

Building Stronger Foundations

Discussion Paper

Implementing the NSW Government Response to
the *Shergold Weir Building Confidence Report*

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Minister's message

I am proud to present this discussion paper for public consultation to progress the NSW Government Response to the *Building Confidence Report*.

Earlier this year, the NSW Government committed to meaningful regulatory reform to ensure that our state's building and construction sector continues to be the strongest across the nation.

In the last two decades, NSW has supported a construction boom driven by a growing population and greater diversity in building use. Nearly 17 billion dollars' worth of construction work has been completed in the past year, up almost ten per cent compared with the same period last year.

While supporting growth, this Government is strongly committed to ensuring the safety of buildings through effective regulation, certification and enforcement. Modern buildings are no longer four walls and a roof – construction is complex, integrated and evolving. Future occupants of buildings deserve to know that they are buying a quality design and expert construction that is protected by strong and modernised building laws. They also deserve to have an avenue of recourse in the event of a defect during a building's life.

This paper delivers on the NSW Government's commitment to consult with industry and community stakeholders on the implementation of the reforms. The paper asks targeted questions about the potential scope of the reforms to take the proposals into the next stage of development. We recognise that these reforms are complex and will impact on a wide range of building practitioners and owners. For these reasons, it will be important to work in partnership with industry and the NSW community to get the balance right.

Buildings are designed and constructed to become places where families gather, where communities flourish, where businesses grow and where memories are made. Occupants of buildings deserve to feel safe and secure within their walls.

I encourage you to take part in this consultation process and have your say on the design and implementation of the biggest overhaul of NSW building laws in the state's history.

Kevin Anderson MP

Minister for Better Regulation and Innovation



Making a submission

Interested organisations and individuals are invited to provide a submission on the issues raised in the discussion paper.

Submissions can be made by email with any documents that are provided to be produced in an 'accessible' format. Accessibility is about making documents more easily available to those members of the public who have some form of impairment (visual, physical, cognitive). Further information on how you can make your submission accessible is contained at <http://webaim.org/techniques/word/>.

How to lodge your submission

You can provide a submission by email to BCR@finance.nsw.gov.au or by using the online form on the 'have your say' webpage for this consultation.

You can also post your submission to Building Stronger Foundations consultation, Regulatory Policy, Better Regulation Division, Department of Finance, Services and Innovation, 2-24 Rawson Place, HAYMARKET NSW 2000.

You can download the discussion paper from www.fairtrading.nsw.gov.au. Printed copies can be requested from NSW Fair Trading by phone on (02) 9895 0791.

The closing date for submissions is close of business, 24 July 2019.

Release of submissions

All submissions will be made publicly available. If you do not wish for your submission or any part of your submission to be published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient.

You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information, for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*.

Next steps

Once the consultation period has closed, the feedback received will be analysed and assessed. Information about the progress of the implementation of the NSW Government Response to the Building Confidence Report will be made available on Fair Trading's website at www.fairtrading.nsw.gov.au.

Interpretation note

Appendix 1 contains a glossary of all summarised terms used throughout this discussion paper.

Introduction

On 9 February 2018, the NSW Government welcomed the report of Professor Peter Shergold AC and Ms Bronwyn Weir entitled '*Building Confidence: effectiveness of compliance and enforcement systems for the building and construction industry across Australia*' (the BC Report). The BC Report was commissioned by the Building Ministers' Forum (BMF) in 2017 and produced 24 recommendations to improve the national best practice model for effectively implementing building regulation and the National Construction Code (NCC).

On 19 February 2019, the NSW Government responded to the BC Report and committed to strengthening the building sector through a suite of reforms (the Response). The NSW Government's response to the BC Report forms part of the NSW Government's agenda to improve building and planning regulation. The NSW Government has already 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*. This was in direct response to the independent review of the *Building Professionals Act 2005*, conducted by Michael Lambert.

As part of reforms under the *Building and Development Certifiers Act 2018*, on 30 December 2018, the NSW Government announced a four-point plan to improve the certification industry:

1. The biggest compliance operation in the industry's history, with 25-30% of the industry to be audited every year,
2. A zero-tolerance approach to non-compliant certifiers including a new disciplinary policy with increased penalties for corruption and negligence,
3. Better protection for strata buildings with certifiers being unable to work on new strata developments if they have breached the Code of Conduct in the last 12 months; and
4. Increased transparency, which will include more information to homeowners about a certifier's compliance history on an enhanced name and shame register.

The Response to the BC Report outlined four key reforms to deliver a more robust regulatory framework for building and construction:

1. Requiring categories of building practitioners who are defined as 'building designers' to formally declare that plans, specifications and performance solutions they provide are compliant with the Building Code of Australia (BCA), and that builders declare that buildings are built according to the declared plans;
2. Introducing a new registration scheme for 'building designers';
3. Ensuring an industry-wide duty of care is owed to subsequent homeowners; and

4. Appointing a Building Commissioner to act as the consolidated regulator for building in NSW.

Half of the recommendations in the BC Report have already either been completely or partially implemented by the NSW Government. The NSW Government has also been progressing a number of the major reforms announced in response to the report including the introduction of a Building Commissioner and the requirement to register a number of categories of building practitioners involved in the design, construction and maintenance of buildings.

This discussion paper takes the next steps in implementing the Response by engaging with stakeholders to shape the direction of these reforms. The NSW Government recognises that industry input is vital in developing the reforms and delivering on a stronger building regulatory system for professionals and the community. Specifically, the paper seeks feedback on the scope of the reforms and considers how the reforms can be designed to work in the future.

The NSW Government will ensure that the reforms integrate efficiently with processes and requirements of both building regulation and the approvals system. It also intends to strike an appropriate regulatory balance between the existing legislative landscape and ongoing reforms in the building and construction sector more broadly.

Issues raised by the BC Report have been considered in other reviews of building, construction and planning systems. Most notably, NSW's own independently commissioned review of *the Building Professionals Act 2005* by Mr Michael Lambert and, internationally, the independent review of United Kingdom's building regulations led by Dame Judith Hackitt. Both of these reviews highlight that compliance and enforcement problems across building systems are not isolated to any one jurisdiction and emphasise the need for broad-scale regulatory and cultural change to achieve real reform.

While the BC Report sets an ambitious implementation timeframe of three years, its underlying premise rests on the fact that regulators must ultimately take time and care in properly considering and developing any reforms to make sure they are fit for purpose.

The NSW Government is committed to getting these reforms right and will use feedback from industry and the community to work through any technical and practical issues that are raised. Following consultation on this paper, the NSW Government plans to table enabling legislation in NSW Parliament by the end of the year.

Part 1 – Outcomes of the Review

In mid-2017, Professor Shergold and Ms Weir were appointed by the BMF to undertake an external assessment of the compliance and enforcement systems for the building and construction industry across Australia (the Review). The Terms of Reference outlined themes to be examined by the Review, including how compliance and enforcement problems were affecting the implementation of the NCC and the impact of recent building regulatory reviews undertaken by state and territory governments.

In 2018, the findings of the Review were detailed and released through the BC Report. The BC Report concluded that, collectively, the issues facing the sector are significant and have contributed to diminished public confidence in the building and construction industry. The nature of the problems identified were wide-ranging, covering issues such as a poor clarity on the accountabilities of different parties, inconsistent licensing and accreditation requirements, and insufficient controls on the accuracy of documentation.

The BC Report identified that, particularly for design practitioners including architects, designers, draftspersons and engineers, there was a systemic failure to expressly legislate “*that the duty of the designer is to prepare documentation that demonstrates the proposed building will comply with the National Construction Code*” (p. 28). The BC Report noted that this can leave the certifier as the main professional responsible for ensuring that design documentation complies with the NCC.

The BC Report found that this issue, and the lack of compliant design and documentation, had led to the incidence of defects in buildings. It observed that practitioners were improvising or making poor decisions in absence of specialist advice provided at the right point in the design-and-construct process. It identified “*water ingress leading to mould and structural compromise, structurally unsound roof construction and poorly constructed fire resisting elements*” (p. 3) as common defects across construction. The BC Report also referenced similar shortcomings in relation to the use of combustible cladding (p. 31).

The impact of these issues was outlined at various points in the BC Report:

“The nature of 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 ... there is often a significant difference between the as-designed building documentation and the as-built building” (p. 10).

...

“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” (p. 31).

However, the BC Report considered that the regulatory system could be greatly improved through genuine and meaningful reform. It called on industry to champion a shift in culture, and on regulators to

strengthen regulatory practice through enforcement.

The NSW Government is also responding to the BC Report on a national scale through its involvement with the BMF. The BMF is coordinating the national response through the *Building Confidence Report – Implementation Plan* (the Implementation Plan), which was published in March 2019. The Implementation Plan outlines the national roadmap for reforms, acknowledging that responses will be tailored to varying regulatory frameworks across jurisdictions. While the purpose of this discussion paper is not to detail the work on the Implementation Plan, it is noted that NSW will remain open to considering reforms consistent with those in other jurisdictions to harmonise the national response.

Part 2 – Responding to the BC Report

2.1 The NSW Government Response

In February 2019, the NSW Government released its response to the BC Report outlining support for most recommendations. In summary, the NSW Response outlined four key reform proposals:

1. Requiring 'building designers', such as 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 would need to **demonstrate how performance solutions would satisfy the requirements of the BCA.**

Builders would also have to **declare that buildings are constructed in accordance with building plans.**

2. Introducing a new **registration scheme for currently unregistered designers and commercial builders** who intend to make declarations.

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

3. Ensuring that **building practitioners owe a common law duty of care** to owners' corporations and subsequent residential homeowners, as well as unsophisticated development clients.
4. **Appointing a Building Commissioner to act as the consolidated regulator** for the construction industry, with powers to investigate and take disciplinary action against building practitioners that engage in improper conduct.

To complement these reforms, it was also proposed that the Building Commissioner would be provided with a suitable suite of compliance and enforcement powers.

The reforms seek to hold the most appropriate practitioner accountable for their portion of work. They aim to strengthen the confidence and competency of builders by imposing obligations on design practitioners, who builders rely on, to demonstrate the compliance of their work. Certifiers and builders would also benefit by having access to better-quality documentation prepared by design practitioners.

It is appropriate to note that the BC Report refers to 'domestic buildings' as class 1 and 10 buildings and 'commercial buildings' as class 2-9 buildings which are multi-storey residential and public buildings, including both public and privately-owned buildings.

The Response reform proposals focus on high-rise residential construction recognising the increased risk profile of such developments. The Response outlined that the reforms were not intended to capture

construction that is not covered by the NCC, such as most civil construction.

Appendix 4 details NSW's progress in implementing the specific recommendations of the BC Report and demonstrates that it has completed or is progressing 20 recommendations, with the remaining four recommendations under active consideration. It is noted that outside of the reforms highlighted in the Response, the NSW Government has made significant progress in implementing supplementary reforms that correlate to recommendations of the BC Report.

2.2 Complementary reforms to the building and construction sector

The NSW Government continues to stand by its commitments outlined in the Response, as well as its overarching commitment to strengthening the building and construction sector more broadly.

The NSW Government has already made substantial progress in delivering a series of priority reforms to the building certification system in response to the Lambert Review, including improving the collection and publication of planning and building data through mandatory reporting requirements and a new digital app, and re-writing existing certification legislation with the development of the *Building and Development Certifiers Act 2018*.

This legislation delivered on the NSW Government's commitment to overhaul certifier regulation and implemented wholesale changes, many of which were first proposed by the Lambert Review, such as clarifying certifiers' roles and responsibilities, strengthening conflict of interest requirements to ensure that certifiers act independently and in the public interest, and tightening probity requirements.

The Lambert Review also made a series of recommendations to enhance the accountability of certifiers, including by broadening the range of penalties that can be imposed in legislation and developing a practice guide for standards. The NSW Government is actively progressing these changes through the development of new certification legislation and the supporting regulations. Outside of this legislative work, the NSW Government has been implementing its four-point plan to restore public confidence in multi-storey residential buildings.

These reforms align with the recommendations of the BC Report as they relate to certifiers and aim to mitigate the issues raised by this and other reviews, including reducing conflicts of interest, improving transparency, targeting disciplinary conduct and enhancing supervisory powers.

In addition, reforms were progressed to the *Environmental Planning and Assessment Regulation 2000* to deliver on other recommendations of the Lambert Review to develop and introduce a co-regulatory accreditation framework for competent fire safety practitioners into NSW legislation. This framework sought to improve the quality of checks made throughout the design, approval, construction and maintenance phases of work and establish formal requirements for competent fire safety practitioners. The introduction of this reform aligns with a number of recommendations of the BC Report, including those relating to strengthening requirements for fire safety and performance solutions.

The NSW Government also introduced a comprehensive building product safety scheme through the development of the *Building Products (Safety) Act 2017* to provide the regulator with a suite of powers to

investigate, ban and rectify the use of unsafe and non-conforming building products, based on the safety risk posed by the product.

Other recent reforms in the planning and approvals sector have already been enacted, including a re-write of the *Environmental Planning and Assessment Act 1979* (the EP&A Act). The re-write delivers an updated, more modern planning system that is simpler to navigate and is designed to ensure high-quality decision and planning outcomes for the people of NSW. In addition, the amended legislation consolidates the provisions related to building and certification in a single part of the EP&A Act.

The NSW Government has also adopted the Lambert Review recommendations to consolidate the portfolio and agency responsibilities for building regulation. Those reforms are ongoing.

2.3 Implementation of the reforms

The NSW Government will work with stakeholders in the building and construction sector to ensure the reform package delivers maximum benefit to the NSW community. Given the depth and complexity of the proposals, consultation will be key to translating the proposals into effective legislative and operational frameworks.

Given the recent incidents relating to building defects in high rise residential buildings, the NSW Government is committed to implementing the reforms as a priority. Property owners and tenants deserve to have absolute confidence in the buildings which they live and work. Accordingly, the NSW Government's intends to develop and table legislation in NSW Parliament by the end of the year.

Action is proceeding to finalise arrangements for recruitment and **appointment of a Building Commissioner**. Further details will be announced soon. This consultation paper focusses on the law reforms needed to introduce the new obligations and processes that will strengthen the regulatory system that the future Building Commissioner will help to administer.

Part 3 – Introducing ‘building designers’ into NSW legislation

The BC Report identified that building professionals often rely upon substandard or incomplete documentation when performing their various functions, and that there was poor documentary evidence to demonstrate that what was ‘planned’ was actually ‘constructed’.

In response, the NSW Government will regulate building designers, architects, engineers and other building practitioners who provide designs, specifications or plans. It will require these persons to declare that their plans and performance solutions comply with the BCA. Further, builders will be required to declare that the building was constructed according to the plans.

3.1 Purpose

Building work in NSW that is within the scope of the NCC must comply with the BCA as well as meet any specific legislative requirements outlined in a range of building-related statutes (for example, *Home Building Act 1989*, *Gas and Electrical (Consumer Safety) Act 2017*, *Plumbing and Drainage Act 2011*, etc). Collectively, these requirements aim to ensure safe and compliant construction of buildings.

The BCA is a performance-based framework built around a hierarchy of guidance and compliance levels. It sets various Performance Requirements being the minimum level that buildings, building elements and plumbing and drainage systems must meet. The Performance Requirements can be met using either a Performance Solution or a Deemed-to-Satisfy (DTS) Solution. A Performance Solution is unique for each individual situation and affords flexibility for practitioners to achieve performance outcomes. In contrast, a DTS Solution provides a prescriptive outline of what, when and how to do something. While the BC Report noted there are clear economic and aesthetic benefits to a performance-based approach, it also noted the challenges associated with assessing and confirming compliance.

Despite practitioners being subject to various duties, they are not always explicitly responsible for explaining how plans are compliant or stopping work from occurring if the construction of the building would lead to a non-compliant structure being erected. This gap has the potential to impact the accuracy of documentation prepared and approved as part of the approvals process.

In the Response, the NSW Government committed to introducing legislated obligations on ‘building designers’ to declare documentation that specifies it is compliant with the BCA, and for such documentation to be made available to the building regulator on request.

The term ‘building designer’ is intended to represent a category of practitioners who perform similar or complementary functions in providing plans and specifications for buildings that are required to comply with the BCA. It is anticipated that there may be many interpretations of this category of work and multiple professionals who may be considered to be already performing some or all of these functions.

3.2 Role and function of ‘building designers’

It is proposed that ‘building designers’ would have two new obligations:

1. Declaring that plans comply with the BCA and other relevant requirements; and
2. Explaining through documentation how any performance solutions used in the design and construction of the building comply with the BCA.

To support these functions, it is proposed that builders will also have a new obligation:

3. Declaring that buildings are constructed according to building plans that have been declared to be BCA compliant.

It is the NSW Government’s view that legislating these functions would enhance compliance with the BCA by providing building practitioners with an explicit obligation to design for BCA compliance when involved in the design or construction of a building. In addition, by introducing a registration scheme there would be increased assurance that only suitable professionals are performing this work and that they are held accountable for their obligations.

The next section of this paper explores the obligations identified above in the context of current practice and how they could operate in future. This commentary is provided to gather feedback on how legislation should define the role of ‘building designers’ and how their proposed functions are being performed under current industry processes. These requirements are also summarised through diagrams in **Appendix 3**.

1. Declaring that plans comply with the BCA and other relevant requirements

Current practice

Standard process

Currently, under the EP&A Act, an applicant is required to provide a number of documents to the consent authority (typically being the local council) or certifying authority as part of an application for development. This can include application forms, supporting technical reports and plans. The types of documents vary depending on the application and scope of the work being undertaken. For example, the documents required at development application (DA) stage could include the site plan of the land, plans of the development which indicate the floor plan, height and intended uses of any proposed buildings and Statement of Environmental Effects, whereas the documents required at the construction certificate (CC) stage include a detailed description of the development and appropriate detailed building work plans and specifications.

Under the EP&A legislation, it is the certifier’s obligation as part of issuing a CC or complying development certificate (CDC) to assess plans and specifications for compliance with the BCA. This requirement is important as it ties in the technical and structural requirements of a performance-based code back to the legislation. However, it also places a significant amount of pressure on the certifier who

must review each component of every certificate application (including technical plans and specifications, BASIX requirements, engineering reports, operational performance of systems, etc.) and be satisfied that those components all comply with the law, standards and the BCA.

In practice, many certifiers rely on statements from various specialist design practitioners or installers that the various components comply with the necessary requirements.

Process involving variations to documents

Minor and material changes can often occur before or during construction. In many cases, these changes require approval, with the type and scope of the change influencing the approval process for amending the requirements. For example, smaller scale changes or those that would otherwise leave the development substantially the same as the original consent may require a modification to the CC or CDC. If the application substantially varies from the original consent, a new DA must be lodged for consideration. An application to modify the development consent may also need to be made to the consent authority. Any changes to a building's design must be approved by the consent and/or certifying authority before that component or stage of work is undertaken. Changes to plans may also affect supporting documentation. For instance, if the variation results in a material difference to the description contained in the BASIX certificate, a replacement BASIX certificate must be included in the application with a description accounting for the variation.

Future process

'Building designers' who prepare plans could be required to sign off and statutorily declare the plans as compliant with the BCA before they are given to the certifier, or at another appropriate point in time. This could be achieved by prescribing this as a function of 'designing work' into supporting legislation. Practically, such a change would mean that each building practitioner involved in the planning and approvals phase of construction would be responsible for their portion of work.

Further work and consultation are required to determine the appropriate stages for plans to be declared and who needs to act on the declarations. For example, it may not be practical, timely or cost-effective for every plan or variation to be statutorily declared in addition to the necessary sign-off requirements already prescribed by the EP&A legislation. Industry feedback will be crucial in determining if it may be more appropriate to require sign-off on plans at key approval stages where documentation is likely to be more developed and closer to what the final structure should look like.

Given that documentation may change between the DA and CC/CDC stages, plans at the DA stage might be too conceptual and premature for a declaration to be meaningful. Similarly, the occupation certificate stage is likely to be considered too late. Accordingly, if the reforms were to be focused on particular stages of approval, the function could be limited to any plans prepared at the CC or CDC stage, depending on the approval pathway.

Questions for feedback:

- 1. What kinds of plans should be signed off and declared by a statutory declaration?**
- 2. Could plans be statutorily declared at the CC/CDC stages? If not, why not?**
- 3. To what extent should changes to plans be submitted to the regulator?**

For variations to plans, the extent to which changed documents should be statutorily declared is likely to depend on the nature of the change. Notwithstanding this, it would be beneficial to require a more stringent process to govern the compliance of changes, particularly those which may have a more significant impact on the development later in its life. One way this could be achieved is to require variations to plans to be statutorily declared during and after the CC/CDC stage, but before work is undertaken. Consideration could be given to only requiring material changes to be declared so that the additional burden is proportionate to the harm. Another possibility is to issue conditions on the CC or CDC which require certain plan alterations to be submitted to the certifier, allowing the certifier to determine whether the modification is compliant and whether it needs involvement from the consent authority. This approach could also offer more flexibility in the modifications process.

Under existing legislation, any changes to design must be approved before that aspect of the work is undertaken. Sometimes, these changes may only reflect a minor variance to the DTS. However, because the process for accepting larger modifications is inflexible and there is no formalised process for accepting smaller scale unauthorised work, these changes are not properly reported back to the consent authority. It is also understood that occasionally 'performance solutions' are used to justify work that does not comply with the DTS provisions of the BCA.

Given the suite of reforms which are being considered, it may also be appropriate to consider whether amendments are necessary to make the modifications process easier to use so that issues are reported, and the documentation always reflects what is constructed.

Questions for feedback:

- 4. Should a statutory declaration accompany all variations to plans or only major variations?**
- 5. Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?**
- 6. What other options could be workable if there are variations to plans?**
- 7. How could the modifications process be made simpler and more robust?**

The Response proposed that declared plans would need to be lodged with the Building Commissioner. The Building Commissioner would have the power to audit the documentation to ensure compliance.

Given the role of the Building Commissioner as the consolidated building regulator, further work is required to determine whether the Building Commissioner should have access to other information in addition to the plans, and the value of receiving the plans in isolation to other supporting documents received by the council. Local councils and private certifiers will retain their existing powers and functions.

Questions for feedback:

8. How should plans be provided to, or accessed by, the Building Commissioner?

9. What types of documents should 'building designers' provide to the Building Commissioner?

2. Explaining through documentation how any performance solutions used in the design and construction of the building comply with the BCA

Current practice

For non-fire safety aspects of building work, there are currently no legislative requirements mandating the process for developing, reviewing and assessing performance solutions. The certifying authority is given the sole responsibility for identifying what should occur. However, in practice, it is understood that certifiers generally rely upon documentation from design specialists which demonstrates that a performance solution satisfies the relevant codes and standards.

In relation to fire safety aspects of building work, certifiers can only issue approval certificates if they have obtained an alternative solution report (performance solution report) from a competent fire safety practitioner. For fire safety components of a building, at a minimum, the performance solution report must:

- outline that the performance solution complies with the relevant performance requirements of the BCA;
- identify the varied DTS provisions of the BCA;
- describe and justify the performance solution, including the acceptance criteria and parameters on which the justification is based and any restrictions or conditions on the performance solution; and
- include a copy of the performance solution design brief.

This framework was introduced into the EP&A legislation in 2017 to help mitigate risks associated with performance-based designs which deviate from the DTS provisions of the BCA. The intent of the reform was also to improve the documentation of how a performance solution meets the performance requirements under the code.

Future process

It is proposed that ‘building designers’ would be required to explain how any aspects of the building involving a performance solution comply with the BCA. This could be achieved by requiring ‘building designers’ as part of the submission of plans to also submit a declaration endorsing that the plan, including the performance solutions used, are compliant with the BCA. Similar to the process for fire safety, it may be practical for a performance solution report to be prepared which clearly outlines the parameters of the performance solution used. Such a report could help the certifier with signing off and endorsing the final paperwork.

Questions for feedback:

10. **In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?**
11. **Would a performance solution report be valuable as part of this process? If not, why not?**
12. **Are there any other methods of documenting performance solutions and their compliance that should be considered?**

3. Declaring that buildings are constructed according to building plans

The BC Report recognised that there is often a significant difference between the as-designed building documentation and the as-constructed building. In NSW, builders already have responsibilities to follow existing statutory controls, such as building according to the CC plans and following the conditions of development consent. Certifiers are responsible for undertaking critical stage inspections and ensuring the work’s compliance at each critical stage. At the end of this work, a principal certifying authority will issue an occupation certificate (subject to compliance with statutory requirements) to indicate that the development is fit for occupation.

Under the reform proposal, it is intended that builders would be required to declare that their buildings are constructed in line with declared, compliant building plans, enabling non-compliant work to be traced back to the relevant practitioner. It is recognised that there are a number of challenges in implementing this reform, including:

- **determining how builders can build to varied plans** – any number of variations could occur to the plans lodged earlier in the project and impact the design of the final building. At times, changes to the design of the building may not be reflected in a final set of plans in real time. As such, the approved plans may look different to the final construction of the building. Further consideration is required to determine how ‘as approved’ and ‘as built’ plans are reconciled and declared by the responsible practitioners and builders.
- **determining who is responsible for final building work** – for larger construction sites (for

example, multi-storey residential buildings), there are many contractors on site who contribute to building work. To require all contractors on site to prepare declarations or to confirm that buildings are built to plan could be burdensome and may not be effective. Similarly, to only require the company employing the builders or the principal contractor to issue a declaration may not be effective either if the intention is to ensure consistency between the lodged plans and the final construction of the building.

Questions for feedback:

- 13. What would the process for declaring that a building complies with its plans look like?**
- 14. What kind of role should builders play in declaring final building work?**
- 15. Which builders involved in building work should be responsible for signing off on buildings?**
- 16. Are there any circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans? If so, what are those circumstances?**

Part 4 – Registration of ‘building designers’

It is proposed that practitioners who provide final designs and/or specifications of elements of buildings and prepare plans based on those designs would be registered. Such practitioners are likely to include building designers, architects and engineers.

Feedback is requested on which practitioners should be registered and how those practitioners should be defined in legislation.

4.1 Overview of registration

The BC Report and Response recommend that ‘building designers’ who perform a declaration function should be registered. Introducing a registration scheme is intended to enhance accountability by ensuring that practitioners have the relevant skills, hold appropriate insurance, and can be held accountable for their actions including being subject to appropriate disciplinary action.

Feedback is requested on the establishment of the registration scheme and the appropriate level of regulation for registered practitioners.

It is proposed that ‘building designers’ would be registered for the specific functions of signing-off plans and declaring that plans are compliant with the BCA.

It is noted that many building practitioners are already subject to regulatory requirements through licensing or registration schemes. These schemes include eligibility requirements where evidence of necessary skills, qualifications, competency and experience, practitioner integrity and insurance coverage are mandatory.

Questions for feedback:

- 17. Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?**

4.2 The registration scheme

Individuals to be registered

The nature of the work undertaken by ‘building designers’ will largely dictate the types of practitioners who would be required to be registered in the new scheme. The Response proposed to require practitioners ‘who provide final designs and/or specifications of elements of buildings’ to be registered. It is likely that the types of practitioners who would perform or already perform similar functions include the following:

- architects;
- builders;
- building designers;
- draftspersons; and
- some categories of engineers.

These practitioners are likely to perform work which requires some assessment of compliance with the BCA, as well as preparation of plans or documentation to describe how a design or system will work. It is acknowledged that after feedback is received and the scope of the functions is further developed, there may be other types of practitioners which could be required to be registered.

Questions for feedback:

18. What occupations or specific activities are involved in ‘building design’ and should be in scope for the registration scheme?

General requirements for registration

Existing regulatory schemes include requirements for assessing the suitability of professionals in the building and construction industry. There are efficiencies to be gained from leveraging off these existing schemes in determining the nature of the proposed registration scheme.

Consideration also needs to be given to whether currently unregulated professionals (for example, commercial designers) will need to be subject to specific requirements relevant to determining whether they are suitable to perform the proposed functions. As these practitioners are not already subject to legislated requirements, there may be a need to separately assess that they have the necessary skills to complete the documentation to a high standard.

Subject to stakeholder feedback, the minimum requirements for a practitioner to apply to be registered could include:

- establishing grounds for finding that a person is suitable to carry out designing work, including where a person:
 - is over 18 years of age;
 - is considered to be fit and proper to carry out designing work;
 - does have the necessary qualifications, skills, knowledge or experience required to carry out designing work;
- completing a standard application form;
- paying a registration fee and any other regulatory charges;
- providing any additional information or evidence the regulator who considers reasonably

necessary to assess the merits of an application.

Questions for feedback:

19. What should be the minimum requirements for a registration scheme?

Requirements for insurance

It is proposed that ‘building designers’ are required to acquire a form of insurance in order to protect themselves and their customers where a loss is suffered as a result of negligence or breach of duty in performing their function. As with other building professionals, prescribed insurance requirements could form part of the criteria to be met before being granted registration. ‘Building designers’ who do not maintain adequate coverage while registered could be subject to disciplinary action (for example, grounds for suspending or cancelling registration).

The NSW Government does not have a position on the form of insurance to be taken out by registered ‘building designers’ and welcomes feedback on this point. It could be a requirement to hold professional indemnity insurance for claims against professional services provided (such as advice, design consultation, planning, etc.). Such insurance is held by other building practitioners, including architects and some engineers.

‘Building designers’ would be free to choose their insurance provider, so long as the insurance complied with any requirements prescribed by legislation (for example, conditions such as value, length of cover, excess, etc).

Questions for feedback:

- 20. What form of insurance should be mandatory for ‘building designers’?
Why?**
- 21. What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?**

Requirements for skills, qualifications and experience

‘Building designers’ would be required to meet a list of competencies to demonstrate that they were able to complete documentation to a high standard. The nature of these requirements could depend on whether the individual was already licensed as another type of building practitioner (for example, as a builder, certifier, architect, etc.) and whether those skills could be credited and carried over for the purposes of being a ‘building designer’.

Questions for feedback:

- 22. What skills should be mandatory for 'building designers'?**
- 23. Should specific qualification(s) be required?**
- 24. Should there be other pre-requisites for registration?**

Powers of the regulator

It is considered appropriate that the regulator is given powers similar to those granted to other regulators who administer licensing schemes. These powers typically include the ability to grant, refuse, suspend, cancel and vary registration.

To be an effective regulator, these powers should be complemented by clear grounds for disciplinary action, as well as a suite of compliance and enforcement powers to be able to monitor and target offences relating to non-compliant registration and 'designing work'. The regulator could also have powers to undertake investigations and audits of both the documents and the registration holder. Tough penalties will be in place for any false or misleading conduct, including falsely signing off on plans in contravention of the statutory declaration.

Complementary protections will be available for those aggrieved by decisions of the regulator, such as a show cause process and administrative review by the NSW Civil and Administrative Tribunal.

Authorised officers will have a suite of powers to assist the regulator with investigating, monitoring and enforcing compliance with the scheme. These may include, but not be limited to:

- information gathering powers, including the power to record evidence;
- powers to require records and answers;
- powers to enter premises and conduct inspections, take and remove samples of a thing, take any photographs or recordings, make any examinations, inquiries, measurements or tests that are considered necessary, seize any thing, etc.

As with other schemes, authorised officers will be required to obtain permission from the owner or a search warrant to enter any residential premises.

Questions for feedback:

- 25. What powers should be provided to the regulator to support and enforce compliance by registered 'building designers'?**

Part 5 – Duty of care of building practitioners

Purchasers of new buildings rely upon the diligence of building practitioners and statutory protections to have confidence in the quality of development. However, for various reasons, owners can face significant difficulties determining and pursuing liability for defects that arise after occupation.

It is proposed to tighten the protections by introducing a duty of care owed by building practitioners to building owners. Feedback is sought on how the duty of care should be implemented, including who it covers and how responsibility should be apportioned across various practitioners.

5.1 Purpose

Building owners have existing protections for building defects in the form of statutory warranties as well as other avenues of recourse through the legal system. Two High Court decisions – *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 ('Brookfield case') and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 ('Woolcock case') – raised doubts about the extent of the protections for owners in the context of negligence. In the Brookfield case, the High Court found that the builders of an apartment complex did not owe a duty of care in negligence to protect an owner's corporation from pure economic loss arising from latent defects in common property. Similarly, in the Woolcock case, the High Court found that engineers did not owe a duty of care to subsequent purchasers of commercial property.

Both cases emphasised that a duty of care could not be imposed unless it was shown that the owner was 'vulnerable' and unable to protect itself from the defendant's lack of reasonable care. That is, a duty of care was unlikely to apply in circumstances where a subsequent owner was a sophisticated commercial party and the contract contained comprehensive provisions about liability relating to defects.

The Brookfield and Woolcock cases concerned the construction of serviced apartments and a commercial warehouse/office complex respectively. As such, these cases cannot be relied upon to establish whether a duty of care will exist for other non-commercial property types (for example, residential apartments). Nevertheless, there have been several other cases that have held that contractual or legislative protections, such as the statutory warranties, have precluded or weighed heavily against a duty of care arising (including but not limited to *Investments Pty Ltd v Walker Group Constructions Pty Ltd* [2016] NSWSC 50, *James v The Owners – Strata Plan No 11478* (2016) 18 BPR 36389 and *The Owners – Units Plan No 1917 v Koundouris* (2016) 307 FLR 372)).

The NSW Government is concerned that these various cases call into question the degree of protection afforded to property owners. It therefore intends to amend the law to ensure that there is an industry-wide duty of care to homeowners, owners' corporations, subsequent titleholders and small businesses. It is envisaged that owners should have clear rights to pursue compensation where a building practitioner has been negligent, and it cannot be absolved through purchasing contracts.

5.2 Existing legislative framework

There are a number of existing obligations and options for the rectification of building defects and recovery of the costs of rectification. These are varied and depend on both the type of defect and the length of time which has passed after the discovery of the defect.

The *Home Building Act 1989* provides statutory warranties that are required to be included in all contracts between owners and builders/tradespersons for residential building work. Statutory warranties apply for six years for major defects, and two years for all other defects, commencing from the date the work was completed.

These warranties provide that:

- the work will be completed with due care and skill and in accordance with any plans and specifications set out in the contract;
- the materials supplied will be new (unless otherwise specified) and will be suitable for the purpose for which they are to be used;
- the work will be done with due diligence;
- the work will be done within the time stated in the contract;
- the work and any materials used in doing the work will be reasonably fit for the specified purpose;
- the work will result in a dwelling that is reasonably fit for occupation; and
- the work will be done in accordance with the *Home Building Act 1989* and or any other law.

The primary means of redress for breaches of the warranties are to have the work rectified by the responsible builder or developer or seek financial compensation for the cost of rectification.

Under the EP&A Act, a civil action for loss or damage arising out of or in connection with defective building work can be brought for up to ten years after the date of completion of the work. This provision does not operate to extend any period of limitation under the *Limitation Act 1969* or the *Home Building Act 1989*.

The *Limitation Act 1969* dictates the time within which a claim must be brought for damages arising from a breach of duty. This time period relates to any action founded on contract or tort, as well as actions for breach of statutory duty, and is prescribed as six years. It is not proposed to amend this period.

These and other protections are summarised in Table 5.2.1.

Table 5.2.1 – legislative protections against building defects

Legislation	Protection	For?
<i>Environmental Planning and Assessment Act 1979</i>	Civil action for loss or damages – within ten years after work is completed.	Anyone.
<i>Home Building Act 1989 – statutory warranties</i>	Claim for breach of implied statutory warranties – within six years after work completed for major defects, and two years for other defects.	Residential building owners.
<i>Home Building Act 1989 – Fair Trading Dispute Resolution and Inspection Service</i>	Mediation of disputes and enforceable ‘rectification orders’ to direct builders to meet their statutory warranty obligations.	Residential building owners.
<i>Strata Schemes Management Act 2015</i>	Developers required to lodge a building bond to secure funds to meet the costs of rectifying building defects.	Owners corporations.

However, following the decisions in the Brookfield and Woolcock cases, if the protections outlined in Table 5.2.1 are unsuitable (for example, outside of the limitation period, owed to a different party, etc.), owners may have more difficulties in pursuing action to sue other building professionals for negligence or breach of contract related to building work. The likelihood of this option being available is further reduced where contracts have exclusions or limitations on liability.

The NSW Response recognised this point and committed to delivering stronger protections for consumers and owners of property. The Response proposed to clarify legislation to ensure that a duty of care is owed to subsequent property owners and other parties.

The aim of this reform is to ensure that property owners have more avenues, and easier access, to seek redress for defective building and related damages and loss. The benefit of the duty of care protection will also be considered for other parties, including subsequent title holders and small businesses, who may not have been party to the original contract.

This duty of care will hold a broader range of practitioners across the contracts chain accountable for defective work, including builders, ‘building designers’, architects, contractors and other building practitioners, to bolster existing legal rights for consumers. This should assist contract parties to better price and manage risk. A major benefit of a new duty for consumers is that it could remove the need for claimants seeking redress to prove that a respondent owed a duty of care, which can otherwise be a major hurdle in taking civil action.

The protection will operate together with existing protections under the EP&A Act and the *Home Building Act 1989* to ensure that affected owners have a breadth of legal avenues to pursue against poor work and are adequately protected by the state’s legal system.

5.3 Establishing a duty of care

Purchasers of buildings often have limited knowledge or understanding of the BCA. It was recognised in the BC Report that purchasers rely on the regulatory system to deliver a building that is compliant with the BCA. Accordingly, purchasers of property also turn to the protections of the system in the event of any failings in the building, such as defects. The NSW Government supports the view that buildings should be built in accordance with relevant laws and standards, and that building practitioners should design and build to standard and bear the risk if they fail to do so.

In law, a duty of care exists because of the relationship between parties (for example, between the building practitioner and the owner). This duty can be prescribed by the provisions of the contract of work but can also exist through the tort of negligence or through a statutory duty. To ensure that homeowners are guaranteed a duty of care for defective or non-compliant work, it is proposed to amend legislation to clarify duties owed by various practitioners.

A well-defined duty may also help to encourage cultural change by creating an overarching standard for building work and ensuring greater accountability across all practitioners in the chain of responsibility.

Scope of duty

Feedback is sought on defining the duty of care so that it supports vulnerable homeowners, owners' corporations, subsequent title holders and small businesses in claiming for defective building work. The scope of the duty of care will be determined by its form, which practitioners should owe a duty and to whom, and the type of work which attracts a duty.

Form of duty

The Response contemplated clarifying existing law to ensure that building practitioners owe a clear duty of care to owners' corporations, subsequent residential homeowner and vulnerable development clients under common law. While the Response proposed legislative amendments to reaffirm a common law duty, it is possible there are other ways that this duty could be achieved, including by prescribing a statutory duty. These forms differ in how they apply and the types of remedies available to the claimant (i.e. remedies prescribed by the law and equitable remedies).

A statutory duty is simply a duty which is imposed by legislation. Where a person is entitled to make a claim for a breach under a statutory duty, the calculation of damages for that breach is calculated in accordance with the statute. The NSW Government could prescribe a duty in legislation which would be relied upon for certain types of work undertaken by certain practitioners.

A common law duty of care is a form of duty that consists of four elements that must be established before an action in negligence can be brought forward. These elements include:

1. A person must owe a duty to take reasonable care to another;
2. The duty of care is been breached;

3. The breach of the duty causes damage to another; and
4. The loss sustained is not too remote a consequence of the breach of the duty.

As expressed in the Response, the NSW Government could develop amending legislation to clarify the existing principles relating to duties of builders and developers and rely on strengthened common law to change the outcomes of cases over time.

Types of practitioners and work

Generally, building practitioners are obliged to perform work with reasonable skill and care, and to the standard of a reasonably competent professional or specialist with similar skills. These practitioners could include builders, developers, building designers, and any other type of building practitioner. In addition to deciding which practitioners should owe a duty of care, the type of work it applies to also needs to be determined. These practitioners may perform residential building work or commercial building work and could owe a duty for work over a certain threshold. For example, a duty of care could be owed to residential building work that was valued over \$5,000 to align with existing requirements under the *Home Building Act 1989*.

Further research is required to clarify which practitioners should be captured by the newly clarified or established duty of care.

Questions for feedback:

- 26. Which categories of building practitioners should owe a duty of care?**
- 27. What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?**
- 28. How will the duty of care operate across the contract chain?**

Individuals to be protected by the duty

The Brookfield and Woolcock cases determined that no duty was owed because of a lack of 'vulnerability' of the parties. Accordingly, this is a reasonable starting point for considering which types of consumers are in most need of a duty of care in the absence of being able to independently protect themselves. The Response contemplated that homeowners, subsequent title holders and small businesses should be owed the duty.

Questions for feedback:

- 29. What types of consumers should be owed a duty of care?**
- 30. On what basis should a particular consumer be afforded the protection?**

Appendix 1 – Glossary

BCA	the Building Code of Australia comprises Volumes One and Two of the National Construction Code and prescribes the technical provisions for the design and construction of buildings and other structures.
The BC Report	the <i>Building Confidence: effectiveness of compliance and enforcement systems for the building and construction industry across Australia</i> report, prepared by Professor Peter Shergold AC and Ms Bronwyn Weir is an expert assessment of compliance and enforcement systems for the building and construction industry across Australia.
BMF	the Building Ministers' Forum is an interjurisdictional group of Australian Government, State and Territory Ministers with responsibility for building and construction.
'Building designer'	proposed category of building practitioners that will be required to register with the Building Commissioner before declaring plans, providing final designs and/or specifications of elements of buildings and working to those plans.
CC	a Construction Certificate is required for building work undertaken under a development consent. It certifies that the proposed building work will comply with the Building Code of Australia and is in accordance with the development consent. A Construction Certificate can be issued by a council or an accredited certifier.
CDC	a Complying Development Certificate is required for work that goes through a fast track approval process for routine development, including one and two storey homes, alterations, additions to existing buildings and outbuildings. It can be used for development that meets predetermined development standards listed in various State Environmental Planning Policies.
DA	a development application is a formal application for development that requires consent under the <i>Environmental Planning and Assessment Act 1979</i> . It is usually made to the local council.
DTS	a Deemed-to-Satisfy solution to building work follows a set procedure of what, when and how to do something. It uses requirements under the National Construction Code, which can include materials, components, design factors

and construction methods that, if used, are deemed to meet the Performance Requirements.

EP&A Act

the ***Environmental Planning and Assessment Act 1979*** sets out the framework for the planning system, outlining requirements for development approval and how development is assessed against those rules.

EP&A legislation

refers to the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000* collectively. Together, these instruments set out the planning framework and detail certain processes that must be followed by consent and certifying authorities, councils and others in relation to development.

Implementation Plan

the ***Building Confidence Report – Implementation Plan*** outlines a plan in response to the BC Report and sets out national priority reforms, a summary of reforms underway in each jurisdiction, planned reforms and proposed timeframes for each jurisdiction and industry involvement in the process.

NCC

the **National Construction Code** sets the minimum necessary requirements for safety, health, amenity and sustainability in the design and construction of new buildings and building work throughout Australia. The Code comprises of the Building Code of Australia and the Plumbing Code of Australia.

The Response

the ***NSW Government Response to the Shergold Weir Building Confidence Report*** outlines the NSW response to the BC Report and commits to a series of regulatory building and planning reforms for future consultation with stakeholders.

Appendix 2 – Summary of questions for comment

1. What kinds of plans should be signed off and declared by a statutory declaration?
2. Could plans be statutorily declared at the CC/CDC stages? If not, why not?
3. To what extent should changes to plans be submitted to the regulator?
4. Should a statutory declaration accompany all variations to plans or only major variations?
5. Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?
6. What other options could be workable if there are variations to plans?
7. How could the modifications process be made simpler and more robust?
8. How should plans be provided to, or accessed by, the Building Commissioner?
9. What types of documents should 'building designers' provide to the Building Commissioner?
10. In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?
11. Would a performance solution report be valuable as part of this process? If not, why not?
12. Are there any other methods of documenting performance solutions and their compliance that should be considered?
13. What would the process for declaring that a building complies with its plans look like?
14. What kind of role should builders play in declaring final building work?
15. Which builders involved in building work should be responsible for signing off on buildings?
16. Are there any circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans? If so, what are those circumstances?
17. Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?
18. What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?
19. What should be the minimum requirements for a registration scheme?
20. What form of insurance should be mandatory for 'building designers'? Why?
21. What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?
22. What skills should be mandatory for 'building designers'?
23. Should specific qualification(s) be required?

24. Should there be other pre-requisites for registration?
25. What powers should be provided to the regulator to support and enforce compliance by registered 'building designers'?
26. Which categories of building practitioners should owe a duty of care?
27. What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?
28. How will the duty of care operate across the contract chain?
29. What types of consumers should be owed a duty of care?
30. On what basis should a particular consumer be afforded the protection?

Current Building Approvals Process

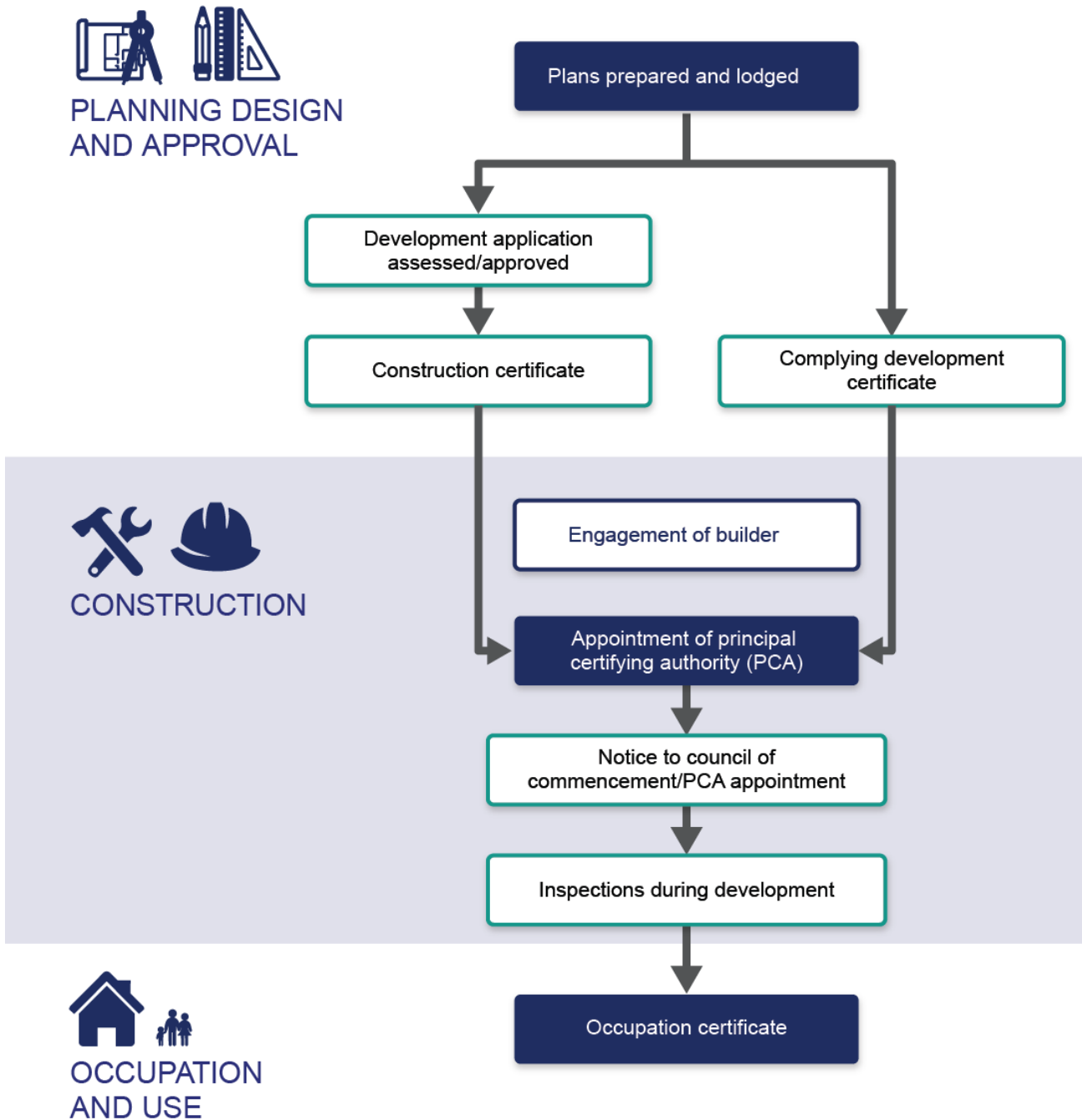


Diagram A3.1 – Current building approvals process

Proposed key functions of registered building designers

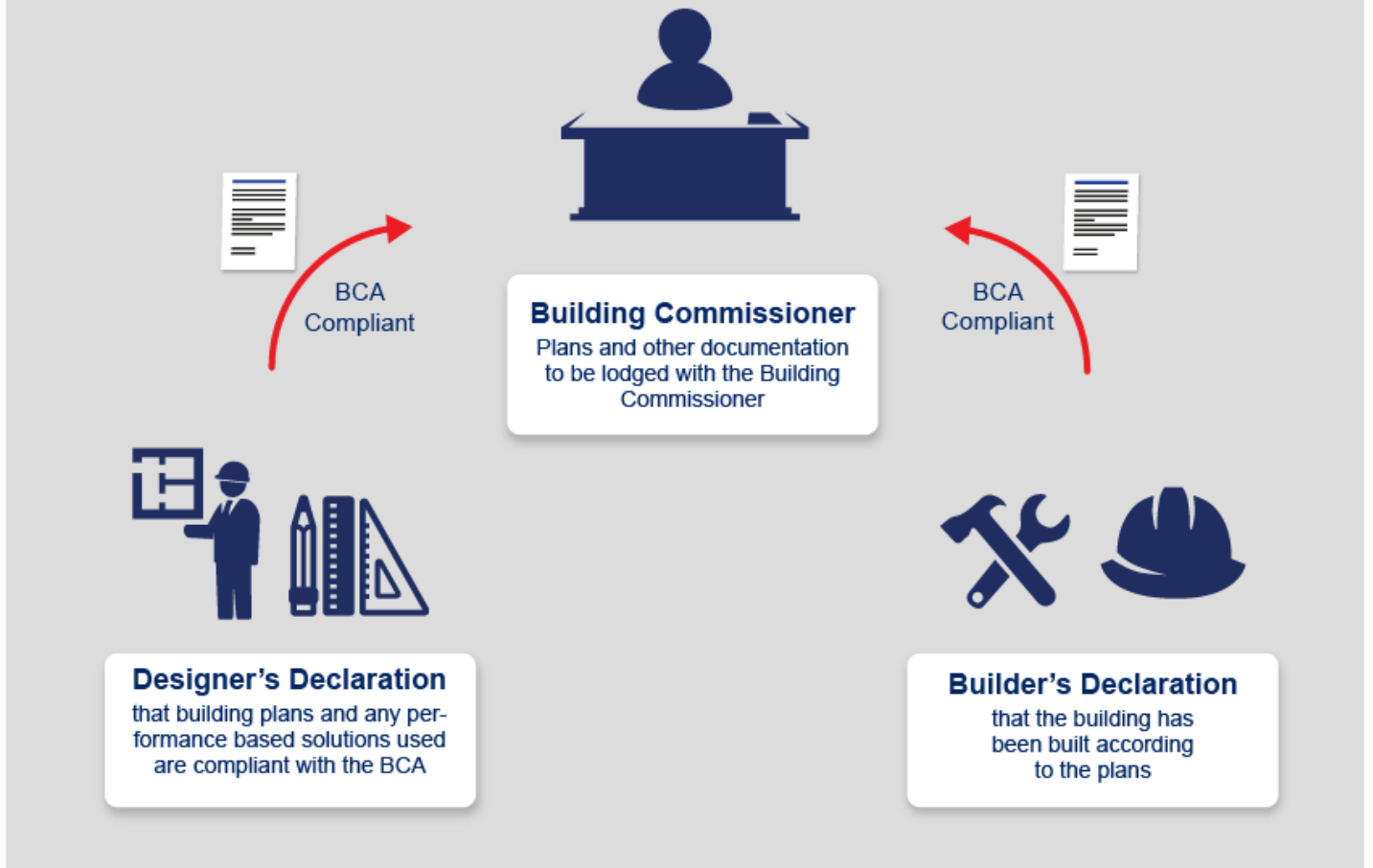


Diagram A3.2 – Proposed key functions of registered building designers

Appendix 4 – Status of NSW’s response to the BC Report’s recommendations

The status of NSW’s response to the BC Report’s recommendations			
#	BC Report Recommendation	Status	NSW Response and progress
1	That each jurisdiction requires the registration of the following categories of building practitioners involved in the design, construction and maintenance of buildings, including builders, site/project managers, building surveyors, building inspectors, architects, engineers, designers/draftspersons, plumbers and fire safety practitioners.	Partially completed / progressing	NSW currently requires the following practitioners to be registered – residential builders, residential site or project managers (as qualified supervisors), building surveyors/certifiers, architects, plumbers and fire safety practitioners. Further, the NSW Response committed to introducing registration for 'building designers' which will include engineers and designers/draftspersons. There are no plans to register building inspectors.
2	That each jurisdiction prescribes consistent requirements for the registration of building practitioners.	Partially completed / progressing	NSW has legislation which obliges a broad range of practitioners in the building and construction sector to demonstrate requirements for training, competency and experience, insurance and fitness and propriety. These obligations will be further considered in the development of the registration scheme committed to by the NSW Response.
3	That each jurisdiction requires all practitioners to undertake compulsory Continuing Professional Development on the National Construction Code.	Under consideration	NSW is considering this recommendation in the context of developing the registration scheme committed to by the NSW Response.
4	That each jurisdiction establishes a supervised training scheme which provides a defined pathway for becoming a registered building surveyor.	Under consideration	NSW is considering this recommendation in the context of implementing the new certification framework through the <i>Building and Development Certifiers Act 2018</i> and supporting regulations.
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).	Progressing	The Building Commissioner would be expected to further develop collaborative mechanisms in consultation with Local Government, Department of Planning, Industry and Environment, Fire and Rescue NSW and relevant stakeholder associations.
6	That each jurisdiction gives regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action.	Completed	NSW building laws include comprehensive powers relating to compliance, investigation and enforcement for all building regulators.
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.	Progressing	The Building Commissioner would be expected to adopt a risk-based auditing strategy, the principles of which would be made public. They would also be expected to release periodic public statements about auditing activities. Further, under the NSW Government's four-point plan for certifiers which is being progressed, 25 to 30 per cent of certifiers will be audited per year.

The status of NSW's response to the BC Report's recommendations

#	BC Report Recommendation	Status	NSW Response and progress
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.	Partially completed	NSW planning laws require consultation with Fire and Rescue NSW for certain performance solutions in prescribed circumstances.
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.	Completed	NSW's new certification framework established under the <i>Building and Development Certifiers Act 2018</i> includes clear prohibitions on pecuniary interests in work and stringent conflict of interest requirements.
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.	Completed	The <i>Building Professionals Act 2005</i> prescribes a code of conduct for accredited certifiers which sets out the required professional and ethical standards, as well as providing powers to investigate certifiers and impose disciplinary action. The new certification framework established under the <i>Building and Development Certifiers Act 2018</i> introduces the power to prescribe penalties for breaches of the code of conduct.
11	That each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations.	Completed	From 1 September 2019, the <i>Environmental Planning and Assessment Act 1979</i> will confer on certifiers greater powers to issue directions to rectify non-compliant aspects of a development.
12	That each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation.	Progressing	NSW will require 'declared' plans to be lodged in a digital format with the Building Commissioner. This will enable risk-based audits of practitioners and documents.
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.	Progressing	NSW will require 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 the BCA.
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.	Progressing	NSW will require relevant practitioners to justify how aspects of the plan comply with the BCA's performance solution requirements.
15	That each jurisdiction provides a transparent and robust process for the approval of performance solutions for constructed building work.	Progressing	NSW will require that performance solutions are declared by building designers, who will need to explain how the performance solution meets the requirements of the BCA.
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.	Progressing	NSW will require that plans need to be attested to by building designers and subject to the oversight of the certifier. Building plans will also need to be confirmed as reflecting the final 'as built' construction.

The status of NSW's response to the BC Report's recommendations

#	BC Report Recommendation	Status	NSW Response and progress
17	That each jurisdiction requires genuine independent third-party review for specified components of designs and/ or certain types of buildings.	Under consideration	The Building Commissioner would be expected to audit buildings and their plans by following a risk-based approach. The Building Commissioner could consider whether further independence is required through, for example, placing conditions on registered persons.
18	That each jurisdiction requires on-site inspections of building work at identified notification stages.	Completed	In October 2017, NSW strengthened its critical stage inspection system. Certifiers are required to undertake inspections of the construction site at several stages to ensure compliance.
19	That each jurisdiction requires registered fire safety practitioners to design, install and certify the fire safety systems necessary in Commercial buildings.	Completed	NSW requires 'competent fire safety practitioners' to undertake certain functions. These include endorsement of fire safety alternative solution reports, plans and specifications for certain fire safety systems and issuing annual fire safety systems.
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.	Progressing	The amended but uncommenced <i>Environmental Planning and Assessment Act 1979</i> includes reforms to establish a building manual.
21	That the BMF agree its position on the establishment of a compulsory product certification system for high-risk building products.	Under consideration	NSW will further consider this recommendation in consultation with the BMF.
22	That the BMF 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.	Progressing	NSW is supporting the BMF to respond to this recommendation.
23	That the BMF 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.	Progressing	NSW expects that its reform commitments will be implemented over the next three years.
24	That the BMF prioritise the preparation of a plan for the implementation of the recommendations against which each jurisdiction will report annually.	Completed	NSW's response was incorporated in the <i>Implementation Plan</i> that was released by the BMF in March 2019.

