

NSW Government Response to the Shergold Weir Building Confidence Report

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Minister's message

Many Australians dream of owning their own home. For most, buying a home is the biggest investment they will make. People deserve to feel safe in their homes and be confident that they are buying a quality building. People rightfully expect that if there are defects in their building because of dodgy or non-compliant work, the law will protect them.

Despite the regulations that already exist to protect homeowners, there is growing evidence that some building practitioners continue to do the wrong thing. It was for these reasons that my interstate colleagues and I commissioned Professor Peter Shergold AO and Ms Bronwyn Weir to review the building and construction industry of Australia.



Their report confirms the experience of too many homeowners in NSW, and indeed around Australia and the world. They find a “prevalence of serious compliance failures in recently constructed buildings”. They recommend a comprehensive plan to address these issues and I want to acknowledge and thank Mr Shergold and Ms Weir for their work.

This paper sets out the NSW Government's strong plan for the future of building laws. Under the plan, building plans will need to accurately record a building's as-constructed design. Registered designers will need to declare that the plans will meet building standards. There will be insurance requirements and building practitioners will have a duty of care to homeowners. And NSW will have a Building Commissioner to provide the oversight needed to hold people who do the wrong thing accountable.

I am committed to getting these important reforms right. The design and implementation of proposals in this plan will be developed in close consultation with the industry and community.

More than three centuries ago, English philosopher John Locke said that the purpose of law “is not to abolish or restrain, but to preserve and enlarge freedom”. This is a plan to enlarge freedom. To be free, people need to be able to make meaningful decisions about risks they take on. Today, an apartment owner has no meaningful way to assess the risk that a new building has major defects, yet they suffer the consequences if it does. This plan will change that.

This plan will ensure that those who control the risks – building practitioners – are held responsible for them. It is an ambitious plan. It is a plan for the biggest overhaul of NSW building laws in the State's history. It is a plan to put homeowners first and it is a plan that I am proud to commend to the people of NSW.

Matthew Kean MP

Minister for Innovation and Better Regulation

Summary

The NSW Government welcomes the report of Professor Peter Shergold AO and Ms Bronwyn Weir into the effectiveness of compliance and enforcement systems for the building and construction industry across Australia (“the Report”). Their review was commissioned by the Building Ministers’ Forum in 2017 and has produced 24 recommendations to improve the national best practice model for effectively implementing building regulation.

The NSW Government is committed to achieving and maintaining best practice regulation across all of the industries that it regulates. This includes robust regulation that ensures the safety, amenity and sustainability of the built environment and protects consumers who invest their savings in homes and other properties.

This response to the Report forms part of the NSW Government’s agenda to improve building and planning regulation. The NSW Government has recently made strides in this area by strengthening certifier laws by enacting the Building and Development Certifiers Act 2018 and creating a simpler, modern planning system under the Environmental Planning and Assessment Act 1979.

The need for reform

The Report follows a series of reports and compliance issues in the construction industry at state, national and international levels. One such issue is combustible cladding and its involvement in the devastating fire in London’s Grenfell Tower, various high-rise building fires in Dubai and two serious incidents in the Lacrosse and Neo 200 buildings in Melbourne. Another issue is building defects in new developments, such as those identified in the interim report for the Opal Tower. In this respect, the Report found (at 3):

“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.”

It is appropriate to note that this is not just an Australian problem. The 2018 Dame Judith Hackitt review of UK building laws (“Hackitt Review”), commissioned by the UK Government, found widespread non-compliance in the UK construction industry and “ignorance” and “indifference” towards building roles and responsibilities respectively; this is an international issue.

As to the cause of some of these issues, the Report tells the story of how non-compliant building can occur (at 10-11):

“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... Once contracted, the builder will work to find efficiencies and cost savings in the development of the design and construction of the 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...

Many [certifiers] 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 Report found that inaccurate designs mean that certifiers can never fully ensure compliance because they then must rely on inspections and “some of the most important safety elements are hidden from view and a point-in-time inspection cannot properly assess essential construction processes” (at 13).

The Report also identifies performance solutions – that is bespoke building solutions that satisfy the performance requirements of the Building Code of Australia (“BCA”) – as a high-risk area. This is because there is scope for these solutions to “be [post-construction] rationalisations made to address design or construction that was not built in accordance with [BCA] requirements” (at 30).

Moving forward – the NSW Government plan

The NSW Government supports the vast majority of the Report’s recommendations, and will implement the following major reforms across the construction industry:

- **Appoint a Building Commissioner:** the NSW Government will appoint an expert Building Commissioner to act as the consolidated building regulator in NSW. The Commissioner will administer all building laws that are or will be in the Minister for Innovation and Better Regulation’s portfolio.
- **Overhaul compliance reporting:** new laws that require building practitioners involved in designing buildings to submit building plans to the Commissioner (so that they may be audited), declare that the plans are BCA compliant and meet other relevant requirements and provide reports explaining why that is the case for performance solutions. Builders will also have to declare that their buildings are constructed in accordance with these plans. It will be an offence to knowingly or recklessly declare non-compliant plans or fail to lodge the documents on time. Disciplinary action will be able to be taken

against practitioners who improperly make these declarations. The Building Commissioner will not need to sign off on building plans.

- **Require building practitioners with reporting obligations to be registered:** ensure that building plans are completed accurately by having the Building Commissioner register the building practitioners who can lawfully make a declaration that plans are compliant or make a declaration that plans accurately reflect a building's as-constructed design. These practitioners will have to maintain the necessary skills and insurance to meet the registration requirements and will be subject to disciplinary action for professional misconduct.
- **Ensure that there is an industry wide duty of care to homeowners:** clarify the law to ensure that building practitioners owe a duty of care to owners' corporations and subsequent titleholders of residential developments, as well as unsophisticated construction clients who are small businesses. This means that homeowners will have a right to pursue compensation when they suffer damage because of a building practitioner's negligence.

Consultation

The NSW Government will conduct further consultation with industry and community stakeholders to ensure that these reforms are developed and implemented effectively. The NSW Government will also continue to work closely with other jurisdictions to promote best practice across all Australian states and territories.

Scope

While the reforms are focused on high-rise residential construction, the Shergold Weir Report made recommendations regarding 'commercial construction' too.

The NSW Government will use the Shergold Weir Report's recommendations as the starting point on the proper scope of the regulatory reforms, and will consult widely with industry and the community to make sure there are not any unintended consequences and that the precise scope of these reforms gets the balance right.

Construction that is not covered by the National Construction Code, such as the vast majority of civil construction, will not be captured by the regulatory reforms.

The NSW Government will overhaul compliance reporting

Building practitioners in NSW are generally required to comply with the BCA. The BCA sets out performance standards with which buildings are required to comply. Building is also regulated by other planning, home building, certifier, building product and consumer laws.

New reporting of requirements and offences

The Report recommends that appropriately qualified practitioners prepare building plans and specifications which accurately depict buildings as they are constructed, including identifying performance solutions. It also recommends that such people prepare documentation which demonstrates how any aspects of the building involving a performance solution comply with the BCA. The Hackitt Review made similar recommendations.

The NSW Government will require building designers, architects, engineers and other building practitioners who provide final designs and/or specifications of elements of buildings to declare that the building plans specify a building which will comply with building regulations, including the BCA.

These design practitioners must demonstrate how any performance solutions will satisfy the requirements of the BCA.

As inspections are not sufficient to ensure compliance, it is necessary to rely on accurate plans to test whether a building is compliant. It is also important for regulators to be able to trace non-compliant work to the relevant practitioner.

To ensure that the Building Commissioner is able to conduct risk-based audits of practitioners and documents, consistent with the Report's recommendations, those that declare building documents will be required to lodge them in digital format with the Building Commissioner.

The NSW Government will require builders to declare that buildings are constructed in accordance with the building plans.

Documents must be completed honestly and lodged with the Building Commissioner within a reasonable period of time before construction and occupation (as applicable). In order to drive compliance, substantial penalties will be imposed on practitioners who do not comply with these obligations.

The NSW Government will make it an offence to dishonestly or recklessly declare inaccurate plans or fail to lodge prescribed documents with the Building Commissioner on time.

The NSW Government will consult broadly with industry and other stakeholders, in both the design and implementation of these policies, including to ensure they integrate effectively with the planning system (also see page 6, below).

The NSW Government will consult widely on both the implementation and design of these proposals.

The NSW Government will require building practitioners with reporting obligations to be registered

To ensure the documents are completed accurately, the Report recommends that practitioners (builders and building designers, including draftsmen and engineers) be registered before they may lawfully make declarations. The majority of building professions are licenced or accredited in NSW, including certifiers, architects and tradespeople who complete residential building work valued at more than \$5,000. Engineers, draftsmen and builders and tradespeople who engage in commercial building work are not currently subject to registration schemes.

The NSW Government will, following consultation, introduce registration schemes for currently unregistered designers and commercial builders who intend to make declarations.

Only authorised practitioners will be entitled to declare plans, how any performance solutions comply with the BCA and that a final building complies with its plans.

Registration schemes will be contingent on practitioners having the skills needed to complete the documentation to a high standard and hold appropriate insurance. To ensure that those registered maintain professional standards, the Building Commissioner will be able to investigate and take disciplinary action against non-compliant practitioners.

The NSW Government will empower the Building Commissioner to investigate and take disciplinary action against building practitioners that engage in improper conduct.

These schemes will also be implemented and designed with wide consultation.

The NSW Government will appoint a Building Commissioner

Previous reviews in Australia and overseas have found that the enforcement and administration of building regulation was fragmented, with a number of government bodies each playing a role. This can mean that consumers do not know where to complain and get information; make it difficult for industry to engage with regulators; and mean that regulators are prevented from best carrying out their role.

The NSW Government will appoint a Building Commissioner as the consolidated regulator for the construction industry.

The Building Commissioner will lead and oversee building regulation and administration in NSW, including:

- licensing and authorisation of building practitioners;
- residential building investigations;
- building plan regulation and audit;
- residential building inspections and dispute resolution;
- plumbing regulation;
- electrical and gas safety regulation;
- strata building bond scheme;
- building product safety;
- building and construction security of payment scheme; and
- engagement and strategic collaboration with local government.

A critical part of the Building Commissioner's role will be an intensive, risk-based approach to auditing building plans lodged by practitioners under these reforms. Strong investigative powers conferred on the Building Commissioner will allow the Commissioner to monitor and scrutinise suspected incidents of wrongdoing in the industry. The Building Commissioner will also be empowered to take disciplinary action, such as suspending or cancelling registrations, and order rectification of building work in circumstances of non-compliance.

Local Councils and private certifiers will retain their existing powers and functions.

The NSW Government will ensure there is an industry-wide duty of care to homeowners

Building owners have some protections for damage suffered as a result of non-compliant construction. They have contractual rights against developers and residential building owners have statutory warranties from builders as to building quality.

However, in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185* and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515*, the High Court found that builders and engineers did not owe duty of care to owners' corporations or to subsequent purchasers of commercial property respectively. The Court came to this view on the basis that parties could contractually transfer their risk. These decisions have shed doubt on whether builders and designers owe a common law duty of care to residential owners' corporations or purchasers for defects.

The Report identifies the vulnerability of purchasers of new residential developments, noting that "*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*" (at 10). The Report also found that practitioners should hold insurance which presupposes a risk of liability which can be insured against.

The NSW Government supports the view that homeowners rightfully expect their building to be built in accordance with applicable laws and that building practitioners should be expected to know whether their work is compliant and bear the risk if it is not.

The NSW Government will ensure that building practitioners owe a common law duty of care to owners' corporations and subsequent residential homeowners, as well as unsophisticated development clients.

Practitioners will be liable for damages arising from a failure to take reasonable steps to prevent reasonably foreseeable risks of damage as a result of defects in the building.

