



11 June 2015

Mr Michael Lambert  
Building Professionals Act Review  
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Dear Mr Lambert,

The Australian Institute of Building Surveyors (AIBS) welcomes the independent review of the BP Act and its consideration of whether or not there is a need to pursue other building regulation policy objectives.

Like Chapter 8 of the Planning Reform White Paper and the Maltabarrow Report it is heartening to see that a holistic approach is being taken. The focus should not just be on certification but the complete building regulation system including all of its regulatory processes and support measures. This is not only necessary to rebuild confidence in the safety and regulatory quality of what is built – but also in the continuing safety of what currently stands. Furthermore, it is necessary to reinvigorate the certification/building surveying profession.

Building regulation in NSW therefore does not need another suite of band aid fixes. It is long overdue for major overhaul.

AIBS offers the following comment for consideration in determining recommendations for improving building regulation in NSW.

Following this is a suite of answers to the questions asked in the Review Document.

### **Governance structure**

AIBS supports the consolidation of building regulatory legislative provisions as much as possible. The current legislation is far too difficult to navigate. It is also difficult to read and interpret. Consolidation should preferably be under a separate and distinct Building Act (like Victoria, Queensland, Western Australia and New Zealand). That Act should have its own explicit statutory objectives so that all building controls that arise under it are consistent with those objectives. If a separate Act is not achievable then at the least there is a need to dedicate a distinct and separate Part of the EP&A Act to building control. This proposal has been on the table since the Campbell Inquiry held in 2002 and more recently the Collins Report.

AIBS also supports de-fragmentation of the current administrative arrangements. All building regulation functions (operational and policy) should be dealt with by a single agency and by Government. This single agency should also include in its structure the role currently carried out under the auspices of the BPB.

If a Building Commission is not proceeded with and the BPB remains a standalone entity then it should have greater control over its structure and budgetary process. This may include being able to employ its own staff etc.

More certainty is required and the development consent must take precedence over any certificate issued by a certifier. Development consents follow a thorough assessment process and include direct community consultation and input. Therefore, the actions of a certifier must never be able to inadvertently amend a development consent.

### **Australian Institute of Building Surveyors**

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The community expects that what was approved at the development consent stage is what will be built – no more nor less.

AIBS supports the combining of the roles of the certifying authority and principal certifying authority to maintain continuity and improve compliance coordination in the certification of a project.

Further AIBS supports replacing the not inconsistent test with “it is consistent” test with the development consent.

The role of the private certifier needs to be more clearly defined and needs to be promoted by the Government in the wider community. Simply the public need to know what they can expect from a private certifier.

Therefore AIBS supports clarification of enforcement responsibilities between councils and private certifiers. Although councils should be notified of all planning / environmental / public safety issues, who should be responsible for initial enforcement action requires careful consideration. The model adopted should best serve those who are affected by, or are concerned about, a development (the public).

In this regard factors to consider include:-

The council may not have intimate knowledge of the development underway and hence their effective and efficient involvement may be hindered;

Meaning the proposed on-site/off-site delineation may be confusing – particularly for members of the public. AIBS considers that the most appropriate model is one that makes the one authority (council or the private certifier) responsible for all initial enforcement action regarding both on-site and off-site issues.

### **Critical Stage Inspections**

The nominated critical stage inspections need to be expanded to include all major stages of construction. While certifiers should be permitted to rely on certificates from suitably qualified professionals such as structural engineers and hydraulic engineers, they should still be required to undertake inspections at all stages of the development to ensure works are proceeding in accordance with the development consent.

With the current regime of critical stage inspections, departures from the development consent are not detected until it is too late and then the matter is handed to councils to try and remedy the problem.

### **Fire Safety at Design construction and Occupation**

AIBS supports the reform of the fire protection system certification in particular the accreditation of fire protection contractors in the design and installation maintenance and future certification of fire safety systems.

It is imperative that building records be improved and in this regard the intent to also mandate submission of plans when relevant is also supported.

Furthermore AIBS supports the creation and maintenance of a building manual in a class 1b-9 building which would help identify alternative solutions (AS) many years after completion as at times reference to an alternate solution has been left off annual fire safety statements.

The building manual could be submitted as a required document at the Occupation Certificate stage (preferably in electronic form)

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## **e-technology**

AIBS supports maximising the use of e-technology in all aspects of building regulation and certification. It is considered particularly important that certifiers have ready on-line access to all information necessary to enable them to effectively fulfil their statutory functions.

## **Process**

AIBS notes that the proposed process improvements in the discussion paper are not as comprehensive as those covered in Chapter 8 of the Planning Reform White Paper and it is not clear why. It is trusted that the full suite of Chapter 8 proposals will be the subject of discussion and consultation in the not too distant future as they contained a number of innovative proposals and indicated that matters which have been a concern for some time will be addressed. However, industry and others are yet to see the detail.

AIBS also notes a number of comments in the discussion paper about a certifier practice guide. That is certainly supported however, care needs to be taken to assure it is not overly lengthy or complex yet contains sufficient detail. Also, the Guide should not be the sole instrument for conveying what is expected of certifiers.

The guide is a good idea. However what is expected of a certifier and others with minimum regulatory responsibilities should be expressed in regulations. The practice guide can then elaborate on those minimum expectations, make recommendations on management of responsibilities, and delve into areas of practice that are complex and require more explanation and guidance on what is expected.

## **Accredited certifier supply and support**

AIBS supports any moves to better help the current pool of accredited certifiers and building surveyors and make the profession more attractive to potential future participants. We therefore support expanding accreditation, improving building regulation process (so that what is expected as a minimum is clearly specified, and certifiers have a better understanding of their core responsibilities); the practice guide; decision support; better education and training.

Consideration should be given to IPART fixing minimum fees for Certification and Inspection work to ensure undercutting does not get pricing below what the cost of effective delivery should be.

In addition to providing the above general comments, please find attached responses to the specific questions raised in your review paper.

I am available should you wish to discuss this submission.

Yours faithfully,



Damian O'Shannassy,  
NSW/ACT Chapter President  
Australian Institute of Building Surveyors

**Responses to questions raised in the ‘Independent Review of the Building Professionals Act 2005’ Discussion Paper May 2015**

1. *Is there merit in consolidating the legislative framework for building sector regulation and control in one part of the EP&A Act, expressed in plain English, on a principles-based approach, with its own objectives, and incorporating any reforms approved by the Government?*

All legislation should be expressed in plain English so it is clear and unambiguous to all concerned. The current legislative regime has developed over a number of years and the building components are fragmented, difficult to locate and even more difficult to interpret.

There is definite merit in consolidating all building control matters in one part of the Act, or preferably in a new separate Act with corresponding consolidation of the regulations.

2. *Are there sufficient additional benefits involved to justify consolidating all building legislation in one Act, including the Home Building Act 1993?*

Rationalisation of the legislation is required to make it easier to find and easier understand. AIBS considers this would best be achieved by consolidation including the Home Building Act provisions.

3. *Are there sufficient benefits to justify the consolidation of building regulation administration?*

The benefit of a single building regulation administration structure was identified in the 2002 Campbell Enquiry – ‘Report upon the Quality of Buildings’ where it was recommended that a Home Building Compliance Commission be established “*forthwith*” to oversight home building regulation in New South Wales. There is no reason for this to be limited to the home building sector but should include all buildings.

With all licensing and accreditation functions in the one area it would be simpler for consumers and practitioners and would likely reduce duplication.

The building policy functions would benefit from obtaining more timely feedback from the regulatory and licensing areas thereby making more informed decisions. Similarly the regulatory and licensing functions would benefit in having a better understanding of the reasons for particular policy decisions.

While disadvantages of a Building Commission have been identified, including the potential loss of linkages between the building policy functions and the DPE and the potential for the commission to be a building industry advocate, it is considered that these could be overcome in the structural organisation of the new entity. Starting with a ‘clean-slate’ provides the opportunity to properly address all potential problems.

4. *Should the BP Act provide the BPB with the power to employ its own staff in addition to seconding staff?*

The BPB should not be a stand-alone authority and should be part of a larger entity, as discussed in question 3 above. If it is to stand alone it should have the power outlined in this section.

5. *Is there merit in the functions undertaken by BPB continuing to be undertaken by a statutory board?*

While there may be an opportunity for the accreditation of various professionals to be carried out by the professions' governing body, it is considered the investigation of consumer complaints, the initiation of disciplinary action and the routine auditing of accredited certifiers should remain the function of a statutory body. This will provide the community with more certainty and confidence.

6. *Would the framework of cooperation developed by the BPB Local Government Reference Group provide an effective approach for interaction between private certifiers and local government?*

The approach developed by the BPB Local Government Reference Group is supported as it would bring more certainty and clarity to the roles and assist in improving the frustrations that the general public have towards both private and Local Government Building Surveyors.

7. *Should certifiers be required to report all cases of building and planning noncompliance to councils?*

There would be many occasions where certifiers identify non-compliances through the course of a development, having the non-compliance remedied with minimal to no delay. Under these circumstances to require certifiers to report such non-compliances would add unnecessary red-tape with no conceivable benefit.

Furthermore, certifiers are responsible for ensuring compliance with development consents and complying development certificates. To require certifiers to report all non-compliances to council may also result in certifiers shifting their responsibility to take action to rectify the non-compliance.

Nevertheless, certifiers should have a statutory duty to report matters to Council that may be beyond the scope of the consent that they are responsible for including unauthorised work and unfenced swimming pools.

8. *Is there merit in a partnership model between the State and local government in the area of certification and building regulation enforcement?*

State and local government do not share responsibilities in the areas of certification and building regulation enforcement in the same way as they are shared with the NSW Food Authority.

Certification and building regulation responsibilities are shared between private certifiers and local councils and it is more important to have the roles of these entities more clearly defined rather than implementing a formal partnership model between State and local government.

9. *Would enhanced oversight of the certification process assist in addressing the problems experienced by owners of strata and community title developments?*

Introducing a 'defects bond' for all new strata schemes would provide greater consumer protection, however it is considered the bond should be held for a minimum of three (3) years with the required defects inspection being undertaken within 18 months of the completion of the building. This timing allows the building to be reviewed after it has been completed for a full 12 months.

10. *Would an electronic system for development applications, complying developments and building certification generate useful information for government and the industry and improve regulatory performance?*

The centralised and digital storage of all information would provide more accurate data for government and would permit information to be more readily available to all parties. This would be particularly useful during the life of the building such as when additions or alterations are proposed thus giving designers to the already built documentation including Alternative Solutions.

11. *Do you support the adoption of standard forms for development applications, CCs, CDCs and OCs?*

The standardisation of forms is supported.

12. *Do you support, as ways of improving the planning and approval stage:*

- *limiting development approval to a concept approval*
- *a standard set of development application conditions*
- *independent assessment of instances where a council seeks to impose higher building standards than the BCA*
- *improved information to the community on developments in their area?*

Section 79C of the EPA Act details the matters that must be considered before a consent authority can determine a development application and include the following;

- “(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) the suitability of the site for the development”*

At times, to be able to properly address the above matters detailed geotechnical, acoustic, traffic and stormwater details are required with the development application. Without such level of detail there is no certainty with regard to what is being consented to.

Having said that, anything that can assist to improve the development assessment process and the community's understanding of it would be beneficial. In that regard, the development of a standard set of development consent conditions is a good idea if applied to generic issues and provisions. Councils must be able to impose development specific conditions or conditions that align with a council's own development control plans that have been adopted in consultation with their community.

The standard conditions contained in the *State Environmental Planning Policy (Exempt & Complying Codes) 2008* that are applied to complying development certificates are a poor example of standard conditions, containing a number of inconsistencies and a lack of certainty.

Improving the information that is available to the community is also supported and the following options provided in the discussion paper should be further canvassed;

- a) more information on development site signs
- b) centralised state-wide electronic recording and tracking of development applications and complying development certificates.

13. *Will a significant improvement in the process of certification, to allow commencement of building work, be provided by:*

- *standardising the information to support the CC/ CDC*
- *standardising the report to support alternative solutions with content confirmed by the certifier*
- *replacing the not inconsistent test with the consistent test for both CCs/ CDCs and OCs?*

Each of the above items would improve the current construction certification process. However, simply replacing the current “*not inconsistent test*” with a “*consistent test*” would not on its own improve the level of certainty that the community expects.

A more robust test or process is required, that assures the community that what is approved at the development consent and complying development certificate stage is built and certified at the occupation certificate (or equivalent) stage.

The community needs to be assured that what is approved at the development consent and complying development certificate stage is what is built.

*14. Do you support combining the roles of certifying authority and principal certifying authority?*

There are significant benefits to be achieved by having the person who approves the construction documents (ie. the “*certifying authority*”) to also be responsible for following the development through physical construction to completion (ie. the “*PCA*”).

In addition, combining the roles reduces the opportunity for the ‘buck’ to be passed between the roles. Only one (1) party will be accountable.

*15. For a CC or CDC, is there merit in separating the assessment of conformity with planning requirements, to be handled by the consent authority, from the assessment of building requirements?*

Both development consents and the development standards for complying developments should be clear and unambiguous, readily and consistently interpreted by all. Neither should require a further planning assessment, which would only add an additional layer of red-tape, time delays and costs.

Accordingly, the focus should be to review the current controls to make them simpler.

If it is decided to require the consent authority to undertake a ‘planning assessment’ of construction and complying development certificates, councils must be given sufficient time to fulfil that task and must be able to fully recover the cost of providing that service. A lack of response by a council cannot be considered a tacit approval of the ‘planning assessment’ process.

*16. Would the current problems with the building construction stage regulatory approach be addressed by:*

- *ensuring the builder receives the certified plans and CC/ CDC*
- *documenting and requiring adherence to good certifier practice*
- *potential additional critical site inspections based on risk assessment*
- *replacing interim and final OCs with an OC and development completion certificate*
- *requiring projects with missed mandatory inspections, and unauthorised work, to obtain an OC*
- *effective financial sanctions for unauthorised work?*

The following responses are provided to each of the above parts of the question;

- It is critical that the builder not only receives the certified plans and associated documents, but a copy must be available on the construction site at all times. If on request the documents are not available the builder or principal contractor should be subject to receiving an infringement notice.
- A ‘Code of Practice’ or ‘Professional Standards Scheme’ should be developed for all classes of certifiers, with practitioners being held accountable for breaches of such a document.
- Critical stage inspections based on risk assessment provides too much discretion to the individual certifier and uncertainty for the community. It permits the under cutting of price to those who are willing to gamble on their potential risk.

The nominated critical stage inspections need to be expanded to include all major stages of construction. While certifiers should be permitted to rely on certificates from

suitably qualified professionals such as structural engineers and hydraulic engineers, they should still be required to undertake inspections at all stages of the development to ensure works are proceeding in accordance with the development consent.

With the current regime of critical stage inspections, departures from the development consent are not detected until it is too late and then the matter is handed to councils to try and remedy the problem.

Setting a minimum standard in line with industry best practice would lead to improved performance across the industry.

- The distinction between an “*occupation certificate*” and a “*completion certificate*” is logical, however there is a concern that buildings will be allowed to be occupied even if they do not comply with the development consent or complying development certificate. Significant departures should prevent a building from being occupied, because once a non-conforming building is occupied there is little incentive to remedy any departure.

Furthermore, certifying only health, safety and suitability for use does not address a multitude of planning issues that should be satisfied before any building is occupied, including parking, privacy controls and acoustic controls.

Providing a timeframe of up to 12 months to complete a building once it has been occupied is considered excessive. Introducing a ‘completion bond’ may provide greater incentive to have buildings completed in accordance with the development consent.

The final certificate required for a completed building, whatever it is called, must endorse that the development;

- a) has a development consent and construction certificate or a complying development certificate;
  - b) has been completed in accordance with the development consent and construction certificate or the complying development certificate;
  - c) has satisfied all development consent or complying development certificate conditions; and
  - d) complies with the Building Code of Australia (BCA) for the applicable classification.
- It is noted that Chapter 8 of the white paper also proposed improvements around the OC. These should also be aired for consultation. It is important that industry and others see the complete package of reform proposals.
  - An improved regime for dealing with missed mandatory inspections and unauthorised work is critical and should include the need to demonstrate compliance with the BCA.

Building certificates are not the best mechanism for regularising unauthorised work for the following reasons;

- a) There is no statutory requirement for a building certificate to be lodged for unauthorised work;
- b) A building certificate only lasts for seven (7) years after which time Council can serve Notices and Orders to have the unauthorised work removed;
- c) A building certificate does not follow the same statutory assessment process as a development application and is not required to be notified to neighbouring properties; and
- d) Conditions are unable to be imposed on a building certificate.



Consideration should be given to mandating the need to lodge retrospective development applications and construction certificates so all applications are assessed and determined in the same manner. Where such approvals are required, there should be an additional financial burden to ensure they are the mechanism of last resort, rather than the preferred option.

- Effective financial sanctions are a necessity to deter unauthorised work and to reduce the burden on the Local and Land & Environment Courts. The value of penalty infringement notices should be increased with multiple increasing infringements being possible for ongoing breaches.

Also, penalty infringement notices should be available when there is a failure to lodge a retrospective application.

*17. Do you support the option of requiring the creation and maintenance of a Building Manual for all new Class 1b-9 buildings?*

The creation and maintenance of a Building Manual for all new Class 1b-9 buildings is supported. It should be lodged at the time the occupation certificate is requested and preferably be in electronic form.

*18. Do you support the reform of the fire protection system certification, including the proposed revised role for NSW Fire and Rescue?*

Expanding the accreditation scheme to suitably qualified and experienced persons for specialist design, installation, commissioning and maintenance of fire safety services is supported. The current practice of building owners selecting whom they like is dangerous to the occupants and fire brigade personnel. They should be only able to select from accredited persons.

However, expanding the role of NSW Fire and Rescue may be problematic as NSW Fire and Rescue may have insufficient resources to provide the services identified in the discussion paper.

*19. Would the options for change set out in this paper be helpful in improving the supply of qualified certifiers and making it a more attractive profession?*

Expanding the scope of accreditation to all key players in the building construction industry is critical, as the current certifiers are not responsible for all elements of a development. More responsibility and statutory accountable needs to be placed on the builder and other key designers and installers.

The provision of improved support, including clear unambiguous codes of practise or practice guides would be beneficial.

It is considered the suggested changes would help retain more qualified certifiers in the profession. Unless the certainty for certifiers is improved and their risk even when operating professionally and ethically is reduced the number of operators will continue to decline.

Consideration should be given to IPART fixing minimum fees for Certification and Inspection work to ensure undercutting does not get pricing below what the cost of effective delivery should be.

<p>20. <i>Is there an adequate pathway that allows a certifier to progress from the A4 category (building inspector) right through to A1 (building surveyor – grade 1), if desired?</i></p> <p>The progression of certifiers needs to be a combination of recognised training and competency assessment. The current pathways are too rigid.</p> <p>The rigid numbers of buildings of different Classes a Certifier must have worked on is often impossible to maintain as some very large projects dealt with prohibit a spread across a number of other projects during that period. The criteria must be that they have been working at that level. If they have qualified to that level they must be capable of transferring their skills from one Class to another as the need arises.</p> <p>As with all professionals, tertiary qualifications do not provide all the necessary skills to undertake this crucial community safety role.</p>
<p>21. <i>Would the proposed changes to the accreditation process address the main deficiencies in the current system?</i></p> <p>No comment provided</p>
<p>22. <i>Do you support the use of an evidence-based framework and guide for the review of the accreditation scheme?</i></p> <p>No comment provided</p>
<p>23. <i>Are the following sufficient to create a suitable level of accountability for certifiers in respect to their regulatory role:</i></p> <ul style="list-style-type: none"> <li>• <i>improved transparency of the performance of a certifier with a Practice Guide</i></li> <li>• <i>proactive investigations and audits</i></li> <li>• <i>increasing the awareness of the role of certifiers?</i></li> </ul> <p>The community lacks confidence in the current certification system and this, in part, is due to the inconsistent approach among certifiers. Certifiers need to have their roles and responsibilities clearly defined and documented and checks need to be implemented to ensure certifiers fulfil these roles and responsibilities.</p> <p>Legally binding Practice Guides will help certifiers understand what is the minimum standard expected of them and will assist to educate the generally public.</p>
<p>24. <i>Does the establishment of certifier panels by councils have merit?</i></p> <p>AIBS does not believe this is the role of Councils to provide panels.</p>
<p>25. <i>Do you support an expanded program of proactive investigations and audits by the BPB and if so, how should they be conducted?</i></p> <p>With any well implemented system it is important to regularly check and adjust the system as required, rather than rely solely on complaints to identify necessary improvements. Therefore more proactive investigations and audits by the BPB would help to reduce the number of complaints and would assist to educate certifiers.</p> <p>Proactive action should not be limited to desktop audits, but should include practical in-field investigations.</p> <p>An alternative may be to encourage certifiers to implement their own independent audit program that verifies compliance with the BPB's adopted guidelines.</p>

26. *Would introducing a demerits point system and issuing more penalty infringement notices provide a more timely mechanism for disciplining certifiers who have not performed to a required professional standard?*

Penalties should be the last resort and any proactive action should be aimed at educating and improving the performance of certifiers.

27. *Would you prefer an online system for the lodgement of complaints?*

The current complaints lodgement system appears to be designed to discourage complaints. Any system that allows all complaints to be captured would be a significant improvement. Therefore an online system is supported.

28. *Would the establishment of an education and training program to inquiries, complaints and audits together with a building services advisory hot line address the needs of certifiers for training and information support?*

A key role of the statutory body responsible for accrediting and investigating certifiers is to provide support and guidance to certifiers. Approved education and training programs and the provision of an advisory hotline would be beneficial.

29. *Is it possible to achieve full competitive neutrality without either councils ceasing to offer certification services, or private certifiers being abolished?*

Full competitive neutrality is an unnecessary goal that will never be achieved and there is little merit in expending further effort to that end.

30. *Would certifiers' insurance issues be addressed by expanding certification and accreditation to cover critical building elements and design, and by implementing an industry scheme to cover the gap in insurance cover from certifiers leaving the industry or where the certifier changes for a particular project? If not, what additional problems remain?*

The Australian Institute of Building Surveyors (AIBS) have suggested the following changes to better protect the community and address the identified certifier insurance issues;

- a) Only licensed builders and trade people should be able to undertake residential building works.
- b) Clearly define the statutory role of the certifier within legislation. The certifier is NOT a Clerk of Works, Project Manager or Supervisor for the works undertaken.
- c) Legislation should clarify that the builder is the person who is responsible for the quality of work and ensuring that building work is completed in accordance with the approved plans and specifications.
- d) There should be licensing of the various building trades and professionals who can then be held accountable by their respective licensing body.
- e) An insurance levy scheme could be applied to address the 'last man standing' type claims. This insurance could also cover the trades as they are unable to gain professional indemnity insurance and frequently set up businesses that can easily cease trading.
- f) An independent Ombudsman could be considered to assess disputes between certifiers and their insurers.
- g) Ensure builders' warranty insurance schemes are in place for all residential developments including multi-level apartment buildings that currently leave consumers exposed without remedy for defective building work.

31. *Do you agree that there is not a 'last person standing' problem arising from the different liability cover between builders and certifiers? If it does arise, please explain the problem created.*

AIBS believes there is a last man standing problem that leaves the Certifier as the only one in many cases with applicable insurance with many projects developed and constructed by "shelf companies". Current litigations are demonstrating this but AIBS is not privy to the details.

32. *Do you favour a simplification of the requirement for swimming pool fencing certification requirements, moving from three standards to one?*

The system implemented in Queensland where all swimming pool owners were provided a sufficient period of time (believed to be 5 years) within which to upgrade their swimming pool fencing to the latest applicable Australian Standard is considered a sensible approach.

The current approach of owners continuing to have to upgrade to new standards is almost unique to pools and should be a one off event as of now. Once this current upgrading is completed all future certification should be that the pool enclosure complies with either the Standard as currently being upgraded to or for newer pools the Standard that existed when the pool was constructed unless there is a trigger such as re configuring the pool or barrier that would result in having to comply with the current standards.

33. *Would setting charges for both councils and the State to recover processing costs for development applications and CDCs be the most equitable and efficient approach?*

Councils are being called on to undertake more and more functions and it is crucial that they are provided appropriate funding to ensure they have sufficient resources to meet their communities' expectations.

With regard to funding the regulatory role of councils in the building certification system it is considered a levy on every development application and complying development certificate application is the most equitable and efficient approach, being easy for the community to understand and easy to implement.