

**Submission to the Building Professionals Board
Report on
*“Building Certification and Regulation –
Serving a New Planning System for NSW”***

March 2014

Table of contents

Executive Summary	3
1. Introduction	5
2. Context	5
3. Issues	6
4. White Paper Directions and Proposals	7
4.1 Current Status of White Paper and Planning Bills	7
4.2 Key White Paper Reforms	7
4.2.1 <i>Fire Protection and Waterproofing</i>	8
4.2.2 <i>Occupation Certificates</i>	8
4.2.3 <i>Roles and Responsibilities</i>	8
5. Response to Report Recommendations	9
5.1 Recommendations 12.1, 12.2 and 12.3 - Expert panels.....	9
5.2 Recommendations contained in 12.4 - Certification Process	10
5.2.1 <i>“Not inconsistent” test</i>	11
5.2.2 <i>Mandated contracts</i>	11
5.3 Recommendation 12.5 - Guideline on Fees	11
5.4 Recommendation 12.6 - The Building Professionals Board	12
5.5 Recommendation 12.7 - Implementation coordination	12
5.6 Resourcing the Recommendations	13
6. Conclusion	13
ATTACHMENT 1	15
ATTACHMENT 2	22

Executive Summary

Local Government's key issues with the building regulation and certification system in NSW have been well documented in recent years. To highlight the breadth of issues that need to be addressed, this submission includes a discussion of the many problems councils are experiencing day to day as a consequence of current regulations and ineffective activity by the BPB. The problems stem largely from the unclear roles and responsibilities of all players, a lack of regulatory clout and inadequate oversight of the entire process by the BPB. Many councils consistently maintain that the private certification system has a poor track record and the BPB has been criticised for a lack of disciplinary action in response to complaints about certifiers. While Local Government is not against the principle of having private certifiers in the marketplace, we expect this to operate within a much tighter regulatory regime.

While we agree with the range of issues detailed in the Maltabarow Report, there are some recommendations with which we do not agree and others which we have emphasised should be given high priority. There is already a vast body of analysis that has been done and it is time that this work is consolidated and some firm policy and regulatory recommendations are put forward and actioned.

In relation to expert panels, Local Government NSW (LGNSW) cautions against having more panels do more analysis without moving forward with specific recommendations and action. In view of this and the cost considerations, we therefore favour the establishment of only one panel rather than three separate panels. In addition, we expect that any new panels established in relation to building and certification reforms by either the BPB and/or NSW Planning and Infrastructure (P&I) must be aligned with any existing and/or other proposed advisory groups to avoid duplication, waste and confusion.

In relation to the recently introduced "not inconsistent" provisions, we agree that these have some problems and limitations and need to be reviewed. However, Local Government can only support the removal of the "not inconsistent" test at Occupation Certificate stage as recommended in the report once a robust regulatory alternative has been put in place.

LGNSW supports the recommendation to remove the recently introduced mandated contract provisions. In their current form, these are considered impractical by both council and private certifiers. We acknowledge that there is nevertheless a need for some form of written agreement between certifiers and owners to clarify responsibilities and accountabilities and secure sound regulatory outcomes. We therefore support the view that a simple agreement which identifies the respective rights and responsibilities of each stakeholder should be sufficient.

LGNSW is encouraged to see a number of conclusions and recommendations relating to the operation of the BPB. The single biggest issue for Local Government with the BPB is its apparent lack of 'teeth' in relation to matters of compliance and enforcement. Our member councils report a number of issues relating to the performance of the BPB and the overall regulatory framework, including a lack of clear policing of certifiers; insufficient penalties; poor disciplinary action; ineffective audits; and problems and delays with the complaints process. LGNSW therefore calls for urgent actions and initiatives to be put in place that will lead to vigorous and proactive auditing and policing of certifiers, higher penalties, a simpler and unimpeded complaints process, responsive disciplinary action, and an ongoing program of effective audits.

The fact that the BPB is currently not well enough resourced to perform its regulatory functions and responsibilities is conceded in the Maltabarow Report. This submission therefore calls on the Government to direct much needed resources and urgent attention to strengthen the BPB in its regulator role and to tighten regulation and enforcement of builders and certifiers overall. LGNSW holds the view that the BPB is an enforcement body and anything less than resourcing it appropriately and retaining it as an independent entity would be unacceptable.

As discussed in the Maltabarow Report and reiterated in this submission, there are many issues with building certification and regulation that have persisted for too long and these must be given greater primacy by the NSW Government.

1. Introduction

Local Government NSW (LGNSW) is the peak body for NSW Local Government, representing all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council.

LGNSW is pleased to provide a submission on the Building Professionals Board (BPB) report by George Maltabarow, *Building Certification and Regulation – Serving a New Planning System for NSW* (referred to in this submission as the Maltabarow Report). We note that the report has captured the main issues and concerns of Local Government, canvassed some possible options and recommended further steps to improve the current situation.

As observed in the Maltabarow Report, the problems with the current building certification system in NSW stem largely from the unclear roles and responsibilities of all players, but Local Government contends that another contributing factor is the lack of a strong regulator to oversee and enforce the entire process. LGNSW and councils have argued for some time that there are many issues with building certification and regulation that have persisted for too long and these must be given greater primacy by the NSW Government. While Local Government is not against the principle of having private certifiers in the marketplace, we expect this to operate within a much tighter regulatory regime.

This submission is broadly structured along the lines of the Maltabarow Report. Section 2 of this submission makes some general observations about context; section 3 reiterates the specific issues of concern held by Local Government (which are detailed in Attachment 1 to this submission); section 4 comments on the report's discussion regarding selected White Paper directions; and section 5 responds to the specific options and recommendations contained in chapter 12 of the Maltabarow Report. While we agree with the issues detailed in the report, there are some recommendations with which we do not agree and others which we have emphasised should be of the highest priority. These differences are discussed in section 5 of this submission.

2. Context

LGNSW recognises that the certification process is expected to deal with higher volumes of work within a framework of more streamlined processes in future. This is reflected in a steady increase in the proportion of certified developments, combined with the proposed expansion of "codified"/complying development assessment by the NSW Government. LGNSW and many councils have consistently argued that the introduction of a tougher building regulation regime is essential if code based assessment and private certification are to be expanded.

Pressure is also being brought to bear as the trend towards greater numbers of dwelling units takes the form of multi-storey apartments rather than stand-alone houses or other low to medium density forms. Combined with increasing numbers of complying development applications there are concerns that an ageing workforce and a low entry rate, will place pressure on a diminishing number of certifiers and could compromise the rate and/or quality of certifiers' work practices and in turn affect good planning and building outcomes.

Local Government is firmly of the view that the planning system must retain provisions to allow Local Government certifiers to continue to carry out their certification functions should they choose to do so. Councils in rural and regional NSW in particular have observed that one of the issues with private certification in rural areas is that the business for private certifiers in

these areas can be irregular and the longer travel distances between certification jobs can make the work less viable, This has resulted in in some projects being certified without adequate site inspections..

An ongoing point of tension (recognised in the report (pp. 11, 19, 31) is the inherent conflict between the obligations of the certifier to the property owner (i.e. their client/customer), and their legal obligations in their capacity as a 'public officer'. Local Government maintains the view that the certifier (whether they are a council or private certifier) is a public officer and needs to act in a manner that reflects community standards. The potential conflict of interest brought about by the inherent conflict between meeting the needs of the client and satisfying wider community and public expectations will remain an ongoing point of tension that will require practical and well-considered policy and regulatory responses.

3. Issues

LGNSW has argued for some time that there are a number of issues with building certification and regulation that need further analysis and resolution. These problems stem largely from the unclear roles and responsibilities of all players and a lack of regulatory clout and oversight of the entire process by the BPB. Many councils consistently maintain that the private certification system has a poor track record with respect to issuing certificates that are significantly inconsistent with consents, failing to detect and act on unauthorised work; and certifying incorrect plans or incorrectly applying Building Code of Australia (BCA)/Regulations. The BPB has been criticised for a lack of disciplinary action in response to complaints about certifiers.

Local Government's key issues with the building regulation and certification system in NSW have been well documented in recent years, by both LGNSW¹ and many NSW councils, in their submissions to the White Paper on the planning system review. These are largely in accord with the issues spelled out in the Maltabarow Report. Key issues with the building certification process were also comprehensively documented by the Building Professionals Board in their submissions to the NSW Planning System Review.

Below (and detailed in Attachment 1 of this submission) is a list of the main issues for Local Government with the current system of building regulation:

1. Enforcement and compliance is not rigorous enough, with insufficient penalties.
2. Insurance/indemnity and accountability of all involved in design and construction is inconsistent.
3. The BPB has performed poorly in its enforcement and compliance responsibilities.
4. The complaints system is too onerous.
5. Councils are having to 'step in' when private certifiers do the wrong thing, but there is no mechanism for councils to recover these costs.
6. The purpose and reliability of Occupation Certificates is not clear.
7. Variations to or disregard for conditions of consent.
8. Unauthorised works and remediation and rectification issues.
9. Implementation of mandated contracts is impractical, problematic and time wasting for certifiers (both council and private).

¹ *LGSA Submission to Planning Green Paper, September 2012 & LGSA Submission to Planning White Paper, June 2013*

10. There are various certification issues associated with swimming pools, fencing, and other activities.
11. Skills, training and education of certifiers needed to retain an adequate supply of certifiers to meet increasing demands, and provide better guidance to certifiers.
12. Reduced or missed payments for section 94 and 94A contributions.

4. White Paper Directions and Proposals

4.1 Current Status of White Paper and Planning Bills

We note that the Maltabarow Report was finalised in May 2013, and there have been two significant developments since the report was written, namely:

- The White Paper proposals have been translated into Exposure Bills² and proceeded to NSW Parliament; and
- The future passage of this legislation in Parliament has been delayed and is not known at this time as a result of a number of amendments passed by the Upper House that have not been accepted by the Government.

LGNSW therefore questions whether the recommendation to set up an expert panel to “assess the White Paper proposals” is prudent at this time. This is discussed further in section 5.1 of this submission.

Despite the current status and unknown future of the planning Bills, Local Government sees the directions and priorities of these and the other White Paper reforms as critical to improving building regulation and certification. The Exposure Bills only made provision for some but not all of the White Paper reforms in this area. With many of the reforms not included in the Exposure Bills, it is assumed that these may be addressed through either:

- policy, procedural and administrative improvements (e.g. refocusing the priorities and resources of the BPB);
- the concurrent review of the *Building Professionals Act 2005*; and/or
- regulation.

4.2 Key White Paper Reforms

LGNSW and councils welcomed proposed provisions in the White Paper to tighten building regulation and address many of the known issues, the five key areas of change³ being:

- Accreditation of additional occupations involved in building design and construction such as designers, specialist engineers, fire protection system installers and inspect/test technicians, energy efficiency designers, access consultants and other relevant professions;
- Mandatory certification of specified building aspects including the design, installation and commissioning of critical building systems and elements;
- Improved levels of documentation through all stages of the building life cycle, including the requirement for a building manual which will include key building information;

² *Planning Bill 2013* and *Planning Administration Bill 2013*

³ NSW Government, *A New Planning System for NSW: White Paper*, April 2013, p.180

- Increased support for certifiers on complex building matters through peer review and enhanced decision support; and
- Strengthened controls on certifiers through stronger disciplinary guidelines, increased auditing and increased obligations to report non-compliant building work and other controls.

The proposed reforms seek to address numerous aspects of the building regulation and certification process with a view to improving the quality and safety of buildings. Local Government welcomes all measures that will improve the quality of buildings and help reduce the amount of defective work that councils have to deal with post development.

While there is broad support within the Local Government sector for these changes, council practitioners flag specific details and practical implications that will need to be resolved. Notwithstanding the outcome of the Exposure Bills, it is critical that Local Government expertise is sought during the development of any policies, guidelines, regulations and detailed implementation of aspects of these reforms.

4.2.1 Fire Protection and Waterproofing

The examples cited in sections 4.2 and 4.3 of the Maltabarow Report highlight two key areas of concern to councils and others in the building industry arising from the need for more effective building compliance and accreditation. As mentioned elsewhere in this submission, the experience of many councils is that defective privately certified development may only come to a council's attention as a result of either Fire & Rescue NSW or an owner/neighbour complaint.

Local Government therefore supports key changes outlined in the White Paper which propose a system for certification that places greater responsibility on contractors, installers and building practitioners (with appropriate accreditation of individuals certifying fire safety systems) to ensure that fire safety systems and other key building components are compliant.

4.2.2 Occupation Certificates

Local Government agrees there are many current issues relating to Occupation Certificates, and these have been acknowledged and well documented in the White Paper⁴. As discussed in the Maltabarow Report the issues revolve around a lack of clarity about the existing role of the Occupation Certificate. We agree with observations in the Maltabarow Report that the recently introduced "not inconsistent" test has some problems and limitations and needs to be reviewed, however we consider it inappropriate to remove this provision unless and until a suitable regulatory alternative is put in place. (This is discussed further in section 5.2.1 of this submission).

4.2.3 Roles and Responsibilities

The need for clear boundaries between regulation, enforcement and service provision is at the heart of the problems between councils and private certifiers. Councils are charged with both a certification role (in competition with private certifiers) while still retaining regulatory powers to

⁴ NSW Government, A New Planning System for NSW: White Paper, April 2013, p.196

issue orders on private certifiers. The respective roles of council as the 'approving authority', council as 'certifier', private certifiers, and the BPB need to be clarified and refined to ensure there are no overlaps, gaps or potential implications for competition principles.

With respect to contacts between owners and certifiers, which is also mentioned in the Maltabarow Report (p.20), council building experts have questioned the need for any mandatory contracts for council certifiers and made the following observations about mandated contracts in general:

- The specific requirements in the Regulation are far too detailed and extensive and it is impractical and unrealistic for such a contract to be entered into before lodging a Construction Certificate (CC) or Complying Development Certificate (CDC) with a council and probably many certifiers.
- In relation to council certifiers, any requirements for a contract should be with the council as an entity, and not with any single individual council staff member/certifier. The question of individual council officers entering into a written contract personally, rather than on behalf of the council has potential legal ramifications.
- The BPB Templates for Certification Work introduce a whole range of new obligations on council certifiers. The forms are complex and introduce more red tape for the applicant, for what will more often than not in the case of many councils, be for a minor CC or CDC, perhaps a carport, fence or addition.

LGNSW therefore supports the removal of mandated contracts in their current form as recommended in the Maltabarow report (refer to section 5.2.2 of this submission).

5. Response to Report Recommendations

As stated previously, the issues highlighted in the Maltabarow Report are in line with the main issues and concerns of Local Government. However, there are some recommendations with which we do not agree, and others which we would like to emphasise as being of the highest priority.

We recognise that the report has reviewed the issues "at a policy level and to recommend a way forward to resolve issues which require technical expertise" (p. 46), and we are pleased to see that the report acknowledges that there will be costs involved in some of the recommendations. However, we would like to have seen a specific recommendation that seeks a commitment from the NSW Government to allocate resource to the BPB to enable them to deliver the specific recommendations within their remit (refer to section 5.7 below).

A response to each of the report's recommendations is provided below.

5.1 Recommendations 12.1, 12.2 and 12.3 - Expert panels

LGNSW supports the recommendation to establish 'expert panels' in principle, however, for practical and resource reasons, we would favour the establishment of only one panel, with specific Terms of Reference to cover the scope of recommendations 12.1, 12.2 and 12.3, rather than having three separate panels. There is already a vast body of analysis that has been done, as summarised in the Maltabarow Report (chapters 5 and 6). It is time that this work is consolidated and some firm policy and regulatory recommendations are proposed.

LGNSW cautions against having more panels do more analysis without moving forward with specific recommendations.

Without more detail on how such panels would operate, the recommendations for three panels may:

- Detract from a full and holistic consideration of the key issues and possible solutions.
- Potentially introduce confusion and overlap of roles and tasks between the three groups.
- Place an administrative burden on the need for 'secretariat' support.
- Introduce direct and or indirect costs, depending on how the panel of experts may be compensated for their time.
- Require an unnecessary additional administrative mechanism to formalise communication and exchange between each panel.
- Redirect valuable funds/resources away from the priority of expanding the compliance and enforcement activities of the BPB.

Furthermore, as discussed in section 4 of this submission, given that many of the White Paper proposals have already proceeded into a draft Exposure Bill and that the future passage of this legislation in Parliament is not known at this time, it would be prudent to rethink the purpose and terms of reference for Panel 1.

While the report does not comment on the likely make-up of such panels, it is anticipated that they will be relying on voluntary participants/representation from key stakeholder groups, some of whom may be required to have input to more than one panel. This could present practical difficulties for individual panel members in terms of time commitments.

A single overseeing panel could be supported with relevant technical reference groups. To this end it is worth considering what role any existing advisory groups could play, for example, the 'Expert Panel on Exempt and Complying Development' which provides advice to NSW Planning and Infrastructure (NSW P&I) on the State Environmental Planning Policy (SEPP) on Exempt and Complying Development (i.e. the Codes SEPP). The Building Regulations Advisory Council (BRAC) is another existing panel, and there may be other similar advisory or working groups within the BPB and/or NSW P&I. Not only would this save the cost, time and resources of establishing entire new groups, but it also makes sense to consolidate the work, contributions and collective knowledge of existing advisory groups rather than reinventing the wheel and introducing new panels.

At the same time as this report from the BPB is recommending three new expert panels, LGNSW has also been approached by a separate branch within NSW P&I which proposes to establish a 'panel of key stakeholders' to discuss processes and procedures for building regulation and certification reform. At this stage it is unclear what relationship these expert/stakeholder groups might have with one another. This leads to a further caution from LGNSW, that any panels established by either the BPB and/or NSW P&I in relation to building and certification reforms (including the Codes SEPP) must be aligned to avoid duplication and confusion.

5.2 Recommendations contained in 12.4 - Certification Process

5.2.1 “Not inconsistent” test

As mentioned previously (refer to section 4.2.2 of this submission) although there are a number of problems in the application and interpretation of the “not inconsistent” provisions, Local Government can only support the removal of the “not inconsistent” test at Occupation Certificate stage, once a robust alternative has been put in place.

The origins of the “not inconsistent” test were at least partly because Occupation Certificates were being issued for projects sometimes considerably at variance from the original development consents. In the absence of any such provision, it was open for a building certifier to issue an Occupation Certificate, even if the development was inconsistent with the consent or BCA.

Unfortunately, in practice, it is not without difficulty, as the double negative of “not inconsistent” creates a level of uncertainty and still requires a decision on the part of the certifier, when this should not be necessary.

Currently the Occupation Certificate is used as the final sign off, however this can be unfair particularly on home owners, and a new tool is needed to ensure consents are adhered to. One possible alternative is to consider introducing some sort of ‘completion certificate’ which could be issued and the ‘not inconsistent’ test applied at that stage.

LGNSW understands there has been some discussion within the profession regarding possible options to provide certainty for consumers about compliance, and we would be happy to discuss potential options with the BPB.

5.2.2 Mandated contracts

LGNSW supports the removal of the contract provision as recommended in 12.4 (and discussed in sections 3.7, 7.3 and 7.4) of the Maltabarow Report. LGNSW acknowledges that the intent of having mandated contracts was to address concerns about potential conflicts of interest between builders and certifiers and to facilitate good working relationships to secure regulatory outcomes and protect the owner’s interests. However, as discussed elsewhere in this submission (refer to section 4.2.3 and Attachment 1) these quite detailed and mandated contract requirements serve no real purpose and are considered unnecessary, cumbersome and impractical. The problems with these contracts in their currently required form might be symptomatic of the fact that both councils and private certifiers hold the view that they were not well consulted or considered before they were implemented (as the Maltabarow Report has pointed out in section 7.3). A simple agreement which identifies the respective rights and responsibilities of each stakeholder should be sufficient, and this point appears to have agreement from both council and private certifiers alike.

5.3 Recommendation 12.5 - Guideline on Fees

Without further details, it is debatable that sufficient need has been demonstrated to support the idea of having an independent body, such as IPART publish a benchmark range of fees as proposed in recommendation 12.5. However, LGNSW remains open to considering the advantages of having such benchmark fees if sound arguments were presented. We do recognise for example, that benchmark pricing might assist in providing better guidance to certifiers about the expectations and attributes of a quality certification service. As discussed

elsewhere in this submission, there are more pressing issues to resolve as a matter of urgency. All resources should be therefore directed at strengthening the BPB in its regulator role and tightening regulation and enforcement overall, rather than diverting attention to fees and charges. In the event that such benchmarking does proceed at some stage in the future, this must be developed in consultation with councils and private certifiers.

5.4 Recommendation 12.6 - The Building Professionals Board

LGNSW is encouraged to see a number of conclusions and recommendations relating to the operation of the BPB (sections 10.4 and 10.7), and recognition of the need for “more resources, particularly in the investigation/compliance area” (p. 42).

As referred to in section 3 and Attachment 1 of this submission, our member councils report a number of issues relating to the performance of the BPB and the overall regulatory framework, including a lack of clear policing of certifiers; insufficient penalties; poor disciplinary action; ineffective audits; and problems and delays with the complaints process. The single biggest issue for Local Government with the BPB is its apparent lack of ‘teeth’ in relation to matters of compliance and enforcement.

There is a perception that the BPB is not well enough resourced to perform its regulatory functions and responsibilities. This is supported by the statement in section 10.2 of the report that of the total staff of 26, “only three of these staff are currently wholly dedicated to investigations and audits” (p. 41). The resourcing and priorities of the BPB must be therefore refocused and boosted so that complaints are investigated promptly; audits are carried out by experienced staff and communication to certifiers follows; and random onsite inspections are regularly conducted.

Section 10.4 of the report identifies one of the key challenges being to expand investigations capacity to allow for a more effective compliance regime (p. 42). LGNSW endorses the position put in section 10.4 that “a properly resourced compliance function is essential” (p. 43).

LGNSW therefore supports the conclusions of section 10.7 and recommendation in 12.6 that the BPB Secretariat must be restructured to include an “expanded investigation/audit function” (p.44) and tasked with developing a work program that will address a number of key elements.

While the report does not make specific recommendations on the exact details of such a restructure, section 10.3 discusses some governance issues and potential options for a revised structure. LGNSW holds the view that the BPB is an enforcement body and should therefore be an independent entity and not merely an advisory body to certain parts of NSW Planning and Infrastructure as posited in section 10.3. In view of Local Government’s concerns about the need for a strong regulator, anything less than an independent entity would be unacceptable.

5.5 Recommendation 12.7 - Implementation coordination

Many commentators have observed that a drawback of building regulation and certification as contained within the NSW Planning system is that it sits within a much broader NSW building industry regulatory framework, with building industry professionals being licensed by one of several NSW administrative bodies, or being self-regulated. LGNSW therefore supports the need for a coordinated joint program of building sector reforms agreed between the State administrations of Planning and Infrastructure, Fair Trading and Local Government. However,

the report is unclear as to which agency will take the lead on this, and without clear accountabilities, leadership and governance, such a program is unlikely to achieve meaningful outcomes. LGNSW proposes that the recommended joint program should be overseen by a sub-committee of the respective NSW Government Ministers with responsibility for these areas, and a strengthened and independent BPB regulator to coordinate and lead the development of the program.

5.6 Resourcing the Recommendations

The Maltabarow Report (p.46) has correctly pointed out that there will be costs involved in setting up expert panels. Costs would be reduced if only one expert panel was established (as discussed in section 5.1 of this submission), supported with technical expertise as required, or that the expertise of existing advisory groups be tapped into.

LGNSW would also like to see a specific recommendation included that seeks a commitment from the NSW Government to allocate resources, in particular to the BPB, to strengthen its role as an independent regulator, deliver the recommended work program and address as a matter of priority the many issues with the building and certification system.

6. Conclusion

In response to the Maltabarow Report this submission has sought to:

- Spell out the specific issues of concern held by Local Government about building regulation and certification;
- Comment on some of the selected White Paper directions discussed in the report; and
- Respond to the specific options and recommendations contained in the report.

The submission focuses specifically on the issues and recommendations raised in the Maltabarow Report. A summary of key observations and recommendations made in this submission in relation to specific elements of the report is included in Attachment 2.

While the Maltabarow Report has captured most of the key issues of concern to Local Government, there are some recommendations with which we do not agree, and others which we have emphasised should be given a high priority. We emphasise that that there is already a vast body of analysis that has been done - the problems are known, the issues are known and many of the remedies are known. It is time that this work is consolidated and some firm policy and regulatory recommendations are put forward and actioned.

As discussed throughout this submission councils are experiencing many issues and problems as a consequence of current regulations and ineffective activity by the BPB. While Local Government is not against the principle of having private certifiers in the marketplace, we expect this to operate within a much tighter regulatory regime. We call for urgent actions and initiatives that will lead to vigorous and proactive auditing and policing of certifiers, higher penalties, a simpler and unimpeded complaints process, responsive disciplinary action, and a program of effective audits.

Councils consistently report a number of issues relating to the overall regulatory framework for building certification and in particular to the performance of the BPB, The single biggest issue

for Local Government with the BPB is its apparent lack of ‘teeth’ in relation to matters of compliance and enforcement. LGNSW therefore urges the Government to direct much needed resources and urgent attention to strengthen the BPB in its regulator role and to tighten regulation and enforcement of builders and certifiers overall.

The fact that the BPB is currently not well enough resourced to perform its regulatory functions and responsibilities is conceded in the Maltabarow Report, LGNSW emphasises that resourcing and priorities of the BPB must be refocused and boosted as an urgent priority.

There are many issues with building certification and regulation that have persisted for too long and these must be given greater primacy by the NSW Government. We are happy to have a more detailed discussion with the BPB about matters raised in our submission and other more detailed issues at a later stage.

ATTACHMENT 1

KEY ISSUES FOR LOCAL GOVERNMENT

*Ref in
Maltabarow
report*

1. Enforcement and compliance is not rigorous enough.

At present, the system lacks clear enforcement obligations and the BPB is slow to act on non-compliance matters, leading to councils having to take on a greater enforcement role. Currently this function is defaulting to councils because of their legal powers (auditing and stop work provisions) and in the absence of any other authority charged with this responsibility. However it was never intended that councils would 'police' the private certifiers, and as competitors in this process, this outcome is an unintended consequence which conflicts with competition principles.

There is a need for a strong regulatory ('policing') role to monitor and regulate the work of private certifiers and police the level of compliance. The BPB currently only responds to complaints about certifiers, rather than undertaking a rigorous and ongoing 'policing' program, and councils currently do not have the power or the resources to audit complying development approvals.

A tougher regulator is required, with appropriate staffing resources and statutory provisions to conduct random checks/audits and to issue stop work orders in certain circumstances. This may involve additional staffing by the BPB or another appropriate body.

It is imperative that, like councils, private certifiers are made accountable to the public for their actions. Better policing of certifiers seeking accreditation and improving background checks on existing certifiers seeking higher accreditation levels as well as regular auditing of certifiers' work by the BPB would help promote council and public confidence in the private certification system.

There needs to be improved disciplinary action against certifiers for breaches and more of a presence from the BPB in regional/country areas.

*Section
2.8, p.8;
Section
3.6, p.13;
Section
3.11, p.16;
Section
10.4, p.42*

2. There are insufficient penalties.

A flow-on from the previous issue and one of the main problems with the current system, is the need for higher penalties to provide greater incentives for certifiers to do the right thing. Legislation governing building and certification regulation must contain stronger penalties for non-compliance with conditions of consent or breaches of the relevant Code of Conduct by private certifiers. We understand that this is a matter for the Building Professionals Board (BPB), and we urge that this issue is addressed as part of the review of the BPB Act.

3. Insurance and accountability of all involved in design and construction.

Currently, accountability for work done is based on a paper trail audit generated by the certifier, and not on actual and regular site inspections.

*Section
3.9, p.15*

One of the core issues is that the only person in the whole development process that is being held accountable and is required to hold insurance is the accredited certifier (including council). A certifier cannot reasonably take on responsibilities and liabilities of the whole design and construction team and each and every contractor.

It has been an ongoing concern, and one that was documented by the BPB more than two years ago⁵ that “one of the emerging trends associated with defects in buildings is that some accredited certifiers, as the only holders of mandatory professional indemnity insurance, are reportedly being pursued in legal claims for building work”.

An additional problem is that councils are regularly reporting cases where they end up ‘cleaning up’ after private certifier actions or inactions. It is too easy for private certifiers to ‘wash their hands’ of a development once they issue an Occupation Certificate. LGNSW therefore agrees with the Maltabarow Report that another key concern is that few certifiers and other building professionals avail themselves of run off insurance cover and that for this reason too often a person who may wish to make a claim has limited recourse.

Provisions are needed to ensure that the principal contractor and other professionals involved in the design and construction of a building are accountable for their work and hold professional indemnity and run off insurance accordingly. This issue appears to remain unresolved.

4. Performance and functions of the BPB.

*Section
3.11, p.16
and
Section
8.1, p.35*

Our member councils report a number of issues relating to the performance of the BPB, namely:

- Poor disciplinary action by BPB.

While Local Government acknowledges that there have been some improvements in the accreditation process for certifiers (since the establishment of the BPB in 2008) councils continue to cite cases where they consider that the BPB has failed to act (e.g. to investigate or discipline irresponsible certifiers), leading to a view within Local Government of poor performance of the BPB. Councils are consistently calling for clearly imposed penalties for private certifiers who are found to be negligent. The BPB is often referred to as a ‘toothless tiger’ that does not effectively reprimand certifiers.

- Audits by BPB are ineffective and unhelpful.

While the BPB does carry out audits of council and private certifiers, these are purely ‘desktop’ audits (i.e. checks of the paperwork), not random on-site inspections, and there are inconsistencies in the way these audits are undertaken by BPB staff. While each council reports having different experiences, a number of councils consider the manner in which the audits are conducted and the outcomes of these audits are insufficient and

⁵ BPB Submission to NSW Planning System Review, November 2011, p. 11

ineffective, with:

- inexperienced officers conducting the audit;
- a minimal amount of time spent reviewing files/procedures; and
- feedback, guidance and recommendations being almost non-existent.

The BPB should develop a prioritised program for these audits with particular attention on the companies/certifiers about whom there have been complaints.

- BPB does not determine complaints in a timely manner.

Some councils report that the BPB does not determine complaints in a timely manner and that there is no immediacy by the BPB to investigate these complaints. As a result, a complaint about a particular development is unlikely to affect or halt that development even if the issue was found to be illegal or sufficient to require work to be rectified or stopped. In some cases the delay in processing complaints about a certifier can lead to incompetent certifiers continuing to practise for a considerable time without appropriate BPB disciplinary action. The turnaround time on complaints made to the needs to be improved to stop illegal development before it has been constructed.

- The complaints system is onerous (refer to issue 5 below).
- BPB is under-resourced.

BPB is not well enough resourced to perform its existing functions and responsibilities, let alone an expanded set of roles and responsibilities. From the perspective of LGNSW and some councils, anecdotal evidence suggests that resourcing of the BPB is not a priority for the NSW Government. (For example, complaints are not investigated promptly; audits have been carried out by inexperienced staff; various consultation processes on policy and legislative reviews (e.g. Building Professionals Act, Better Buildings Model) appear to have stalled; there has been limited feedback to participants/stakeholders on progress of these reviews; and BPB staff fail on occasions to answer and/or return phone calls.

5. Complaints system is too onerous.

Councils report that the process to lodge a complaint with the BPB against a certifier is onerous and difficult. Where there are problems with the certification process, the present system requires councils to carry the weight of investigation when lodging a complaint. This involves acquiring an onerous amount of information, for which councils do not have the resources. The ultimate outcome is that councils and the community are discouraged from speaking out about poor practices, and certifiers who are not doing the right thing are getting away with it.

*Section 3.4
(p. 11)*

6. Councils are having to step in, with impacts on staff time, costs etc

As discussed above, where enforcement action is necessary (e.g. orders, fines, court action and physical rectification), councils are expending

significant resources resolving regulatory planning issues without resorting to 'formal' regulatory action. We understand that there are no mechanisms for councils to recover compliance costs associated with regulating private certifiers.

7. Clarity and purpose of Occupation Certificates.

There are currently differing opinions and a lack of clarity about what an Occupation Certificate is certifying and what is required prior to its issue. This originates with the fundamental question which needs to be clarified as to whether the Occupation Certificate is that a building is fit for occupation, or that the development as a whole has been 'completed'.

*Section
4.4, p.19*

If a development is not completed in accordance with the consent issued, this defeats the purpose of the consent and the reasons for the imposition of the conditions. It is expected that private certifiers would check that the requirements of the consent have been reasonably satisfied, in the same way that councils' building surveyors did in the past and still do. However, there is often inconsistency between the consent and the actual development that is finally approved with the issue of the occupation certificate.

The logical role of a final Occupation Certificate should be to certify that the works are complete and that the development complies with its consent. However the current system of issuing Occupation Certificates does not provide any mechanism for ensuring that all requirements of a development consent have been complied with. This is leading to inconsistency of application and uncertainty for property owners/purchasers. Councils can be subsequently involved in protracted dealings with the development applicant to satisfy these outstanding conditions, usually at great expense to the applicant and council.

8. Variations or disregard to conditions of consent.

Councils cite many instances of private certifiers issuing certificates that are significantly inconsistent with consents, failing to detect and act on unauthorised work during inspection, certifying incorrect plans or incorrectly applying BCA/Regulations (e.g. private certifiers ignoring the construction of entire unauthorised habitable basements in new houses and a certifier failing to properly monitor sediment and erosion control resulting in major siltation of a creek system.)

There is a diversity of opinions among councils as to whether or not construction plans should be strictly consistent with the development approval plans. While it is generally acknowledged that for practical reasons there needs to be some flexibility between development approval and construction approval, there are concerns that current practice is highly variable and has become too lenient. The accountability mechanism in place to encourage private certifiers to comply with all the relevant requirements is too weak and must be strengthened. A mechanism is needed to ensure that the "not inconsistent" test is not abused.

While having some flexibility available for design changes may be considered

reasonable for 'minor' modifications this could easily be misinterpreted to allow significant modification without recourse to the consent authority through the modification/s96 process. This could see an increase in 'unauthorised' work being carried out under the guise of 'minor modification'.

9. Unauthorised works and rectification issues

*Section
8.1, p.35*

In spite of State and Commonwealth regulations and the building inspection regime enshrined in legislation, councils cite numerous cases where significant defects continue to occur during building construction. Building defects impact the quality and liveability of buildings, affect property values and rental incomes, and can lead to ongoing damage to a building. They impose significant remediation costs on individual landowners and regulatory costs on councils.

Deficient privately certified development is generally brought to a council's attention by Fire & Rescue NSW, an owner/neighbour complaint or irregular/defective certification of fire safety measures installed in a building. Council officers endeavour to have the relevant private accredited certifier facilitate the remediation of the defective development, but these attempts are not often successful.

Another issue is that defective developments often remain latent and may not be identified for some considerable time after completion (e.g. following a fire incident reported to Council by Fire & Rescue NSW). Local Government understands that the BPB will not investigate issues more than three years old. The *Building Professionals Act* (s23 (g)), provides a discretionary power for the BPB to dismiss any complaint against a private accredited certifier when the complaint relates to a matter which occurred more than 3 years before making the complaint. Councils have reported that they have lodged a number of complaints against private accredited certifiers that were dismissed by the BPB merely because the general policy is to dismiss complaints where they relate to a matter that occurred more than three years before the making of the complaint. Unfortunately for occupants/owners, defective developments may remain latent for a number of years before coming to the attention of councils.

An examination of the BPB website – summary of decisions, reveals that there are numerous cases where the private certifiers are found guilty of unsatisfactory professional conduct and professional misconduct. In such cases the matter is ultimately referred back to the relevant council to take action to rectify the matter. It is inappropriate that councils have this responsibility when they have had no involvement in the certification of the development in the first place, and it is unjust that local ratepayers haven't ultimately fund such action, often including legal costs. A single authority must be given clear powers to act in these situations. Councils having to deal with the errors of private certifiers is one of the primary reasons for the angst between councils and private certifiers in the industry.

10. Mandated contracts

LGNSW acknowledges that the intent of having mandated contracts was to address concerns about potential conflicts of interest between builders and

*Section
7.4, p.33*

certifiers and facilitate good working relationships to secure regulatory outcomes and protect the owner's interests. However, as noted in the Maltabarow Report, councils consider the provisions introduced on 1 March 2013 requiring mandated contracts between owners and certifiers serve no real purpose and are impractical to implement, and the template provided by the BPB is difficult to understand and unhelpful from the point of view of certifiers as a contracting party. Local Government therefore opposes having mandated contracts, but nevertheless agrees there is certainly a need to ensure that applicants know what services the certifying authority will provide and who will carry out the work. A simple certifier agreement which identifies the respective rights and responsibilities of each stakeholder should be sufficient.

*Section
3.7, p. 14*

11. Various certification issues relating to swimming pools, fencing, food premises and other activities.

Councils have reported various issues of concern in the area of regulation of the following:

- Non-compliances in relation to swimming pools and fencing, even though an owner has been given an Occupation Certificate.
- Some pool maintenance companies are now offering inspections and issuing a "certificate" saying the pool meets BCA standards, but this certificate is not a certificate under the Pools Act. This is a matter that should be taken up by the Department of Fair Trading.
- No level playing field in relation to fees - Private certifier can determine their own fee (e.g. \$300 or \$400), whereas councils are bound by the Swimming Pools Act (and can only charge \$150 first inspection & \$100 subsequent).
- Approval of (and/or failure to notice) structures within isolated pool areas, that are not related to pool storage, equipment or specific-pool use.
- The generally limited expertise and experience of private certifiers in properly assessing the requirements for food premises.

12. Skills, training and education of certifiers.

With the steady increase in complying development and forecasts of growth in the building/development sector, some councils have expressed concern about the lack of competent building certifiers that will be available to effectively cope with market demand. This is of equal concern in both metropolitan areas - where growth is expected to increase – and rural/regional locations – where there is already a limited availability of private certifiers. Local Government is concerned that the increased demand placed on industry for certifiers, as the market expands could lead to a lessening of standards (by certifiers) if there are not enough certifiers to meet market demand.

*Section
10.4, p.42*

Local Government agrees that there is definitely a need for the BPB to provide greater guidance and practice notes to assist certifiers. Councils

have indicated that communication from the BPB can be improved by sharing key learnings (e.g. from their audit processes), providing checklists and general advice to certifiers.

Councils have also commented that there is inadequate training of various practitioners involved in the design, construction and maintenance of buildings (i.e. designers, architects, builders, trades, certifiers and the like).

A potential solution to this potential shortfall is for the BPB to train more certifiers, or accredit other professionals (e.g. planners, engineers). Councils have also been quick to point out that training needs to take on a more practical component, and accreditation process needs to take into account both degree qualifications as well as years of relevant practical experience.

13. Reduced or missed payments for section 94 and 94A contributions

A common issue faced by councils is that a private certifier neglects to advise the applicant they are liable for s94 and 94A contributions. This is yet another area requiring follow up. Another issue is that councils regularly see cases where applicants seek to reduce the contribution amount payable by reducing the declared number of rooms in, or value of, their project. An example cited by some councils is when a complying development certificate is issued for detached habitable rooms that turn out to be separate residences or multiple occupancies, in order to evade the correct assessment process and payment of Section 94 contributions.

For this reason, councils argue that private certifiers should not be able to release final occupation certificates until notice is given by council that all fees and charges including monetary contributions under s94/s94A have been paid in full.

ATTACHMENT 2

Summary of Key Observations and Recommendations in LGNSW Submission

Observations and recommendations of LGNSW	<i>Relevant section in LGNSW submission</i>
<p>LGNSW makes the following observations with regard to the overall context in which building certification operates:</p> <ul style="list-style-type: none"> The introduction of a tougher building regulation regime is essential if code based assessment and private certification are to be expanded. 	2.0 Context
<p>LGNSW makes the following observations with regard to key issues for Local Government:</p> <ul style="list-style-type: none"> There are a number of issues with building certification and regulation that need further analysis and resolution. These problems stem largely from the unclear roles and responsibilities of all players and a lack of regulatory clout and oversight of the entire process by the BPB. The private certification system has a poor track record with respect to issuing certificates that are significantly inconsistent with consents, failing to detect and act on unauthorised work; and certifying incorrect plans or incorrectly applying BCA/Regulations. The BPB has been criticised for a lack of disciplinary action in response to complaints about certifiers. 	3.0 Issues and Attachment 1
<p>LGNSW makes the following observations with regard to the status of the White Paper and planning Bills:</p> <ul style="list-style-type: none"> Despite the current status and unknown future of the new legislation, Local Government sees the directions and priorities of these and the other White paper reforms reforms as critical to improving building regulation and certification. 	4.1 Status of White Paper and Planning Bills
<p>LGNSW makes the following observations with regard to key White Paper reforms to building regulation and certification :</p> <ul style="list-style-type: none"> LGNSW and councils welcomed proposed provisions in the White Paper to tighten building regulation and address many of the known issues While there is broad support within the Local Government sector for these changes, there are specific details and practical implications that will need to be resolved. Notwithstanding the outcome of the Exposure Bills, it is critical that Local Government expertise is sought during the development of any policies, guidelines, regulations and detailed implementation 	4.2 White Paper Reforms

<p>of aspects of these reforms.</p>	
<p>LGNSW makes the following observations with regard to Fire protection and waterproofing:</p> <ul style="list-style-type: none"> Local Government supports key changes outlined in the White Paper which propose a system for certification that places greater responsibility on contractors, installers and building practitioners (with appropriate accreditation of individuals certifying fire safety systems) to ensure that fire safety systems and other key building components are compliant. 	<p><i>Section 4.2.1 Fire protection and waterproofing</i></p>
<p>LGNSW makes the following observations with regard to Occupation Certificates:</p> <ul style="list-style-type: none"> LGNSW agrees that the existing role of the Occupation Certificate is unclear. However, we strongly disagree with the proposition of removing the “not inconsistent” test that without a suitable regulatory alternative first being put in place. LGNSW understands there has been some discussion within the profession regarding possible options to provide certainty for consumers about compliance, and we would be happy to discuss potential options with the BPB. 	<p><i>Section 4.2.2 Occupation Certificates and Attachment 1</i></p>
<p>LGNSW makes the following observations with regard to roles and responsibilities:</p> <ul style="list-style-type: none"> The need for clear boundaries between regulation, enforcement and service provision is at the heart of the problems between councils and private certifiers. The respective roles of council as the ‘approving authority’, council as ‘certifier’, private certifiers, and the BPB need to be clarified and refined to ensure there are no overlaps, gaps or potential implications for the principles of competition. 	<p><i>Section 4.2.3 roles and responsibilities</i></p>
<p>LGNSW makes the following observations with regard to proposed expert panels:</p> <ul style="list-style-type: none"> LGNSW supports the recommendation to establish a number of ‘expert panels’ in principle, however we would favour the establishment of only one panel, rather than three separate panels. LGNSW cautions against having more panels do more analysis without really moving forward with specific recommendations. LGNSW urges that any stakeholder panels established by either the BPB and or NSW P&I to consider building and certification reforms are aligned to avoid duplication and confusion. 	<p><i>Section 5.1 Recommendations 12.1, 12.2 and 12.3 – Expert panels</i></p>
<p>LGNSW makes the following observations with regard to the “not inconsistent” provisions:</p> <ul style="list-style-type: none"> While there are a number of problems in the application and 	<p><i>Section 5.2.1 “Not inconsistent”</i></p>

<p>interpretation of the “not inconsistent” provision, LGNSW does not support the removal of this provision at Occupation Certificate stage, without a robust alternative first being put in place.</p> <ul style="list-style-type: none"> • LGNSW understands there has been some discussion within the profession regarding possible options to provide certainty for consumers about compliance, and we would be happy to discuss potential options with the BPB. 	<p><i>test and Attachment 1</i></p>
<p>LGNSW makes the following observations with regard to mandated contracts:</p> <ul style="list-style-type: none"> • LGNSW supports the removal of mandated contracts as recommended in section 12.4 and discussed in sections 3.7, 7.3 and 7.4 of the Maltabarow Report • LGNSW supports the intent of having mandated contracts, to address concerns about potential conflicts of interest between builders and certifiers and facilitate good working relationships. • However, these contracts serve no real purpose and are considered unnecessary, cumbersome and impractical. • A simple agreement which identifies the respective rights and responsibilities of each stakeholder should be sufficient. 	<p><i>Section 5.2.2 mandated contracts and Attachment 1</i></p>
<p>LGNSW makes the following observations with regard to the recommendation re benchmarking fees:</p> <ul style="list-style-type: none"> • LGNSW supports the idea of having an independent body, such as IPART publish a benchmark range of fees. 	<p><i>Section 5.3 – guideline on fees</i></p>
<p>LGNSW makes the following observations with regard to the Building Professionals Board:</p> <ul style="list-style-type: none"> • The single biggest issue for Local Government with the BPB is its apparent lack of ‘teeth’ in relation to matters of compliance and enforcement. • LGNSW is pleased to see a number of conclusions and recommendations relating to the operation of the BPB, and recognition of the need for more resources for investigation and compliance. • The resourcing and priorities of the BPB must be refocused and boosted so that complaints are investigated promptly; audits are carried out by experienced staff and communication to certifiers follows; and random onsite inspections are regularly conducted. • LGNSW supports the conclusions and recommendation that the BPB Secretariat must be restructured to include an expanded investigation/audit function and tasked with developing a work program that will address a number of key elements. • LGNSW holds the view that the BPB is an enforcement body and should therefore be an independent entity and not merely an advisory body to certain parts of NSW Planning and Infrastructure. Anything less than an independent entity would be unacceptable. 	<p><i>Section 5.4 and Attachment 1</i></p>
<p>LGNSW makes the following observations with regard to a coordinated</p>	<p><i>Section 5.5</i></p>

<p>joint program:</p> <ul style="list-style-type: none"> • LGNSW supports the need for a coordinated joint program of building sector reforms agreed between the State administrations of Planning and Infrastructure, Fair Trading and Local Government. • LGNSW proposes that the joint program should be overseen by a sub-committee of the respective NSW Government Ministers with responsibility for these areas, and a strengthened and independent BPB regulator to coordinate and lead the development of the program. 	<p><i>implementation coordination</i></p>
<p>LGNSW makes the following observations with regard to a resourcing the recommendations of the Maltabarow Report:</p> <ul style="list-style-type: none"> • There will be costs involved in setting up expert panels. Costs would be reduced if only one expert panel was established and the expertise of existing advisory groups is utilised. • LGNSW would also like to see a specific recommendation included that seeks a commitment from the NSW Government to allocate the necessary and appropriate resources to implement the recommendations. 	<p><i>Section 5.6 resourcing the recommendations</i></p>