JAS-ANZ and QualityTrade, a certified products business to business online market place with funding from the NSW Government Building Partnerships Program. The pilot is seeking to resolve the lack of digital infrastructure and a central, trusted means of confirming accredited certification of businesses and building products.

The Senior Officials Group leading work in this space around labelling of aluminium cladded products is a start towards implementing this recommendation. Master Builders recommended a more effective system for product labelling combined with consistent information on product technical statements could be adopted for high risk products but would need to be subject to cost-benefit analysis.

Outcomes from the various processes underway need to be reviewed and considered in the implementation of this recommendation.

Implementation of recommendations (Recommendations 22 to 24)

Recommendation 22: Dictionary of terminology

That the Building Ministers' Forum develop a national dictionary of terminology to assist jurisdictions, industry and consumers to understand the range of terminology used to describe the same or similar terms and processes in different jurisdictions.

Master Builders supports this recommendation. A national 'dictionary of terminology' will improve understanding across state borders and should be an outcome that is easy to achieve. We understand that this is work that has been undertaken in the past and could be used as a starting point.

Recommendation 23: Implementation of the recommendations

That the Building Minister's Forum acknowledges that the above recommendation are designed to form a coherent package and that they be implemented by all jurisdictions progressively over the next three years.

Master Builders welcomes the opportunity to participate in the process. Whilst there's a need for consistency and clarity Master Builders is conscious of reform fatigue where states have been progressively implementing reforms to respond to concerns around building quality.

Master Builders recommends BMF develop a matrix that shows consistencies and gaps across jurisdictions against recommendations in the *Building Confidence Report* that can be shared with industry. This might be a good starting point for government and industry to contemplate the scale of implementing recommendations, what recommendations could be implemented faster than others and where there is shared support for measures to be implemented.

Recommendation 24: Implementation plan

That the Building Ministers' Forum prioritises the preparation of a plan for the implementation of the recommendation against which each jurisdiction will report annually.

Master Builders supports this recommendation and welcomes the opportunity for industry to engage throughout the implementation period directly with BMF.

In developing the implementation plan governments must consider the impact on affordability. A rigorous cost-benefit analysis of all proposed regulatory requirements must be conducted prior to them being introduced.

Yours sincerely



Denita Wawn

Chief Executive Officer

cc Mr Mick Gentleman MLA, ACT Minister for Planning
 The Hon Anthony Roberts MP, NSW Minister for Planning
 The Hon Matthew Kean MP, NSW Minister for Innovation and Better Regulation
 The Hon Nicole Manison MLA, NT Deputy Chief Minister and Minister for Infrastructure, Planning and Logistics
 The Hon Mick de Brenni MP, Queensland Minister for Housing and Public Works
 The Hon. Stephan Karl Knoll, South Australian Minister for Transport, Infrastructure and Local Government, Minister for Planning
 The Hon. David James Speirs, South Australian Minister for Environment and Water
 The Hon Guy Barnett MP, Tasmanian Minister for Building and Construction
 The Hon Richard Wynne MP, Victorian Minister for Planning
 The Hon Bill Johnston MLA, Western Australian Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement

6 July 2018

Hon Mick de Brenni MP
Minister for Housing and Public Works
Minister for Digital Technology
Minister for Sport
PO Box 2457
BRISBANE QLD 4001

Email: OADG.BIP@hpw.qld.gov.au

Dear Minister,

Building Confidence: Improving the effectiveness of compliance and enforcement system for the building and construction industry across Australia

Thank you for the opportunity to provide feedback on this important review. Master Builders would like to offer the following comments on the recommendations contained in the review.

Recommendation 1: Registration of building practitioners

That each jurisdiction requires the registration of the following categories of building practitioners involved in the design, construction and maintenance of buildings:

- *Builders*
- *Site or project manager*
- *Building surveyor*
- *Building inspector*
- *Architect*
- *Engineer*
- *Designer / draftsperson*
- *Plumber*
- *Fire safety practitioners*

Queensland already benefits from a comprehensive system of contractor licensing and professional registration. Specifically, the three professions identified in the report as needing to be registered are already licensed in Queensland.

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The Queensland approach can therefore serve as a model for the other states in developing ‘complimentary provisions’.

There are also great benefits derived from ensuring that the accountability and regulatory oversight of architects is consistent with other categories of building practitioners. They design and specify products and in a number of instances they act as the project manager. Master Builders therefore supports change to the legislation where necessary to achieve this goal.

National consistency of registration is a sensible goal but not a priority.

Recommendation 2: Consistent requirements for registration

That each jurisdiction prescribes consistent requirements for the registration of building practitioners including:

- certificated training which include compulsory training on the operation and use of the NCC as it applies to each category of registration;
- additional competency and experience requirement;
- where it is available, compulsory insurance in the form of professional indemnity and/or warranty insurance together with financial viability requirement where appropriate; and
- evidence of practitioner integrity, based on an assessment of fit-and-proper person requirements.

From nationally consistent registration, it flows that the requirements for registration should also be nationally consistent. Again, we believe that the Queensland system of building contractor licensing and professional registration provides a workable model.

Further, we support appropriate training on the NCC being compulsory to each category of licensing and registration.

We support expanded competency and experience requirements where they are identified as being necessary.

Also important will be addressing the quality of training that underpins registration. For example, the falling quality in training that has accompanied the enormous increase in Certificate IV in Building & Construction training providers must be addressed as a priority. We recommend that jurisdictions look to introduce a formal assessment as part of the licensing process for Low Rise Builders as is currently in place in Victoria and the ACT.

We support the compulsory insurance and financial viability requirements already in place in Queensland.

Evidence of practitioner integrity by way of a fit and proper assessment has long been a requirement in Queensland and works well. Master Builders also supports the continuation of the Queensland system of minimum financial requirements for building contractors.

There is clearly a statutory role for the government in auditing and disciplining engineers, architects and building surveyors; professions where the accreditation by their industry body is



the basis of their registration. We welcome other building practitioners being held to the same high standard as construction licensees.

Recommendation 3: Continuing Professional Development

That each jurisdiction requires all practitioners to undertake compulsory Continuing Professional Development on the National Construction Code.

Master Builders has long advocated for the introduction of a targeted, compulsory CPD program for licensees. We agree that it is essential for CPD to provide for “targeted learning on topics of genuine relevance to improve the competence of practitioners”.

Similarly, we would welcome better mechanisms to identify reoccurring compliance issues to feed into the CPD system.

We are well placed and stand ready to assist in the delivery of CPD.

While we recognise it is beyond the scope of this review, it is important that any program extends beyond training on the NCC to include business management skills and help address the important problem of security of payment.

Recommendation 4: Career paths for building surveyors

That each jurisdiction establishes a supervised training scheme which provides a defined pathway for becoming a registered building surveyor.

The declining numbers of building surveyors is a concern shared by industry. We therefore support the recommendation for supervised training schemes to provide a defined pathway to becoming a building surveyor, in the expectation that it will achieve the goal of encouraging practitioners to “aspire to achieving that status”. Government incentives would be a significant benefit in this area.

Recommendation 5: Improving collaboration between regulators

That each state establishes formal mechanisms for a more collaborative and effective partnership between those with responsibility for regulatory oversight, including relevant state government bodies, local governments and private building surveyors (if they have an enforcement role).

Master Builders supports clear roles and responsibilities for state government, local governments and private building surveyors in providing regulatory oversight.

It is also important that each regulator is appropriately resourced to adequately fulfil their assigned role.

Queensland legislation already provides “provides clear statement of responsibility for each authority”.

While there is a collaborative relationship amongst regulators for the oversight of the building and construction industry, there is an opportunity to achieve better outcomes through improved collaboration across all industry stakeholders.

Recommendation 6: Effective regulatory powers

That each jurisdiction give regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action.

The QBCC now has a broad suite of powers to monitor buildings and building work with the passing of the Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017.

The exception is the power to audit the performance of practitioners registered by other bodies such as engineers and architects. Master Builders believes that all building professionals should be held to the same high standard.

Recommendation 7: Strategy for the proactive regulation of Commercial buildings

That each jurisdiction makes public its audit strategy for regulatory oversight of the construction of Commercial buildings, with annual reporting on audit findings and outcomes.

Master Builders supports the current QBCC audit strategy that is publicly available on their website. The statutory powers to take action in support of the strategy and a public register of any enforcement action are also in place.

The QBCC's Annual Report could include a report on the "outcomes and learnings" from the audits.

Recommendation 8: Collaboration with fire authorities in the development of fire safety design

That, consistent with the International Fire Engineering Guidelines, each jurisdiction requires developers, architects, builders, engineers and building surveyors to engage with fire authorities as part of the design process.

Master Builders supports the Queensland Fire and Rescue Service having an input in the building approval process. It is important that the involvement is appropriate to the project.

The Queensland system where the Queensland Fire and Rescue Service has a mandatory role as an advice agency at the building approval and building certification stages works well and we recommend that this be considered for adoption by the other states.

We are opposed to any form of mandatory involvement outside these two stages as it would not be feasible nor cost effective for either industry or the fire service.

The Queensland Fire and Rescue Service ‘right of appeal’ already exists through the Queensland Planning and Environment Court.

We support, in principle, a Code of Conduct for fire engineers based on the updated International Fire Engineering Guidelines.

Recommendation 9: Integrity of private building surveyors

That each jurisdiction establishes minimum statutory controls to mitigate conflicts of interest and increase transparency of the engagement and responsibilities of private building surveyors.

Controls intended to manage conflict of interest must be carefully considered as the potential for unintended consequences is great.

Building surveyors (certifiers) perform an important and clearly defined regulatory function.

Under the terms of building contracts, the builder controls the building site and the execution of the building works. Certification is an integral part of building work and therefore should remain the builder’s responsibility. The builder also has the right expertise to engage and coordinate the certifier for the building works being undertaken.

Where the owner has engaged the certifier it is unrealistic to expect that they would be directed to address all issues with a project, including those of quality which are outside the regulatory function and not appropriate.

Master Builders does not support the requirement to have QBCC approval to disengage a building surveyor. While recognising the role of the certifier as the regulator, there to protect the public interest, adding QBCC approval would only add delays and costs to construction. As an alternative, we recommend that the QBCC monitor whether there are contractors abusing their role and require that certifiers notify the QBCC when they are disengaged.

We accept that the certifier cannot have another interest in the project and support some limits being put in place. At the same time there is value in the certifier advising early in the process on how to achieve compliance and this should be allowed to continue.

We support there being checks in place before accepting certificates such as Form 15s. We regularly work with our members to advise on their own checks that they should have in place and would welcome the government’s support in this area. Education programs targeting improved industry knowledge and understanding on the use of Form 15s and 16s could form part of a targeted CPD program.

We support the owner receiving copies of the final documents (as per Recommendation 20). Documents should not be forwarded during construction as this can lead to unnecessary delays.

In Queensland the owner has an effective right of appeal in being able to refer any concerns with the certification to the QBCC and onto QCAT.

Recommendation 10: Code of Conduct for building surveyors

That each jurisdiction put in place a code of conduct for building surveyors which addresses the key matters which, if contravened, would be a ground for a disciplinary inquiry.

Master Builders supports a Code of Conduct for building surveyors.

In Queensland there is the “Code of conduct for building certifiers” with which they must comply and by which their performance may be measured. A breach of the Code may constitute unsatisfactory conduct or professional misconduct under the *Building Act 1975 (Section 32)*.

Master Builders also recommends that a demerit point system for building surveyors be introduced, similar to the one that exists for other licensees as another means for the Commission to address misconduct by building surveyors.

Recommendation 11: Role of building surveyors in enforcement

That each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations.

In Queensland building surveyors have enforcement powers to stop work in the case of noncompliant or defective work until the point of giving the final inspection certificate or certificate of classification. If the enforcement notice is not complied with the local authority must be notified. To be effective, the responsibility to prosecute these offences must sit with a local authority or a state regulator.

There is scope to strengthen requirements regarding mandatory reporting but this needs careful consideration given the complexity of commercial building. Mandatory reporting requirements also need to be matched by the regulators’ capacity to investigate and take action once a report is made. This must be achieved in a cost effective way, without adding to licensing and insurance costs borne by the contractor.

Master Builders is opposed to broad supervision powers for building surveyors as that is beyond their role as a regulator. They are not there to act as the owner’s site supervisor.

We support all efforts to assist building surveyors in carrying out their regulatory role, including training, help desks and other support.

When it comes referrals that are made to the relevant regulator, we have confidence in their ability to prioritise their own workload appropriately.

Recommendation 12: Collecting and sharing data and intelligence

That each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation.

While there is value in a centralised building information database, we expect that it can only be achieved at a significant cost. Building manuals (Recommendation 20), along with advancing the

quality of project documentation (Recommendation 13) and the take up of Building Information Modelling would be more realistic steps towards the goal of better building information.

This is also a reactive response and is only likely to address problems after mistakes have been made.

Databases to assist building practitioners in their decision making would be more proactive response and help mistakes not to be made in the first place. To this end, Master Builders has long advocated for a product certification database to help in selecting compliant building products (Recommendation 21).

Recommendation 13: Responsibility of design practitioners

That each jurisdiction requires building approval documentation to be prepared by appropriate categories of registered practitioners, demonstrating that the proposed building complies with the National Construction Code.

Master Builders has long been an advocate for quality project documentation. Quality documentation goes to the heart of build quality. We believe that if we are to get buildings right that the investment needs to be made in getting it right up front. Documentation also needs to be practical and appropriate to the project.

We recommend the document “*Getting it Right First Time*” prepared by a Queensland industry-wide taskforce as a starting point for further work in this important area.

Designers, architects and engineers must have a legislated duty to prepare documentation which demonstrates that the proposed building will comply with the NCC.

Recommendation 14: Adequate documentation for performance solutions

That each jurisdiction sets out the information which must be included in performance solutions, specifying in occupancy certificate the circumstances in which performance solutions have been used and for what purpose.

It is imperative that we get the documentation of performance solutions right, if we are to address non-compliance. We strongly support the development of a national best-practice guide for documenting performance solutions that is given legislative force.

We suggest that this recommendation be given a high priority in the implementation plan.

Recommendation 15: Approval of performance solutions for construction building work

That each jurisdiction provides a transparent and robust process for the approval of performance solutions for constructed building work.

In the majority of cases an alternative solution is likely to have implications for how the building it to be used and maintained, insurance contracts. It is also likely to be a variation on the original scope of works. It is therefore important that the owner be notified.

Including the owner will also assist in the reduction of product or system substitution by the builder.

Including a list of all performance solutions on the occupancy certificate (in Queensland the Form 11: Certificate of Classification) could be a practical way to improve documentation in this area.

Recommendation 16: Approval of documentation throughout the construction process

That each jurisdiction provides for a building compliance process which incorporates clear obligations for the approval of amended documentation by the appointed building surveyor throughout a project.

We agree that there needs to be a process for any changes to an approved performance solution to be properly checked.

Recommendation 17: Independent third party review

That each jurisdiction requires genuine independent third party review for specified components of designs and/or certain types of buildings.

We are opposed to mandatory third party review. This is the responsibility of the certifier and should be left to their professional judgment. On projects where the certifier feels it is appropriate we would support their decision.

Recommendation 18: Mandatory inspections

That each jurisdiction requires on-site inspections of building work at identified notification stages.

The current Queensland legislative requirements for mandatory inspections are adequate.

For commercial construction in Queensland “Guidelines for inspection for class 2 to 9 buildings” are already in place and should be considered in developing a national guide.

Recommendation 19: Inspection and certification of fire safety installation

That each jurisdiction requires registered fire safety practitioners to design, install and certify the fire safety systems necessary in Commercial buildings.

We support the Queensland system where licensees and registered persons design, install and certify fire safety systems in commercial buildings.

Recommendation 20: A building manual for commercial buildings

That each jurisdiction requires that there be a comprehensive building manual for Commercial buildings that should be lodged with the building owners and made available to successive purchasers of the building.

Master Builders supports comprehensive building manuals being provided to the owner at the end of the project. This will be a more effective mechanism for ensuring a safe building for occupants than providing piecemeal information throughout the construction process.

We have concerns with the potential cost impact of this recommendation. This would be mitigated by the increased uptake of BIM. We therefore recommend government assistance with increasing take-up of this technology.

Recommendation 21: Building product safety

That the Building Ministers' Forum agrees its position on the establishment of a compulsory products certification system for high-risk products.

Master Builders has long advocated for improved product certification across all product types and strongly supports this recommendation.

While addressing high-risk products is an important first step, it is also important that the system is flexible to improve product information across all products types and able to incorporate new products.

Recommendation 22: Dictionary of terminology

That the Building Ministers' Forum develop a national dictionary of terminology to assist jurisdictions, industry and consumers to understand the range of terminology used to describe the same or similar terms and processes in different jurisdictions.

A national 'dictionary of terminology' will improve understanding across state borders and should be an outcome that is easy to achieve. We understand that this is work that has been undertaken in the past and could be used as a starting point.

Recommendation 23: Implementation of the recommendations

That the Building Minister's Forum acknowledges that the above recommendation are designed to form a coherent package and that they be implemented by all jurisdictions progressively over the next three years.

We acknowledge that the recommendations are intended to form a coherent package, to be executed in their entirety over a three year period.

Seeking “national consistency whilst also empowering jurisdictions to implement change in their own way” is a practical and realistic approach.

Recommendation 24: Implementation plan

That the Building Ministers' Forum priorities the preparation of a plan for the implementation of the recommendation against which each jurisdiction will report annually.

In developing the implementation plan government must consider the impact on affordability. With all of the QBCC’s resources directly provided by the industry in the form of license fees and insurance premiums, any increase in resource requirements will directly add to the cost of new construction.

A rigorous cost-benefit analysis of all proposed regulatory requirements must therefore be conducted prior to them being introduced.

Thank you for the opportunity to provide input to this review. Please do not hesitate to contact me if I can provide any further information.

Regards,



Paul Bidwell
Deputy CEO

BUILDING CONFIDENCE: SHERGOLD-WEIR REPORT

SUBMISSION: MASTER BUILDERS VICTORIA

14 August 2018

Master Builders Victoria welcomes the opportunity to provide feedback on the report from Peter Shergold and Bronwyn Weir: *Building Confidence: Improving the effectiveness of compliance and enforcement system for the building and construction industry across Australia*, February 2018 (Shergold-Weir report).

Master Builders Victoria supports many of the recommendations of the review, including the need for mandatory practitioner registration and continuing professional development (CPD) as well as greater accountability for practitioners and the regulators across the whole supply chain. We make the following points by way of general comment:

1. National principles or benchmarks

We note that the Shergold-Weir report does not endorse a ‘one size fits all’ solution. This is consistent with our view. We agree with the statement that: *“Each jurisdiction can meet its governance responsibilities in its own manner, under the cooperative oversight of the BMF.”* We also strongly support the recommendations that a national best practice model be established for aspects of the building system (e.g. mandatory trades licensing, mandatory CPD, regulator auditing processes). This should take the form of a type of benchmark without mandated rules or legislation, especially where the state laws or systems are the same or substantially similar. Each jurisdiction can then work towards those best practices according to their own requirements.

National consistency in building legislation and regulation, for example in relation to trades registration, is desirable but could take years to achieve and may be impossible in many cases. We recommend that all states work towards a nationally consistent approach, whether through benchmarks or their own legislative reforms. In Victoria we would be concerned that progress with regulatory system improvements in this state might be reversed. We have long been lobbying for mandatory trades registration and would not like progress to be stalled by new requirements for national consistency.

2. Focus on best practice and an ambulance ‘at the top of the cliff.’

In relation to recommendations about regulatory powers, the Victorian Building Authority (VBA) has been given many powers of inspection, entry, discipline etc. Master Builders Victoria considers that even with significant powers the VBA was unaware of the scale and impact of a major industry challenge like non-compliant cladding. This originated as a technical knowledge issue, not in respect of ineffectual powers and controls. The solution to industry challenges does not lie in giving regulators more powers. The answer is to provide more resources to educate and gather intelligence. This can then be provided as guidance to industry about potential trends or emerging issues. The Victorian Cladding Taskforce

BUILDING CONFIDENCE: SHERGOLD – WEIR REPORT

recommended a State Building Inspector be appointed within the VBA as a leading expert to provide the very best technical knowledge. We support this recommendation and consider this could be one of the best practices in the systems across the country. The State Building inspectors could also share intelligence to ensure that the issues around compliance are avoided in the future.

In 2018 significant changes to the Building Act 1993 and building regulations were enacted in Victoria. The legislation included changes such as additional mandatory inspections related to fire and pool safety and increased obligations on building surveyors with respect to conflict of interest. The legislative changes in Victoria align with a number of the recommendations raised in the Shergold-Weir report. While we still see significant value in the report the Victorian changes are a good example of state-based solutions in action. The recent enactment of this legislation also illustrates where mandated national consistency in laws would be costly and inefficient.

3. Importance of the whole value chain in building and construction

The solution to many of the issues facing the building industry do not lie in increasing accountability at the end of certification process. There is a risk that overloading one category of building professional, such as surveyors, will merely exacerbate existing pressure points and create unrealistic expectations and liability concerns. We believe the entire certification process from beginning to end needs to be a strong chain of skilled building professionals relying on each other's professional assessments and mutual assurance. There are numerous professionals in the certification chain, at very least suppliers, designers and architects but also other groups such as disability consultants, fire inspectors and energy raters. If we want to aim for a best practice certification process, the responsibility of all professions in the chain should be considered.

Master Builders Victoria also endorses the Master Builders Australia submission, but has specific responses in relation to the Victorian system. Master Builders Victoria's responses to individual recommendations are contained in the following document.

IS YOUR BUILDER A MASTER BUILDER?



Recommendation 1: Registration of building practitioners

That each jurisdiction requires the registration of the following categories of building practitioners involved in the design, construction and maintenance of buildings:

- *Builders*
- *Site or project manager*
- *Building surveyor*
- *Building inspector*
- *Architect*
- *Engineer*
- *Designer / draftsperson*
- *Plumber*
- *Fire safety practitioners*

In Victoria there is a system of registration that captures most of the categories referenced in the Shergold-Weir report but there are key categories of tradesperson such as carpenter, bricklayer and waterproofer that the report does not reference. Master Builders Victoria has lobbied for a system of mandatory trades registration based on the existing DB-L categories of registration, to ensure that greater skill, safety and quality outcomes are delivered in the industry. In addition, greater accountability should be developed for practitioners across the supply chain such as suppliers, designers and architects.

Consistent with point 1 at the beginning of this submission, national consistency of registration is a sensible goal but not a priority.

Recommendation 2: Consistent requirements for registration

That each jurisdiction prescribes consistent requirements for the registration of building practitioners including:

- *certificated training which include compulsory training on the operation and use of the NCC as it applies to each category of registration;*
- *additional competency and experience requirement;*
- *where it is available, compulsory insurance in the form of professional indemnity and/or warranty insurance together with financial viability requirement where appropriate; and*
- *evidence of practitioner integrity, based on an assessment of fit-and-proper person requirements.*

Consistent with our point 1 at the beginning of this document, we strongly support the development of best practices. This would require jurisdictions to have mandatory practitioner registration for key categories.

Consistency of system and implementation is desirable but it is not a priority.

IS YOUR BUILDER A MASTER BUILDER?



BUILDING CONFIDENCE: SHERGOLD – WEIR REPORT

Master Builders Victoria supports existing skills and qualifications testing systems as well as other tests such as fit-and-proper person and financial viability within the Victorian building practitioner registration system. This is already set up to register building practitioners including Domestic Builder Limited (DB-Ls) but certain categories do not at present require mandatory registration. Master Builders Victoria has been lobbying for the introduction of mandatory trades registration (e.g. DB-Ls like carpenters, waterproofers etc)

Also important will be addressing the quality of training that underpins registration. For example, the falling quality in training that has accompanied the enormous increase in Certificate IV in Building & Construction training providers must be addressed as a priority. Industry training RTOs like Master Builders Victoria should be recognised across the country for the superior deliverables and outcomes they provide. Further, we support appropriate training on the NCC being compulsory to each category of registration.

Master Builders Victoria has established the Building Leadership Simulation Centre (BLSC), one of three in the world. The centre provides a controlled simulation environment that accelerates learning through the immediate application of skills and knowledge. This dramatically improves learning retention while eliminating the risks inherent in a real-world setting, such as injury, cost and damage to future business. For industry to flourish we need to be embracing the innovation from industry itself and more heavily utilising the BLSC.

There is clearly a statutory role for the government in auditing and disciplining architects and professions where accreditation by their industry body is the basis of their registration. We welcome other building practitioners being held to the same high standard as registered building practitioners.

Recommendation 3: Continuing Professional Development

That each jurisdiction requires all practitioners to undertake compulsory Continuing Professional Development on the National Construction Code.

Master Builders Victoria has long advocated for the introduction of mandatory CPD programs for registered practitioners – which would include but not be limited to appropriate NCC topics. We agree that it is essential for CPD to provide for “targeted learning on topics of genuine relevance to improve the competence of practitioners”.

One of the continuing frustrations for builders throughout Australia, particularly small businesses, is the lack of free access to Australian building codes and standards. While we note the NCC is now available on the ABCB website there are a range of codes that require subscriptions for access. Not only does this hamper easy compliance with regulation, the codes are regulatory instruments and should be freely available to those working to observe them.

Similarly, we would welcome better mechanisms to identify reoccurring compliance issues to feed into the CPD system – such as the State Building Inspector role outlined in Point 2 on the first page of this submission.

We have been working with the VBA to develop a system of CPD for builders and tradespeople – and stand ready to support its implementation.

Recommendation 4: Career paths for building surveyors

IS YOUR BUILDER A MASTER BUILDER?



BUILDING CONFIDENCE: SHERGOLD – WEIR REPORT

That each jurisdiction establishes a supervised training scheme which provides a defined pathway for becoming a registered building surveyor.

The declining numbers of building surveyors is a concern shared by industry. In Victoria, there is a great concern that whilst there is a pathway to becoming a registered practitioner there are a lack of trainers and providers available and disincentives to entering the career path because of insurance and other pressures upon surveyors. This issue needs addressing urgently including provision of Government incentives.

Registered training organisations like Master Builders can play a role in providing a solution to these skill shortages and we encourage governments at all levels to consider opportunities for meaningful partnership with industry in training.

Recommendation 5: Improving collaboration between regulators

That each state establishes formal mechanisms for a more collaborative and effective partnership between those with responsibility for regulatory oversight, including relevant state government bodies, local governments and private building surveyors (if they have an enforcement role).

Master Builders Victoria supports clear roles and responsibilities for state government, local governments and private building surveyors in providing regulatory oversight. It is also important that each regulator is appropriately resourced to fulfil their assigned role.

While there is a collaborative relationship amongst regulators for the oversight of the building and construction industry, there is an opportunity to achieve better outcomes through improved collaboration across all industry stakeholders.

In addition, there is a role as outlined in Point 2 on the first page of this submission – for State Building Inspectors to play an information sharing and educative role across the country.

Recommendation 6: Effective regulatory powers

That each jurisdiction give regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action.

The VBA has a broad suite of powers to monitor buildings and building work, which have been enhanced through the amendments to the *Building Act 1993* and the implementation of the *Building Regulations 2018*.

The exception is the power to audit the performance of practitioners registered by other bodies such as architects. Master Builders Victoria believes that all building professionals should be held to the same high standard.

Although Master Builders Victoria supports compliance standards in the construction industry it does consider that regulators must improve quality of communication with industry and technical and operational knowledge in order to better communicate with the industry generally.

IS YOUR BUILDER A MASTER BUILDER?



We do not consider that expansion of enforcement powers is the ultimate solution to improved outcomes. Enforcement is an ‘ambulance at the bottom of the cliff’ solution because it is slow to identify systemic problems and focuses on after-the-fact compliance. In addition, there is little in the proposed enforcement powers proposed in the report that does not already exist in Victoria.

The report recognises the challenges facing the building industry and the supply chain is systemic. A more contemporary approach by government is to recognise that the ‘ambulance at the top of the cliff’ is a consultative, industry partnership approach with the building industry.

Recommendation 7: Strategy for the proactive regulation of Commercial buildings

That each jurisdiction makes public its audit strategy for regulatory oversight of the construction of Commercial buildings, with annual reporting on audit findings and outcomes.

Master Builders Victoria supports a more transparent audit strategy as well as reporting strategically about the “outcomes and learnings” from inspections by the VBA. In particular, commercial and multi-story residential buildings need to be given more focus by the VBA.

The VBA currently conducts proactive inspections as does Consumer Affairs Victoria and WorkSafe relevant to their areas of expertise. Master Builders Victoria welcomes proactive inspections and audit processes as part of quality assurance within the system. We also note the findings of the Victorian Cladding Taskforce which was taken up by government to require the VBA to inspect more of Victoria’s buildings each year, from less than 2% of buildings to up to 10%.

Recommendation 8: Collaboration with fire authorities in the development of fire safety design.

That, consistent with the International Fire Engineering Guidelines, each jurisdiction requires developers, architects, builders, engineers and building surveyors to engage with fire authorities as part of the design process.

Master Builders Victoria supports fire authorities having an input in the building approval process. It is important that the involvement is appropriate to the project. In Victoria, in addition to a certification process there are systems in place for consultative meetings between fire authorities, architects, builders, engineers and building surveyors to consider compliance with safety design.

We believe the apparent diminishment of technical operational expertise within regulators and the significant strain on building surveyors may be partly alleviated by such advisory services. However, if a number of advisory services exist within a jurisdiction they should be co-ordinated and the limits of their authority/liability must be clear to industry.

Recommendation 9: Integrity of private building surveyors

IS YOUR BUILDER A MASTER BUILDER?



BUILDING CONFIDENCE: SHERGOLD – WEIR REPORT

That each jurisdiction establishes minimum statutory controls to mitigate conflicts of interest and increase transparency of the engagement and responsibilities of private building surveyors.

Controls intended to manage conflict of interest must be carefully considered as the potential for unintended consequences is great. Building surveyors (certifiers) perform an important and clearly defined regulatory function in Victoria.

Recent reforms in Victoria have been undertaken to require the owner to engage the building surveyor whilst the builder has the right to coordinate the surveyor for the building works being undertaken. Conflict of interest provisions for surveyors were enhanced in 2018 with a related party prohibition. Building surveyors are registered practitioners with the VBA and therefore are subject to the disciplinary process within the Victorian system.

Ensuring that surveyors are given information and have appropriate CPD requirements would also ensure the skills and quality of building surveyors is delivered.

Recommendation 10: Code of Conduct for building surveyors

That each jurisdiction put in place a code of conduct for building surveyors which addresses the key matters which, if contravened, would be a ground for a disciplinary inquiry.

In Victoria, industry associations for practitioners – like Master Builders – have Codes of Conduct for their members. Additionally, there are significant legal requirements imposed on registered practitioners, as well as disciplinary and dispute resolution processes. Ensuring the practitioner registration and legal obligations are understood by registered practitioners, should be the primary focus of reforms.

Recommendation 11: Role of building surveyors in enforcement

That each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations.

Master Builders Victoria is opposed to broadened supervision responsibility for building surveyors because surveyors are not appointed to act as the owner's site supervisor and should not carry out duties akin to a project manager.

Aside from proposed mandatory reporting requirements, it is difficult to see what enhanced supervisory powers are contemplated by the review. Consistent with point 4 at the beginning of our submission building surveyors are not the only link in the chain of the certification process. We have concerns that more obligations and will also burden to a profession that is currently reporting considerable pressure and future skill shortage.

Recommendation 12: Collecting and sharing data and intelligence

That each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation.

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We support the better coordination of information but the cost/benefit of this proposal should be taken into account against higher priority matters in the report.

We note that the Australian Boards Building Code certified products register and the Codemark Scheme already exist at a national level and recommend that the review take this into account when considering the merits of a jurisdiction by jurisdiction option. Master Builders Australia outlines the information and certification model that might be considered in this context.

Recommendation 13: Responsibility of design practitioners

That each jurisdiction requires building approval documentation to be prepared by appropriate categories of registered practitioners, demonstrating that the proposed building complies with the National Construction Code.

Quality project documentation is the basis for build quality. Low quality documentation leads to inefficiency, cost overruns, and adversarial behaviour.

We also consider there is merit in introducing CPD for designers and other professions around regulatory compliance which would help reduce heavy reliance on surveyors during the process.

Recommendation 14: Adequate documentation for performance solutions

That each jurisdiction sets out the information which must be included in performance solutions, specifying in occupancy certificate the circumstances in which performance solutions have been used and for what purpose.

This matter has been appropriately addressed in Victoria as part of the recent changes to legislation (see particularly regulation 38 of the Building Regulations 2018 and referenced on Form 16 of the regulations.)

Recommendation 15: Approval of performance solutions for construction building work

That each jurisdiction provides a transparent and robust process for the approval of performance solutions for constructed building work.

Please see answer in Recommendation 14 (above)

Recommendation 16: Approval of documentation throughout the construction process

That each jurisdiction provides for a building compliance process which incorporates clear obligations for the approval of amended documentation by the appointed building surveyor throughout a project.

This is another example of our point 4 at the outset of this submission relating to the collective responsibility for certification throughout the process. We agree that documentation must be clear throughout the process but consider the building surveyor is only one link in an overall process, albeit a critical one. Better education on

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documentation is a priority for all building industry professionals to understand the relevance and importance of documentation at all stages in the process.

Recommendation 17: Independent third party review

That each jurisdiction requires genuine independent third party review for specified components of designs and/or certain types of buildings.

We are opposed to mandatory third party review and prescribing where types or designs of buildings must be subject to third party review. The discretion to determine third party review should be left to professional judgment which is a better than trying to mandate on the basis of complexity or in relation to design or type of building. This recommendation is also relevant to our point 4 at the outset of this paper and we consider it preferable to strengthen and improve the chain of responsibility, rather than add mandatory review onto the surveyor certification process.

Recommendation 18: Mandatory inspections

That each jurisdiction requires on-site inspections of building work at identified notification stages.

The mandatory certification stages for building work have been changed in Victoria to meet this requirement in 2018. It is understood these changes were based on risk as they vary for different classifications of building work.

Recommendation 19: Inspection and certification of fire safety installation

That each jurisdiction requires registered fire safety practitioners to design, install and certify the fire safety systems necessary in Commercial buildings.

We support the recommendation that the Fire Engineer certify the proposed fire safety system and inspects and certifies that the works on site comply with the designs.

Recommendation 20: A building manual for commercial buildings

That each jurisdiction requires that there be a comprehensive building manual for Commercial buildings that should be lodged with the building owners and made available to successive purchasers of the building.

We understand that Regulation 49 of the Victorian building regulations requires that a copy of the approved documentation as part of the building permit/occupancy process is maintained by councils until such time as the building is demolished or removed. Given that the ownership of a building can readily change it reasonable that council be the document holder.

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Recommendation 21: Building product safety

That the Building Ministers' Forum agrees its position on the establishment of a compulsory products certification system for high-risk products.

Master Builders Victoria supports this position. We recommend the review specifically consider the role of manufacturers who can be reluctant to provide appropriate data that demonstrates compliance and construction appropriate requirements. Master Builders Victoria recommends it be mandated that manufacturers allow industry access to this data. In the alternative we recommend that government creates a register of certified products with consistent accreditation documentation for industry assessment and review. This should be considered in the context of a national system as part of the BMF process (and the Master Builders Australia submission highlights a process for this).

Recommendation 22: Dictionary of terminology

That the Building Ministers' Forum develop a national dictionary of terminology to assist jurisdictions, industry and consumers to understand the range of terminology used to describe the same or similar terms and processes in different jurisdictions.

We support this kind of initiative as another step toward a consistent national terminology for building – to the extent it doesn't create further complications (e.g. licensing vs. registration might mean the same thing in different jurisdictions).

Recommendation 23: Implementation of the recommendations

That the Building Minister's Forum acknowledges that the above recommendation are designed to form a coherent package and that they be implemented by all jurisdictions progressively over the next three years.

We specifically reference our point 1 at the outset of this submission and the acknowledgement by the review that one size will not fit all. Master Builders Victoria supports a national initiative toward best practice but considers elements of the process must be discretionary and jurisdictions must have the option to make their best choices when looking at the overall scheme. We would prefer to identify areas of commonality to work toward (such as Recommendations 21 and 22) and areas in which compliance is substantially achieved and would otherwise be duplicated (for example conflict of interests legislation for building surveyors).

It must be acknowledged that the legislation in Victoria has only recently been re-drafted and implemented. Those new provisions address a significant number of the recommendations in the Shergold-Weir report.

Recommendation 24: Implementation plan

That the Building Ministers' Forum prioritises the preparation of a plan for the implementation of the recommendation against which each jurisdiction will report annually.

We agree that an implementation plan is a sensible next step, subject to our comments that we prefer to identify areas of commonality to work toward and ensure we do not duplicate areas in which compliance is substantially achieved through state based legislation.

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