



Review of the *Building Act 1975* and building certification in Queensland

Final report of discussion paper

Andrew Wallace
Barrister-at-Law

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Final Report of the Review of the Discussion
Paper –
A review of the *Building Act 1975* and building
certification in Queensland

Report to the Honourable Tim Mander, Minister
for Housing and Public Works

Andrew Wallace
Barrister-at-Law

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This is the Final Report in response to the Discussion Paper entitled 'A review of the *Building Act 1975* and building certification in Queensland', prepared to assist the Minister for Housing and Public Works gain an understanding of the various issues confronting stakeholders in the building and construction industry, particularly in relation to the operations of the *Building Act 1975* and building certification in Queensland.

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Table of Contents

ABBREVIATIONS.....	6
1. EXECUTIVE SUMMARY.....	7
TABLE OF RECOMMENDATIONS	11
2. HISTORY OF THE <i>BUILDING ACT 1975</i> AND PRIVATE CERTIFICATION	38
3. BACKGROUND	38
4. PURPOSE OF THE DISCUSSION PAPER	40
5. TERMS OF REFERENCE	41
6. REVIEW METHODOLOGY	43
7. OBJECTIVES OF THE <i>BUILDING ACT 1975</i>.....	46
8. GENERAL COMMENTS FROM THE AUTHOR	46
9. GENERAL COMMENTS AND FEEDBACK FROM CONTRIBUTORS	48
10. CONSULTATION ISSUES	49
1.0 Building Certifiers	49
Question 1.1.1: Which is your preferred option for improving the private certification system?	49
Question 1.1.1 – Recommendations	65
Question 1.2.1: Should it be made mandatory for an owner to engage a building certifier?	66
Question 1.2.1 – Recommendations	73
Question 1.2.2: If it should not be mandatory for an owner to engage a building certifier is there a need to make owners more aware of their ability to engage a certifier?	74
Question 1.2.2 – Recommendations	77
Question 1.2.3: Should owners have an increased ability to request information or inspections from a certifier?	78
Question 1.2.3 – Recommendations	81
Question 1.2.4: Do you support mandatory requirements for a certifier to provide inspection documentation to the owner?	83
Question 1.2.4 Recommendations	85
Question 1.3.1: Which is your preferred option for strengthening the disengagement process?	87
Question 1.3.1 Recommendations	95
Question 1.4.1: Do you support the introduction of a fourth ‘inspector’ level of building certifier?	97
Question 1.4.1 Recommendations	109
Question 1.4.2: Do you think the Commission not accreditation bodies should be responsible for assessing qualification and experience requirements for certifiers?	111
Question 1.4.2 Recommendations:	118
Question 1.5.1: Which is your preferred option in relation to the Code of Conduct?	119
Question 1.5.2: If you support retaining the Code of Conduct, what format would you prefer:	119
Question 1.5.1 and 1.5.2: Recommendations:	122
Question 1.6.1: Do you support the creation of a new guideline clarifying when a certifier may provide advice during the design stage of a building?	123
Question 1.6.1: Recommendations	136
Question 1.6.2: Do you think that building certifiers providing advice outside of the building approval process should be subject to disciplinary action for providing incorrect or misleading advice?	138
Question 1.6.2 Recommendations	141
Question 1.7.1: Which is your preferred option for improvements to the disciplinary framework?	142
Question 1.7.1: Recommendations	156
Question 1.8.1: Do you think a demerit point system for building certifiers should be introduced?	158
Question 1.8.1: Recommendations	164
Question 1.9.1: Do you think that mandatory CPD for certifiers should be linked to their licence requirements instead of their accreditation?	166
Question 1.9.1 Recommendations	170

Question 1.9.2: Do you think the Commission should have the ability to direct CPD bodies to address specific subject areas?.....	171
Question 1.9.3: Do you think CPD activities for building certifiers should also be made available to other industry practitioners?.....	171
Question 1.9.2: Recommendations.....	175
Question 1.9.3: Recommendations.....	176
Question 1.10.1: Which is your preferred option for improving accountability and record-keeping requirements for private certifier employers?.....	177
Question 1.10.1: Recommendations.....	190
2.0 Development Applications and Approvals.....	192
Question 2.1.1: Do you think local governments should be required to provide advice to certifiers about planning scheme compliance if requested that can be relied upon by the certifier?.....	192
Question 2.1.1: Recommendations.....	200
Question 2.2.1: Which is your preferred option for improving the current lapsing framework?....	202
Question 2.2.1: Recommendations.....	210
Question 2.3.1: Do you think the current referral triggers should be reviewed with the aim of reducing the number of referrals needed for building development applications?.....	212
Question 2.3.1: Recommendations.....	220
Question 2.4.1: Do you think the scope of building work that does not require an approval should be increased?.....	221
Question 2.4.2: If yes, can you list any examples of building work that could be made self-assessable or exempt?.....	221
Questions 2.4.1 and 2.4.2: Recommendations.....	232
3.0 Inspection and certificates.....	234
Question 3.1.1: Do you think the current [Form 15] and Form 16 should be reviewed?.....	234
Question 3.1.2: If so list any possible changes or improvements.....	234
Question 3.1.3: Do you think the use of competent persons should be restricted to certain aspects of building work?.....	234
Question 3.1.1: Recommendations.....	246
Question 3.1.3: Recommendations.....	263
Question 3.2.1: Do you think additional mandatory inspections should be introduced in relation to houses, duplexes, villas and townhouses (class 1a buildings)?.....	266
Question 3.2.2: If yes list the type of inspections you think should be considered for class 1a buildings.....	266
Question 3.2.3: Do you think mandatory inspections should be introduced for other types of buildings?.....	266
Question 3.2.4: If so list the types of inspections you think should be considered for other classes of buildings.....	266
Question 3.2.1: Recommendations.....	272
Question 3.2.3: [Mandatory inspections for class 2 - 9 buildings].....	274
Question 3.2.3: Recommendations.....	280
Question 3.3.1: Which is your preferred option for providing clarification on the use of technology in inspections?.....	281
Question 3.3.2: To what extent should a building certifier rely on technology when performing an inspection?.....	281
Question 3.3.1 and 3.3.2: Recommendations.....	291
Question 3.4.1: Which is your preferred option for improving the use of certificates of classification?.....	293
Question 3.4.1 : Recommendations.....	305
Question 3.5.1: Which is your preferred option for clarifying when certificates of classification should be given for pre-1998 buildings?.....	307
Question 3.5.2: Do you support allowing a 'final' certificate to be issued for a single detached house or shed independently of a building development approval?.....	307
Questions 3.5.1 and 3.5.2: Recommendations.....	319
4.0 Enforcement of building standards	321
Question 4.1.1: Do you support local governments taking over the enforcement processes for defective building work after a certifier has issued a show cause notice?.....	321
Question 4.1.1: Recommendations.....	328
Question 4.2.1: Which is your preferred option for improving the pool safety management plan framework?.....	329
Question 4.2.1: Recommendations.....	334
Question 4.3.1: Which is your preferred option for providing greater oversight of energy assessors?.....	336
Question 4.3.1: Recommendation.....	341

Question 4.4.1: Which is your preferred option for improving the framework for self-assessable government building work?.....	342
Question 4.4.1: Recommendation.....	347
5.0 Miscellaneous.....	348
Question 5.1.1: In your opinion is the current building certification system working well in rural and regional Queensland?.....	348
Question 5.1.1: Recommendation.....	362
Question 5.2.1: Do you support the relocation of the provisions in the Building Act 1975 that relate to licensing and disciplinary action of building certifiers to the Queensland Building and Construction Commission Act 1991?.....	364
Question 5.2.1: Recommendations.....	365
6.0 Further Recommendations.....	366
6.1.1 Swimming pool safety.....	366
6.1.1 Recommendation.....	367
6.1.2 Minimum standard of design documentation.....	368
6.1.2 Recommendation.....	371
6.1.3 Local Planning Instruments.....	372
6.1.3 Recommendation.....	372
6.1.4 Accountability of building and construction industry stakeholders.....	373
6.1.4 Recommendations.....	383
6.1.5 Waterproofing.....	384
6.1.5 Recommendation.....	386
6.1.6 Limitation of liability in relation to building work.....	387
6.1.6 Recommendation.....	394
6.1.7 Guidelines.....	395
6.1.7 Recommendations.....	398
6.1.8 Relocation of Building Codes Queensland.....	400
6.1.8 Recommendations.....	404
6.1.9 Building Forms.....	405
6.1.9 Recommendation.....	405
6.1.10 Attract new entrants to the building certification profession.....	406
6.1.10 Recommendation.....	408
6.1.11 Pool safety inspectors.....	410
6.1.11 Recommendation.....	411
6.1.12 Fire safety in residential care buildings.....	412
6.1.12 Recommendation.....	414
6.1.13 Post-report industry consultation.....	415
6.1.13 Recommendation.....	415
Table of Cases:.....	416
Table of Statutes.....	418
Bibliography:.....	419
ANNEXURE A:.....	426
ANNEXURE B:.....	434
ANNEXURE C:.....	436
ANNEXURE D:.....	446
ANNEXURE E:.....	447

ABBREVIATIONS

AIB	Australian Institute of Building
AIBS	Australian Institute of Building Surveyors
AS	Australian Standards
BCA	Building Code of Australia
BCIPA	<i>Building and Construction Industry Payments Act 2004</i>
BCQ	Building Codes Queensland
BDAQ	Building Designers Association of Queensland
BIPU	Building Industry Policy Unit
CRC	Cairns Regional Council
DTS	Deemed-to-satisfy
Department	Department of Housing and Public Works
FPA Australia	Fire Protection Association Australia
GRC	Gladstone Regional Council
Goondiwindi RC	Goondiwindi Regional Council
HIA	Housing Industry Association
LCC	Logan City Council
LGAQ	Local Government Association of Queensland
MBA	Master Builders Australia
NCC	National Construction Code
QBC Board	Queensland Building and Construction Board
QBCC	Queensland Building and Construction Commission
QBSA	Queensland Building Services Authority
QCAT	Queensland Civil and Administrative Tribunal
QDC	Queensland Development Code
QFES	Queensland Fire and Emergency Services
QHWS	Queensland Home Warranty Scheme
RICS	Royal Institution of Chartered Surveyors

1. EXECUTIVE SUMMARY

- [1] The *Building Act 1975* commenced on 1 April 1976. It prescribed for the first time, standard building by-laws for all building work in Queensland. Until that time, building regulations were provided in an ad-hoc manner in local government by-laws.
- [2] The *Building Act 1975* and the *Building Regulation 2006* when used together are referred to as 'the building legislation'.
- [3] The building legislation and associated statutory instruments form a complex web of interconnected rules which regulate the building control system in Queensland. Prior to 1998, the building control system was administered solely by local governments whose building departments would assess and approve building applications and inspect and approve building work.
- [4] The dual public/private system of building certification was introduced in Queensland on 30 April 1998. Since that time, there have been numerous reviews of the certification system, particularly in the past decade.
- [5] The Minister for Housing and Public Works initiated a 'root and branch' review (the Review) of the building legislation and the system of private certification following a number of complaints regarding sub-standard building and certification work in Mackay in February 2014.
- [6] Running parallel with the Review, Building Codes Queensland (BCQ) have also undertaken a 'page-turn' review of the building legislation in an effort to identify redundant provisions as part of the Government's commitment to reduce the legislative and regulatory burden on business by 20% by 2018. The results of that 'page-turn' review are not considered in this report.

Key Reforms

Increased accountability

- [7] There is one consistent theme which permeates the 122 recommendations (the Recommendations) contained within this report and that is the need for increased accountability, not just for building certifiers, but for all building and construction industry stakeholders.

[8] The Recommendations can be distilled into 4 discrete categories of reform, involving:

- (1) Building certifiers;
- (2) Development applications and approvals;
- (3) Inspections and certificates;
- (4) Enforcement and miscellaneous matters.

Building certifiers

[9] The key elements of reform in relation to building certifiers include:

- (1) The retention of a dual public and private system of building certification, but with a number of appropriate amendments;
- (2) Building certifiers (whether they are employed by local government or within the private sector) together with all industry stakeholders, should be held appropriately accountable for their acts, errors and omissions, whilst retaining their entitlement to procedural fairness;
- (3) Consumers should be educated about the important role played by building certifiers in the building control process and how building certifiers may be engaged directly and used to enhance the quality and the standard of building work (consumer education);
- (4) Disengagement of a building certifier may only be permitted with the consent of the Queensland Building and Construction Commission (QBCC);
- (5) Recognition that industry must attract more people into the private certification profession ("more boots on the ground") by:
 - (i) Introducing a fourth level inspector;
 - (ii) The appropriate training, use and supervision of cadet certifiers;
 - (iii) Ensuring that building certifier training courses are relevant, up to date and meeting the expectations of the industry.
- (6) The building legislation and the Code of Conduct for building certifiers (the Code of Conduct) should be amended to reflect a greater emphasis on the public interest being the 'overriding duty' of the building certifier which prevails to the extent of inconsistency with any other duty;
- (7) The building legislation and/or a guideline should clarify when a building certifier can provide regulatory and design advice;
- (8) The disciplinary system of building certifiers should be amended to ensure that accountability, education and deterrence are provided through:
 - (i) Appropriate, flexible and equitable penalties;
 - (ii) The establishment of a demerit point system.

- (9) Mandatory compulsory professional development (CPD) for all building industry stakeholders;
- (10) The licensing of private certifier employers.

Development applications and approvals

[10] The key elements of reform in relation to development applications and approvals include:

- (1) Private certifiers should be able to rely upon town planning scheme compliance advice provided by a local government or its authorised town planner;
- (2) The provision for greater flexibility for building certifiers to be able to determine when a building approval should lapse and when it should be reinstated;
- (3) No expansion of self-assessable building work in Wind Region C (tropical cyclone region);
- (4) Expansion of self-assessable building work in Wind Region B.

Inspections and certificates

[11] The key elements of reform in relation to inspections and certificates include:

- (1) Overhaul of the Form 15 and Form 16 and the stricter auditing by the QBCC of their use;
- (2) With some exceptions, building certifiers should conduct physical on-site inspections in relation to all mandatory inspections;
- (3) The use of competent persons should be restricted and subject to stricter auditing by the QBCC;
- (4) The mandatory minimum inspections for single detached houses should remain unchanged and be replicated for duplexes, villas and townhouses (attached class 1a buildings) with additional mandatory inspections for firewalls;
- (5) Class 2-9 buildings should have mandatory inspections for passive fire separation elements and a final inspection;
- (6) The use of technology during building inspections should only be used as an aid to assist the process of undertaking a physical inspection of building work;
- (7) A Decision Notice should record the classification of a building and the version of the National Construction Code (NCC) by which the building was assessed;
- (8) In order to cut unnecessary red tape, develop a single certificate of occupancy model allowing a person to request a certificate that is not tied exclusive to a building development approval.

Enforcement and miscellaneous matters

- [12] The key elements of reform in relation to enforcement and other miscellaneous matters are:
- (1) A private certifier should be able to refer building and construction compliance issues to the QBCC, after serving a show cause notice;
 - (2) A private certifier should be able to refer planning compliance or other local government compliance issues to the local government, after serving a show cause notice;
 - (3) Streamline the application process for pool safety management plans for class 3 buildings;
 - (4) Government should not intervene in the amounts charged by building certifiers by introducing a mandatory minimum scale of certification fees;
 - (5) Building certification work should be removed as an exemption from the definition of 'building work' from s.5 and Item 34 of Schedule 1AA of the *Queensland Building and Construction Commission Regulation 2003*;
 - (6) A limitation of actions period of 10 years should be introduced for all building work;
 - (7) Private certifiers, inspectors and pool safety inspectors should have a minimum of \$2,000,000.00 professional indemnity insurance coverage;
 - (8) Subject to a cost-benefit analysis, establish the Building Industry Policy Unit (BIPU) within the organisational structure of the QBCC using staff from BCQ. BCQ should then be disbanded.
- [13] The Review has also examined alternative markets for building certifiers by eliminating artificial brakes on productivity.
- [14] The Recommendations should be considered as a suite of broad reforms which seek to strike the balance of maintaining appropriate regulation of the building control system to ensure accountability and the health and safety of the community, whilst reducing unnecessary red tape so that wherever possible, Government does not intervene further in an already heavily regulated industry.
- [15] A reference in this Report to the term 'building certifiers' means both private certifiers and local government certifiers. In most instances, submitters have been disclosed where their identities have been known. Most survey responses did not identify the submitter. In circumstances where the submitter has wished to remain anonymous or where the Review has considered it appropriate, the identity of a submitter has been withheld.

TABLE OF RECOMMENDATIONS

1.	Retain the current system of private certification with appropriate improvements.
2.	The Code of Conduct for building certifiers should be amended to remove reference to the phrase “potential conflict of interest” and be replaced with “conflict of interest”.
3.	It should not be made mandatory for an owner to engage a building certifier.
4.	It should be made mandatory for a building development application to be accompanied by the owner’s written consent for the application. This could be done by an amendment to the Form 1 Application, which would require the approval signature of the building owner.
5.	The use of the term “client” in the <i>Building Act 1975</i> when referring to the engagement and on-going responsibilities of the private certifier should be replaced with another term that connotes less of a fiduciary relationship, such as “applicant” or “engaging party”.
6.	<p>There is a need to ensure that owners are made aware of their ability to directly engage a building certifier and that with the certifier’s agreement, the engagement may involve more than the minimum mandatory inspections. This may be effected by alerting owners via a conspicuous notice contained in:</p> <p>(a) Contractual provisions in level 1 and level 2 regulated building contracts by making amendments to ss.13(3) and 14(3) of Schedule 1B of the <i>Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014</i>. To provide greater awareness of these opportunities, it is advisable that the amendments require that the conspicuous notice be separately signed or initialed by the building owner(s); and</p> <p>(b) The <i>Consumer Building Guide</i> referred to in schedule section 18 of the <i>Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014</i>.</p>
7.	<p>Regardless of who has engaged the building certifier, if requested in writing by a building owner, the building certifier must within 5 business days of the request inspect the building for the purposes of conducting a final inspection and if satisfied that:</p> <p>(a) The provisions contained within s.99 of the <i>Building Act</i></p>

	<p>1975 have been satisfied, issue the owner with a final inspection certificate in respect to class 1 and 10 buildings; or</p> <p>(b) The provisions contained within s.102 of the <i>Building Act 1975</i> have been satisfied, issue the owner with a certificate of classification in respect to class 2-9 buildings.</p>
8.	An owner upon agreement with the building certifier, should be able to engage the building certifier to undertake more than the minimum mandatory inspections for an agreed cost, with such costs to be set out in the contract between the building certifier and the owner.
9.	Regardless of who has engaged the building certifier, the building certifier must provide the building owner with all inspection documentation, including non-compliance notices within 5 business days of the relevant stage being reached.
10.	The Review notes and supports the provisions contained in s.14(5) of Schedule 1B of the <i>Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014</i> which provides that a 'level 2 regulated contract' must contain a provision that states that the contractor may not claim payment for the completion of any stated stage, unless the contractor has given the owner all certificates of inspection relevant for the stage.
11.	Section 144 of the <i>Building Act 1975</i> should be amended to require an application for disengagement to be made by either the applicant for the building development approval or the building certifier and that such application is to be made to and determined by the QBCC for a reasonable scheduled fee in accordance with a published Queensland Building and Construction Board policy.
12.	<p>The QBC Board should develop a policy which would establish guidelines and factors to which the QBCC must take into consideration when determining whether or not to grant an application for disengagement, including:</p> <p>(a) Provision for the granting of the application in circumstances where the applicant has established on the balance of probabilities that the private certifier is incapable of discharging his or her duties whether for example by reason of the death, incapacity, insolvency, disappearance of the private certifier or the applicant to the building development approval, or on such other reasonable grounds determined by the QBCC;</p> <p>(b) Require the decision maker to at all times act in the public</p>

	<p>interest, but would allow the decision maker to take into consideration the consent to the disengagement by the builder, the building owner and the private certifier;</p> <p>(c) Enable the QBCC to charge a reasonable scheduled fee for the costs of deciding the application;</p> <p>(d) Enable the QBCC to obtain such third party advice as is reasonably required to assist it in deciding the application, the costs of which are to be borne equally by the applicant and the certifier ('the parties') or in such proportions decided by the QBCC;</p> <p>(e) Require a decision to be made on the application within 5 business days after receipt of the application, or such longer period as may be agreed by the parties, or failing agreement, the application should be deemed to have been refused if not made and communicated to the parties within 5 business days after the application is made.</p>
13.	Any decision made by the QBCC to grant or refuse an application for disengagement may be reviewed in the first instance to the Internal Review Unit of the QBCC and then if unsuccessful, ultimately to QCAT. Amendments would therefore be required to s.86(1) of the <i>Queensland Building and Construction Commission Act 1991</i> to facilitate that review.
14.	To prevent "certifier shopping", the <i>Building Act 1975</i> should be amended to prevent more than one building certifier (whether local government or private certifier) to be engaged per application/approval.
15.	The provisions relating to the licensing and discipline of building certifiers contained in Chapter 6 of the <i>Building Act 1975</i> and any related provisions contained within the <i>Building Regulation 2006</i> , should be relocated to become proposed Part 11 of the <i>Queensland Building and Construction Commission Act 1991</i> and Schedule 2 of the <i>Queensland Building and Construction Commission Regulation 2003</i> .
16.	<p>That the <i>Queensland Building and Construction Commission Act 1991</i> be amended to provide for the introduction of a fourth level certifier to be designated as an 'Inspector-restricted' to carry out inspections on behalf of a Level 1 or 2 building certifier in relation to structures not more than 3 storeys high or with a gross floor area not exceeding 2000m², but not including Type A construction on class 4 to 9 buildings, provided that the applicant:</p> <p>(a) Is an individual;</p> <p>(b) In the two years prior to applying, has held for at least 5 years as a minimum, a Builder-medium rise licence class,</p>

	<p>pursuant to the <i>Queensland Building and Construction Commission Act 1991</i>; and</p> <p>(c) Has completed further tertiary or vocational studies approved by the QBCC; and</p> <p>(d) Holds professional indemnity insurance in the minimum sum of \$2,000,000.00, with such scheme to be approved by the QBCC; and</p> <p>(e) Is a person of good standing; and</p> <p>(f) Participates in the mandatory CPD program for building certifiers; and</p> <p>(g) Is bound by the Code of Conduct for building certifiers.</p>
17.	<p>Further, that the <i>Queensland Building and Construction Commission Act 1991</i> be amended to provide for the introduction of a fourth level certifier to be designated as an 'Inspector-open' to carry out inspections on behalf of a Level 1 or 2 building certifier in relation to all classes of buildings, provided that the applicant:</p> <p>(a) Is an individual; and</p> <p>(b) In the two years prior to applying, has held for at least 5 years as a minimum, a Builder-open licence class, pursuant to the <i>Queensland Building and Construction Commission Act 1991</i>; and</p> <p>(c) Has completed further tertiary or vocational studies approved by the QBCC; and</p> <p>(d) Holds professional indemnity insurance in the minimum sum of \$2,000,000.00, with such scheme to be approved by the QBCC; and</p> <p>(e) Is a person of good standing; and</p> <p>(f) Participates in the mandatory CPD program for building certifiers; and</p> <p>(g) Is bound by the Code of Conduct for building certifiers.</p>
18.	<p>An Inspector-restricted licence holder should be able to attain the licence category of Inspector-open via successful application for recognition of prior learning to a registered training organisation.</p>
19.	<p>In line with the other licensees it regulates, the QBCC ought to be responsible for setting the qualifications and experience requirements for certifiers.</p> <p>The QBCC should regularly consult with industry and the current accreditation standards bodies, the Australian Institute of Building Surveyors and the Royal Institution of Chartered Surveyors to determine the appropriate qualifications and experience requirements for building certifiers.</p>

20.	Applications for the review of decisions made by the QBCC in relation to the accreditation and licensing of building certifiers may be made to the QBCC Internal Review Unit and ultimately to QCAT. Amendments would therefore be required to s.86(1) of the <i>Queensland Building and Construction Commission Act 1991</i> to facilitate that review.
21.	Retain the Code of Conduct in a stand-alone document, given effect by regulation.
22.	The Code of Conduct should be reviewed to properly reflect the accepted recommendations of this Review and the recommendations contained in the Transport, Housing and Local Government Committee Report No.14 into the Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012.
23.	Sections 127(1) and 136(1) of the <i>Building Act 1975</i> together with the Code of Conduct for building certifiers should be amended to reflect a greater emphasis on the public interest being the 'overriding duty' of the building certifier which prevails to the extent of inconsistency with any other duty.
24.	<p>Pursuant to s.258 of the <i>Building Act 1975</i>, the chief executive should develop a clear guideline which clarifies:</p> <ul style="list-style-type: none"> (a) The circumstances in which a building certifier when engaged to perform certifying functions may provide regulatory and design advice in the design or construction phase of a building under their jurisdiction. This regulatory and design advice ought not involve the actual design or formulation of alternative solutions; (b) That building surveyors who are acting as consultants but NOT engaged as building certifiers may provide any services including the actual design and formulation of alternative solutions in the design or construction phase of a building for which they are competent. However, it ought to be considered a conflict of interest for the building certifier and the building surveyor where a building surveyor provides those services in circumstances where: <ul style="list-style-type: none"> (i) The building surveyor is employed by the building certifier responsible for performing certification work for the same building; or (ii) The building surveyor is employed by the same entity which employs the building certifier responsible for performing certification work for the same building. <p>For the purposes of this recommendation a person is regarded as employed regardless of whether the person is</p>

	<p>engaged under a contract of service (as an employee) or a contract for service (as a subcontractor).</p> <p>(c) To remove doubt, a building surveyor who has provided building consultancy services in respect to a building should be entitled to be engaged as the building certifier for a building development application for the building, provided that he or she has not provided the actual design or formulation of an alternative solution as part of the building development application.</p>
25.	In addition to Recommendation 24, ss.128 and 137 of the <i>Building Act 1975</i> should be amended to clarify the functions of building certifiers and building surveyors.
26.	<p>The following terms should be defined in the <i>Building Act 1975</i> and the <i>Queensland Building and Construction Commission Act 1991</i>:</p> <p>(a) Building surveyor; and</p> <p>(b) Building surveying function [See Recommendations 24(b) and (c)]</p>
27.	A building surveyor who is providing a building surveying function in relation to a building but who is not engaged as a building certifier for the building, ought not be considered as carrying out a certifying function in respect to the building. In addition, building surveyors ought not be required to comply with the Code of Conduct for building certifiers. Therefore building surveyors ought not be the subject of complaints, investigations and disciplinary proceedings relating to building certifiers currently under Chapter 6, Part 4 of the <i>Building Act 1975</i> .
28.	<p>Building surveyors ought to be licensed by the QBCC and should fall within the usual disciplinary process of licensees governed by the <i>Queensland Building and Construction Commission Act 1991</i>. Note however:</p> <p>(a) Building surveyors who are also licensed as building certifiers, ought not have to pay an additional licence fee;</p> <p>(b) The definition of “surveyor” in s.6 of Schedule 1AA of the <i>Queensland Building and Construction Commission Regulation 2003</i> should be amended to remove any confusion between a licensed building surveyor and licensed cadastral surveyor.</p>
29.	The distinction between “unsatisfactory conduct” and “professional misconduct” ought to be retained.

30.	A third category of building certifier misconduct should be established for minor administrative errors.
31.	<p>The QBCC ought to have a discretion to be able to issue a building certifier with an Improvement Notice for minor administrative errors or for a first offence (provided it is not conduct which amounts to professional misconduct) without such to be listed on the building certifier's public record.</p> <p>Note: for the purposes of this recommendation a minor administrative error or a first offence may involve multiple administrative errors or first offences or both.</p>
32.	The QBCC should place a greater emphasis on the auditing of building certifiers' assessment and inspection work, rather than relying upon administrative or "desk-top" audits. The QBCC Certification Unit should be appropriately funded to carry out this work and to ensure that it is able to attract and retain sufficiently experienced personnel.
33.	<p>Subject to any administrative review entitlements, the QBCC ought to have the sole responsibility for investigating and determining whether a building certifier has made a minor administrative error or engaged in unsatisfactory conduct or professional misconduct and for determining the appropriate penalty as detailed in s.211 of the <i>Building Act 1975</i>.</p> <p>However there should be a distinction between the person who investigates a complaint against a building certifier and the person who determines whether the complaint is made out and what the appropriate penalty should be. These tasks should be performed by a more experienced person within QBCC, ideally the Certification Manager or his or her superior.</p>
34.	<p>The QBCC should have the legislative power to dismiss a complaint made against a building certifier on the basis that it is frivolous, vexatious or lacking sufficient evidence to support the complaint.</p> <p>If dissatisfied with the decision, the complainant should be able to seek a review of the QBCC's decision from the Internal Review Unit and if the complainant remains dissatisfied after that process, the complainant should be able to review the decision in QCAT.</p> <p>Unless a complaint about the conduct of a building certifier in performing the building certifying function relates to the health and safety of building occupants, the ability to make a complaint</p>

	to the QBCC should be barred six years after a final inspection certificate or certificate of classification is issued, or if a certificate is not issued, six years after the building is occupied or could reasonably have been occupied.
35.	Decisions made by the QBCC in relation to the disciplining of building certifiers may be reviewed by the Internal Review Unit of the QBCC, prior to an application for a review of the decision to QCAT. Amendments would therefore be required to s.86(1) of the <i>Queensland Building and Construction Commission Act 1991</i> to facilitate that review.
36.	<p>To the extent that they are relevant to building certifiers and the building certifying function, building certifiers should be bound by the provisions contained in the following parts of the <i>Queensland Building and Construction Commission Act 1991</i>:</p> <ul style="list-style-type: none"> - Part 3 - Licensing - Part 3A – Excluded and permitted individuals and excluded companies - Part 3B – Permanently excluded individuals - Part 3C – Convicted company officers - Part 3D – Banned individuals - Part 3E – Disqualified individuals (Subject to Recommendation 37) - Part 6 – Rectification of building work - Part 7 – Jurisdiction of the tribunal - Part 8 – Registers - Part 9 – Inspectors - Part 10 – Miscellaneous - Part 11 – Proposed specific provisions in relation to the licensing and discipline of building certifiers - Part 12 - Proposed specific provisions in relation to the licensing and discipline of pool safety inspectors.
37.	<p>To achieve greater accountability of building certifiers, a demerit point system should be established which provides and promotes:</p> <ul style="list-style-type: none"> (a) Education before punishment; (b) The discretionary allocation of demerit points; (c) Flexibility so that it is capable of ‘ratcheting up’ the consequences for recalcitrant behaviour; (d) Appropriate deterrence; (e) Improvement within reasonable timeframes; and (f) Cultural change amongst building certifiers. <p>However, further investigation must be undertaken before any conclusions can be reached about the desirability of holding building certifiers to account under the current demerit point</p>

	scheme for building contractors established under Part 3E of the <i>Queensland Building and Construction Commission Act 1991</i> .
38.	<p>Further to the Recommendations made in response to Question 1.4.2, mandatory CPD for building certifiers should be linked to their licence requirements instead of their accreditation.</p> <p><i>The Queensland Building and Construction Commission Act 1991</i> and the <i>Queensland Building and Construction Commission Regulation 2006</i> should be amended to:</p> <ul style="list-style-type: none"> (a) Enable the QBCC to accredit organisations including current accreditation bodies to provide mandatory CPD programs to building certifiers (Certifier CPD Providers) renewable after a five year period; (b) Require Certifier CPD Providers to maintain a register of all CPD programs completed by building certifiers and provide them with certification of participation in those CPD programs; (c) Enable the QBCC to be a provider of CPD Programs.
39.	The QBCC should regularly consult with Certifier CPD Providers and industry groups to assist in the identification of emerging trends and common defects and difficulties encountered within the building and construction industry.
40.	The <i>Queensland Building and Construction Commission Regulation 2003</i> should be amended to require Certifier CPD Providers to liaise with and take direction from the QBCC in the formulation of specific subject areas identified as requiring attention.
41.	CPD Programs hosted by Certifier CPD Providers or the QBCC should also be made available to all QBCC licensees.
42.	<p>The <i>Queensland Building and Construction Commission Act 1991</i> and the <i>Queensland Building and Construction Commission Regulation 2003</i>, should be amended to phase in the introduction of mandatory CPD programs over a two year period for all QBCC licensees, both corporate and personal. The amendments should:</p> <ul style="list-style-type: none"> (a) Require CPD programs be hosted by Certifier CPD Providers and other bodies such as authorised trade membership associations (Contractor CPD Providers); (b) Accredite Contractor CPD Providers, renewable after a five year period; (c) Require Contractor CPD Providers to maintain a register of all CPD programs completed by licensees and provide licensees with certification of participation in those CPD

	<p>programs;</p> <p>(d) Enable the QBCC to be a provider of Contractor CPD Programs.</p>
43.	<p>Building certifiers ought to remain licensed by the QBCC and should fall within the usual licensing and disciplinary provisions governed by Parts 3, 3A, 3B, 3C and 3D of the <i>Queensland Building and Construction Commission Act 1991</i>.</p> <p>(Further to Recommendation 37, additional investigations must be performed before any conclusions can be reached about the desirability of holding building certifiers to account under the current demerit point scheme for builders and trade contractors established under Part 3E of the <i>Queensland Building and Construction Commission Act 1991</i>.)</p>
44.	<p>In so doing, the <i>Queensland Building and Construction Commission Act 1991</i> will provide for the licensing of private certifier employers as sole traders, in partnership (whether with other private certifiers or not) or in a corporate structure.</p>
45.	<p>Employed private certifiers ought not be held responsible for the administrative acts, errors or omissions of their private certifier employers, just as local government certifiers ought not be held responsible for the administrative acts, errors or omissions of their employers.</p>
46.	<p>Other than the requirements for a nominee supervisor, there should be no mandatory minimum number of employed private certifiers who must work for a corporate private certifier employer. However, Government should keep a watching brief on this issue to ensure that problems do not arise which unduly impact upon the community.</p>
47.	<p>Legislative amendments required to effect these recommendations include:</p> <ul style="list-style-type: none"> (a) Section 34 of Schedule 1AA of the <i>Queensland Building and Construction Commission Regulations 2003</i> will require amendment to specifically remove the exemption of certification work performed by a building certifier from the definition of building work; (b) The definition of “building work services” in Schedule 2 of the <i>Queensland Building and Construction Commission Act 1991</i> should include “building certifying function” as that term is defined in s.10 of the <i>Building Act 1975</i>; (c) s.67AB(1)(a) of the <i>Queensland Building and Construction Commission Act 1991</i> to take into account the fact that building certifiers are not licensed “contractors”;

	<p>(d) The definition of “carry out tier 1 defective work” contained in s.67AB(2)(c) should also be amended to include “building certifying function” as that term is defined in s.10 of the <i>Building Act 1975</i>.</p> <p>Note: This list is not intended to be exhaustive</p>
48.	<p>The chief executive should develop a guideline which clarifies the rights and obligations of private certifier employers, private certifier employees and the applicant to a building development application (the applicant) in relation to:</p> <ul style="list-style-type: none"> (a) The engagement of the private certifier; (b) Ownership of the applicant’s file remaining with the private certifier employer; (c) Obligations of the private certifier employer in relation to the record keeping of the applicant’s file; (d) Obligations of the private certifier employer to assist the QBCC by among other things, providing copies of the applicant’s file when requested, whether or not the certifier employee remains an employee at the relevant time; and (e) The appropriate use and supervision of cadet building certifiers.
49.	<p>The <i>Building Act 1975</i> should be amended to require local governments to provide advice to private certifiers if requested, regarding town planning scheme compliance within certain time restrictions and on a cost recovery basis with fees set by regulation. Government should consult further with stakeholders regarding appropriate content, timeframes and costs.</p> <p>It is noteworthy that s.149 of the <i>Environmental Planning and Assessment Act 1979</i> (NSW) provides for a similar facility, the costs of which are regulated under s.259 of the <i>Environmental Planning and Assessment Regulation 2000</i> (NSW) in the sum of \$133.00. However no liability attaches to a local government in NSW for the provision of that advice which must be given “as soon as practicable”.</p>
50.	<p>In the event that local government does not have the resources to provide appropriate town planning scheme compliance advice, or it does not wish to personally provide that service, it should be able to delegate the responsibility to an authorised town planner.</p>
51.	<p>Private certifiers and building owners should be able to rely upon town planning scheme compliance advice provided by a local government or its authorised town planner.</p>

52.	In the event that the town planning scheme compliance advice provided by a local government or its authorised town planner is incorrect or incomplete, a private certifier should not be personally liable for anything done or omitted to be done in good faith in performing the building certifying function or in the reasonable belief that the thing was done or omitted to be done in the performance of the building certifying function in reliance upon the town planning scheme compliance advice.
53.	<p>No disciplinary action should be brought against a private certifier who in good faith relies upon town planning scheme compliance advice provided by a local government or its authorised town planner.</p> <p>Similarly, no enforcement action should be able to be taken by a local government against a building owner where a building certifier has in good faith relied upon town planning scheme compliance advice provided by a local government or its authorised town planner and that advice proves to be incomplete or incorrect.</p>
54.	<p>Any amendments to the lapsing provisions of the <i>Building Act 1975</i> should be consistent with the provisions contained in what is likely to become the <i>Planning and Development Act 2015</i>.</p> <p>Whilst s.90 of the Draft Planning Bill does provide for the granting of an extension of a building development approval, it does not expressly provide for its reinstatement once it has lapsed although the Minister may make rules about the revival of lapsed applications under s.72(2) and (3) of the Draft Planning Bill.</p>
55.	<p>Subject to Recommendation 54, the <i>Building Act 1975</i> should be amended to provide:</p> <ul style="list-style-type: none"> (a) In the case of Class 1 & 10 buildings, a building approval will lapse within the later of the following period to end: <ul style="list-style-type: none"> (i) The period determined by the building certifier; or (ii) 18 months of the date of approval. (b) In the case of Class 2-9 buildings, a building approval will lapse within the later of the following period to end: <ul style="list-style-type: none"> (i) The period determined by the building certifier; or (ii) 36 months of the date of approval. (c) For all classes of buildings, upon application, provided the building work has substantially commenced, a building approval may be reinstated within the later of the following period to end: <ul style="list-style-type: none"> (i) The period determined by the building certifier; or (ii) 12 months of lapsing.

	<p>(d) In the event of reinstatement, the building approval may be extended to the later of the following period to end:</p> <ul style="list-style-type: none"> (i) The period determined by the building certifier; or (ii) 12 months after reinstatement; <p>failing which the approval shall lapse, requiring a new building development application.</p>
56.	The lapsing provisions contained in the <i>Building Act 1975</i> (ss.89-93) in respect to building development approvals for demolition and removal should remain unchanged.
57.	A review of the current referral triggers requires thorough consultation with all of the referral agencies and other stakeholders to determine what if any reductions can or should be made.
58.	The review should focus attention on whether the existing referral triggers actually provide tangible benefits to the community, whether they reduce potential risks and if they should remain, whether in this age of contestability, the advice can be obtained in a more cost effective and time efficient manner without impacting on the public interest.
59.	In the interests of public safety, there is no demonstrable case for Government to increase the scope of self-assessable and exempt building work in locations contained within Wind Region C (tropical cyclone area) as mentioned in AS/NZS1170.2:2011.
60.	<p>In the case of building work in locations contained within Wind Region B, as mentioned in AS/NZS1170.2:2011, it is recommended that Schedule 1 of the <i>Building Regulations 2006</i> be amended to allow the following additional work to be constructed without a building approval (self-assessable building work):</p> <ul style="list-style-type: none"> (a) Shade sails up to 20m², not attached to a building; (b) Class 10a buildings with a plan area not more than 15m²; (c) Above ground water tanks not more than 15m² in plan area and not more than 2.4m in height located outside the front setback or prescribed building envelope under a planning scheme; (d) Patios with a plan area not more than 15m² and attached to a dwelling should be classified as self-assessable.
61.	<p>The prescribed work contained in Schedules 1 and 2 of the Building Regulation 2006 should be clarified:</p> <ul style="list-style-type: none"> (a) In accordance with paragraph [772] herein; and

	(b) To ensure that the self-assessable or exempt building work identified therein, overrides any contrary provision in a local law or local planning scheme.
62.	<p>Schedule 1 of the <i>Building Regulations 2006</i> should be amended to provide that what would otherwise be regarded as self-assessable building work should require building development approval where:</p> <p>(a) The proposed work is within the zone of influence of any service such as water, sewer, or stormwater; and</p> <p>(b) Within the zone of influence or 1.5m horizontal distance of any retaining wall.</p>
63.	The <i>Building Act 1975</i> Forms 15 and 16 should be reviewed and amended in accordance with these Recommendations.
64.	All QBCC licensees, including building certifiers and other building professionals such as architects, engineers and cadastral surveyors require education about the purpose, significance, how and when it is appropriate to complete and accept Form 15s and 16s. This could be achieved by the development of a guideline issued by the chief executive, appropriate CPD programs and liaising with professional bodies.
65.	Subject to the changes in Recommendation 68, the current Form 15 should remain unchanged.
66.	<p>The current Form 16 should be split into three separate forms:</p> <p>(1) Inspection certificate for a stage of building work;</p> <p>(2) Inspection certificate for an aspect of building work; and</p> <p>(3) QBCC Licensee Aspect Certificate.</p> <p>The website which provides copies of the forms should also provide properly completed pro forma example forms to assist those who are required to fill them out.</p>
67.	The inappropriate issuing and acceptance of Form 15s and 16s should be subject to stricter auditing by the QBCC and demerit points should be allocated for both the offending licensee (where applicable) who issues it and the building certifier who accepts it.
68.	Both Form 15s and 16s should be amended to require an acknowledgement that the design/stage/aspect has been prepared/completed in accordance with the relevant tests, specifications, rules, standards, codes of practice and other publications and that the person acknowledges that the inappropriate issuing and acceptance of the Form may result in

	demerit points being allocated and/or an infringement notice to both the offending licensee (where applicable) who issues it and the building certifier who accepts it.
69.	Subject to recommendations 70, 71 and 72, building certifiers should conduct physical on-site inspections in relation to all mandatory inspections.
70.	Building certifiers should be able to delegate the carrying out of a mandatory inspection of a stage or aspect of assessable building work to another appropriately graded building certifier or appropriately graded inspector. (Note however, an inspector should not be able to perform a final inspection - see Recommendation 79.)
71.	<p>The use of competent persons should be restricted to the inspection of an aspect of a stage of building work:</p> <ul style="list-style-type: none"> (a) Subject to Recommendation 72, by persons who have been assessed by the building certifier as competent in accordance with the guidelines entitled 'Guideline for the assessment of competent persons'; (b) For aspects of construction that are outside the building certifier's particular areas of expertise; (c) For construction that is undertaken in a location that is remote from that of the building certifier; (d) For certain aspects of building work that pose particular problems for certifiers undertaking inspections, for example waterproofing; (e) By cadet certifiers who: <ul style="list-style-type: none"> (i) Have completed the equivalent of a minimum of 1 year full-time academic study in furtherance of obtaining their certification qualification; and (ii) Have completed the equivalent of a minimum of 1 year full-time employment as a cadet certifier under the supervision of a building certifier level 1 or 2; and (iii) Have satisfied his/her certifier employer that they are competent to carry out the function required; and (iv) Continue to remain appropriately supervised by a building certifier level 1 or 2, bearing in mind the level of experience and knowledge of the cadet and the type of certification work performed. <p>Note in respect to cadet certifiers:</p> <ul style="list-style-type: none"> (i) Section 23C of the Building Regulations 2006 should be amended to reflect the above; and (ii) It is NOT recommended that cadet certifiers have the ability to:

	<ul style="list-style-type: none"> - Inspect aspects of building work that involve matters of life-safety, such as fire-separation walls; or - Conduct final inspections. <p>The over-reliance on competent persons by certifiers is likely to be addressed in part, if Recommendations 16-18 are adopted (the introduction of the fourth level inspector).</p>
72.	A building certifier should be required to continue to assess licensed and registered persons for their competency pursuant to s.18(2)(b) of the <i>Building Regulation 2006</i> . In circumstances involving 'inspection help' this assessment should be done before the inspection help is provided pursuant to s.22(2) of the <i>Building Regulation 2006</i> . Appropriate penalties should apply where s.22(2) has not been complied with for both the purported competent person who provides the purported Form 16 and the certifier who accepts it.
73.	<p>For building certifiers whose principal place of business is not located in Cyclone Region C to be able to provide certifying services in Cyclone Region C must satisfy an additional licence requirement that they have completed further mandatory CPD approved by the QBCC.</p> <p>Similarly, builders and some tradespeople including carpenters, blocklayers and roofers should also be required to have completed further mandatory relevant CPD approved by the QBCC if they are not based in Cyclone Region C.</p>
74.	The inappropriate use of competent persons (that is where a purported competent person is not assessed in accordance with the <i>Building Regulation 2006</i> and/or the Guideline) should be subject to stricter auditing by the QBCC and demerit points should be allocated and/or infringement notices issued to both offending licensees (where applicable) and the building certifiers who rely on them.
75.	The Guideline for the assessment of competent persons should be amended to reflect the above recommendations and should be amended to reflect current legislation.
76.	In relation to single detached houses, it is considered that the number and type of mandatory inspections are sufficient as a minimum. It is not considered desirable to introduce a mandatory inspection for the waterproofing of wet areas or external decks given the difficulties that can be encountered in properly assessing the correct application of waterproofing membranes by anyone other than the applicator.

	Further provision is made at Recommendation 108 in relation to the application of waterproofing.
77.	<p>It is recommended that the mandatory minimum inspections for single detached houses be replicated for duplexes, villas and townhouses (attached class 1a buildings) with additional inspections required for fire separating walls. Therefore, in relation to attached class 1a buildings, the mandatory minimum inspections should be:</p> <ul style="list-style-type: none"> (a) Footings (b) Slab (c) Frame (d) Passive fire separation elements (fire separating walls, floors and penetrations/collars). Note: It may be necessary to conduct more than one inspection depending upon the design, construction method and materials used. (e) Final. The final inspection should include a re-inspection of passive fire separation elements after all services have been connected to the building to ensure the integrity of those elements. The final inspection should only be performed by the building certifier or another building certifier of the relevant class.
78.	Section 24 of the <i>Building Regulations 2006</i> and the Guidelines for inspection of class 1 and 10 buildings and structures should be amended to reflect these recommendations if accepted.
79.	<p>Given the number of variables which exist between the various class 2-9 buildings, it is difficult to list desirable hard and fast minimum mandatory inspections. Notwithstanding, it is recommended that the current approach of risk-based assessment for inspection stages should remain as set out in the Guidelines for the inspection of class 2 to 9 buildings made by the chief executive under s.258 of the <i>Building Act 1975</i>, with the exception of the following minimum mandated inspections:</p> <ul style="list-style-type: none"> (a) Passive fire separation elements (fire separating walls, floors and penetrations/collars). <p>Note: It may be necessary to conduct more than one inspection depending upon the design, construction method and materials used.</p> <ul style="list-style-type: none"> (b) Final. The final inspection due at substantial completion should include a re-inspection of passive fire separation elements after all services have been connected to the building to ensure the integrity of those elements. The final inspection should only be performed by the building certifier or another building certifier of the relevant class.

80.	The <i>Building Act 1975</i> should be amended to make it an offence for any person to obstruct, interfere, unlawfully influence by way of offering a commission, benefit or advantage, attempt to unlawfully influence by way of offering a commission, benefit or advantage or threaten a certifier to the detriment of the certifier whilst in the performance of his or her duties or proposed duties. (Recommended maximum 1000 penalty unit offence).
81.	Section 258(2) of the <i>Building Act 1975</i> should be amended to include the Guidelines for the inspection of class 1a buildings (as amended to incorporate attached class 1a buildings – see Recommendations 77 and 78) and guidelines for the inspection of class 2-9 buildings.
82.	The use of technology in inspections should be clarified in the guidelines produced by the chief executive for the inspection of class 1 and 10 buildings and class 2 to 9 buildings.
83	<p>The Guidelines produced by the chief executive in relation to the inspection of class 1 and 10 buildings and class 2 to 9 buildings should be amended to reflect the following recommendations:</p> <ul style="list-style-type: none"> (a) Subject to paragraph (b), building certifiers, are entitled to utilise whatever reasonable and lawful technology that is at their disposal to assist them in the performance of the certifying function. (b) However, the use of technology during building inspections should only be used as an aid to assist the process of undertaking a physical inspection of building work by a building certifier, authorised Inspector of the appropriate licence category or a competent person inspecting an aspect of building work. (c) A building certifier may only rely upon photography or videography provided by a person not referred to in paragraph (b) if: <ul style="list-style-type: none"> (i) It relates to a minor part or minor aspect of building work which is incomplete or defective; and (ii) It has been previously inspected by an authorised person referred to in paragraph (b); and (iii) The building work if properly completed or rectified is reasonably capable of identification using the medium of photography or videography; and (iv) In the reasonable opinion of the building certifier, a further physical inspection is not warranted; and (v) All photography or videography relied upon, must be permanently recorded and must be retained either electronically or in hard copy with the building development approval.

	A breach of the Guidelines should attract a loss of demerit points and in some cases disciplinary action should be instigated by the QBCC.
84.	<p>The use of certificate of classification would be improved by the adopting the following recommendations:</p> <p>Consistent with s.335(3)(b) of the <i>Sustainable Planning Act 2009</i>, the building certifier should record the classification of the building on the Decision Notice. The Decision Notice should also state the version of the National Construction Code by which the building has been assessed.</p> <p>Note: Given the overlap between the relevant provisions of the <i>Building Act 1975</i> and the planning legislation, it is appropriate that these requirements be contained in the Draft Planning Bill or its Regulation and Chapter 5 of the <i>Building Act 1975</i>.</p>
85.	<p>Rename the certificate of classification (Form 11) to that of a “Certificate of Occupancy” to promote greater clarity of the purpose of the certificate amongst building owners, the industry and the general public. It also aligns more closely with the terminology used in other jurisdictions.</p> <p>Note: This will require amendments to various provisions within the <i>Building Act 1975</i>.</p>
86.	The maximum number of people able to occupy a building should be listed as a requirement pursuant to s.103 of the <i>Building Act 1975</i> . (The Review notes that this is already listed in Item 5 of Form 11).
87.	<p>Whilst renaming the current certificate of classification Form 11, Government should take the opportunity to liaise with stakeholders to identify any further amendments to the Form 11 that are considered desirable to promote safety, accountability, efficiency, reduce unnecessary red tape and compliance costs on the industry. For example, it is suggested that:</p> <ul style="list-style-type: none"> (a) The details of the builder and QBCC licence number should be recorded; and (b) Reference to the ‘Building Code of Australia’ should be amended to the ‘National Construction Code’.
88.	In order to cut unnecessary red tape, develop a single certificate of occupancy model allowing a person to request a certificate of occupancy, that is not tied exclusively to a building development approval. This would allow either a private certifier or a local government certifier to issue a certificate of occupancy for any

	<p>class of building at any time. This single system would address new buildings, existing buildings and changes to classification or use.</p> <p>Note: This process would not permit illegal building work. The same enforcement options for local government in relation to development offences under the planning legislation should continue to exist.</p>
89.	<p>In order for a local government certifier or a private certifier to issue the certificate of occupancy, the certifier would have to be satisfied that the building complies with the technical requirements that would be prescribed in Chapter 5 of the <i>Building Act 1975</i>.</p> <p>In considering whether to issue a certificate of occupancy, the certifier must decide whether the building is safe for occupation, having regard to the following technical requirements (where applicable):</p> <ul style="list-style-type: none"> (a) When the building was built; (b) The use (and proposed use, if applicable) of the building; (c) If it can reasonably be established, whether the building generally complies with the requirements, including the health and amenity requirements and/or use that applied under an approval or would have ordinarily applied at the time of construction of the building; (d) Whether the building is structurally sound and capable of withstanding the loadings reasonably expected to arise from its use; (e) Considering the relevant parts of the BCA, whether the building will reasonably provide for the: <ul style="list-style-type: none"> (i) Safety of persons in the building if there is a fire, including, for example, means of egress; and (ii) Prevention and suppression of fire; and (iii) Prevention of the spread of fire.
90.	Where a matter relates to building and construction compliance issues, after serving a show cause notice on the offending party, a private certifier should be able to refer the matter to the QBCC to continue the enforcement action.
91.	Where a matter relates to planning compliance or other local government compliance issues, after serving a show cause notice on the offending party, a private certifier should be able to refer the matter to local government to continue the enforcement action.
92.	In the event that a building certifier fails to issue a show cause

	<p>notice to the builder and/or building owner and thereby commence the enforcement action in circumstances where the private certifier has been found to have been aware of the contravention or ought reasonably have been aware of the contravention, the building certifier should be considered to have committed an offence under the building legislation. Such acts or omissions should be regarded as professional misconduct. In serious cases, this could result in the building certifier having their licence suspended or even cancelled.</p>
93.	<p>In an effort to reduce red tape and to reduce the number of non-compliant pools associated with class 3 buildings, the application process for pool safety management plans should be made simpler and more transparent by:</p> <ul style="list-style-type: none"> (a) Subject to paragraph (b), requiring the Department (or QBCC) to make a decision whether or not to grant the application as soon as practicable but no later than 20 business days after receiving the application; (b) In the event that the Department requests additional information from the applicant, the Department should be granted an extension of a further 5 business days to make the decision after receiving the information; (c) Reducing the number of instances where the Department is required to seek further submissions or additional information from an applicant, by amending the current guidelines to incorporate specific examples of alternative safety measures and when they could be used.
94.	<p>In an effort to reduce red tape and to reduce the costs associated with maintaining and renewing a pool safety management plan:</p> <ul style="list-style-type: none"> (a) Rather than having to reapply for an approval of a plan every 12 months, a plan should remain valid for up to three years, unless the property is sold or leased to another entity, or if the conditions under which the plan was approved have changed; (b) The pool owner should be required to have the pool inspected to ensure that it is compliant with the plan at the expiration of the three-year period. The persons able to perform such inspections would be: <ul style="list-style-type: none"> (i) A building certifier (Level 1 or 2) who is also a licensed pool safety inspector; or (ii) A building certifier (Level 1 or 2) in the employ of the QBCC for a regulated fee (assuming that the QBCC assumes the functions of assessing applications for pool safety management plans and the auditing, licensing and compliance of pool safety inspectors). (c) If satisfied that the pool does comply with the pool safety

	<p>management plan, the building certifier must provide a certificate to the owner and a copy of that certificate should be provided to the Department (or the QBCC) together with a re-application fee and the process would be repeated.</p> <p>(d) To counter the possibility that the extension of the pool safety management plan may result in illegal pools not being identified for inordinate periods, the Department (or QBCC) should conduct random, targeted auditing of pools associated with class 3 buildings.</p>
95.	Introduce a new QBCC licence class for house energy assessors which requires as a minimum, successful completion of a nationally recognised Certificate IV in NatHERS Assessment (CPP41212). A grace period will be required to enable those currently working as energy assessors to transition to the new qualification.
96.	House energy assessors should also be required to comply with the phased-in mandatory CPD program required for all QBCC licensees (Refer Recommendations 41 and 42).
97.	<p>Licensees already holding the licence classes of building design-low rise, building design-medium rise and building design-open or any other person who would satisfy the technical and experience requirements to obtain those licences ought not have to obtain the house energy assessor licence to carry out that scope of work.</p> <p>NOTE: This exemption should only apply if the design licence qualifications contain energy assessment competencies which are at least the equivalent of the Certificate IV in Energy Efficiency & Assessment referred to in Recommendation 95.</p>
98.	The <i>Building Act 1975</i> should be amended to align assessment and inspection processes for building work conducted for or on behalf of the State, public sector entities or local governments with that of assessable building work.
99.	<p>The building certification needs of regional Queensland communities are adequately catered for by the dual public/private certification system in Queensland.</p> <p>Additionally, the building certification needs of rural and remote Queensland communities will be better catered for by the combination of:</p> <ul style="list-style-type: none"> (a) Continued local government services; (b) The private certifiers who are prepared to travel significant distances to perform inspections;

	<p>(c) The introduction of the 'fourth level inspector' (Recommendations 16 - 18);</p> <p>(d) The more appropriate use of competent persons (Recommendation 71); and</p> <p>(e) Better defined roles and responsibilities for cadet certifiers (Recommendations 48 and 71).</p>
100.	The Review does not consider that the Government should intervene by legislating further competitive neutrality requirements on local governments, particularly where that may impact significantly on the costs of building certification services in rural and remote Queensland.
101.	Government should not intervene in the amounts charged by building certifiers by introducing a mandatory minimum scale of certification fees.
102.	<p>To ensure that regional, rural and remote building certifiers have their say on issues which impact upon them, a position for at least one building certifier representative from each of the following regions outside South East Queensland should be created to enable attendance at the meetings of the Building Industry Consultative Group, chaired by Building Codes Queensland:</p> <p>(a) One building certifier from far north Queensland;</p> <p>(b) One building certifier from central Queensland; and</p> <p>(c) One building certifier from southwest Queensland</p>
103.	The provisions relating to the licensing and discipline of pool safety inspectors contained in Chapter 8, Parts 5 to 8 of the <i>Building Act 1975</i> and any related provisions contained within the <i>Building Regulation 2006</i> , should be relocated to become Part 12 of the <i>Queensland Building and Construction Commission Act 1991</i> and Schedule 2 of the <i>Queensland Building and Construction Commission Regulation 2003</i> .
104.	Subject to Recommendation 103, the provisions relating to swimming pool safety contained in Chapter 8 of the <i>Building Act 1975</i> and any related provisions contained within the <i>Building Regulation 2006</i> , should be relocated to the proposed <i>Building Swimming Pool Regulation 2015</i> .
105.	To provide better building outcomes, a minimum standard of design documentation should be established in a guideline produced by the chief executive. The guideline should be produced in consultation with industry stakeholders. However it is recommended that Government consider inserting into the guideline various provisions previously contained within s.2.4(1)

	of the <i>Standard Building Law</i> (repealed).
106.	Section 78A of the <i>Sustainable Planning Act 2009</i> prohibits the inclusion of provisions regarding building work in a local planning instrument. To the extent that a local planning instrument does contain such a provision, the local planning instrument has no effect. It is recommended that the Minister for State Development, Infrastructure and Planning should have the ability to require a local government to remove such provisions from the local planning instrument.
107.	<p>Unless otherwise indicated, the following recommendations assume the passage of the proposed amendments contained within the <i>Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014</i> as they pertain to existing s.72 of the <i>Queensland Building and Construction Commission Act 1991</i>.</p> <p>Further to recommendations 14, 15 and 37 of the Transport, Housing and Local Government Committee Report No.14 into the Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012 and Item 9 of the Government's Ten Point action plan, to ensure that building certifiers are held properly accountable for approving unlawful, defective or incomplete building work, it is recommended that:</p> <ul style="list-style-type: none"> (a) Building certification work be removed as an exemption from the definition of "building work" from s.5 and Item 34 of Schedule 1AA of the <i>Queensland Building and Construction Commission Regulations 2003</i>, thereby among other things enabling directions to be made against a building certifier by the QBCC requiring the rectification of defective building work and/or the completion of incomplete building work pursuant to s.72(2) of the <i>Queensland Building and Construction Commission Act 1991</i>; (b) Section 72A(1) of the <i>Queensland Building and Construction Commission Act 1991</i> should be amended to provide that the QBCC may apportion liability between 2 or more parties involved in the provision of defective and/or incomplete building work; (c) Section 71I(2)(b) of the <i>Queensland Building and Construction Commission Act 1991</i> should be amended to expressly include that for the purposes of s.71I(1)(h) and (i), a person carries out building work by: <ul style="list-style-type: none"> (i) the provision of building certification services; or (ii) the carrying out of building work under a subcontract; (d) To further promote accountability in the building industry, in addition to taking disciplinary action against licensed builders and building certifiers, the QBCC should actively

	pursue, issue directions to rectify defective and incomplete building work and commence disciplinary action against trade subcontractors believed to be responsible for the carrying out of defective building work.
108.	The application of waterproofing membranes to wet areas and decks should only be performed by suitably licensed QBCC licensees, regardless of the value of the work performed. The licence class of waterproofing (Part 56) and to the extent that waterproofing work is performed as part of wall and floor tiling work (Part 55), these licence classes should be added to Item 2(b) of Schedule 1AA of the <i>Queensland Building and Construction Commission Regulation 2003</i> .
109.	<p>The <i>Building Act 1975</i> should be amended to bar any building action being taken against a builder or building certifier in relation to any building work more than 10 years after:</p> <ul style="list-style-type: none"> (a) The certificate of classification (or certificate of occupancy assuming Recommendation 85 is accepted) is issued in respect to class 2-9 buildings; (b) The final inspection certificate (or certificate of occupancy assuming Recommendation 88 is accepted) is issued in respect to detached class 1a and 10 buildings; (c) If neither paragraph (a) or (b) applies because a certificate was not issued, the date on which that part of the building in relation to which the building work was carried out was first occupied or used.
110.	<p>In recognition that the minimum limit of indemnity insurance required by a private certifier has not increased since 1998, s.52(1)(a) of the <i>Building Regulation 2006</i> should be amended to provide that the minimum limit should be raised to the sum of \$2,000,000.00.</p> <p>Similarly, s.16B(1)(a) of the <i>Building Regulation 2006</i> should be amended to provide that the minimum limit of indemnity insurance required by a pool safety inspector should be raised to the sum of \$2,000,000.00.</p>
111.	There is a tension between the ordinary meaning of the words in ss.258 and 133A (and s.246BF) of the <i>Building Act 1975</i> and the provisions of the Code of Conduct. Whilst the Code must be read subject to the provisions of the <i>Building Act 1975</i> , the position should be clarified by either amending the provisions of the Act to make it clear that the guidelines must be complied with (which tends to be somewhat counterintuitive to the concept of a 'guideline') or by amending the Code of Conduct to remove the requirement that building certifiers " <i>must apply all guidelines</i> ".

112.	If a decision is made to amend the <i>Building Act 1975</i> to clarify that a guideline must be complied with, then consideration should be given to changing the name 'guideline' to 'direction' or some other term that connotes the mandatory nature of the compliance required.
113.	If Recommendation 116 is adopted by the Government, then all of the guidelines made by the chief executive pursuant to s.258(1) of the <i>Building Act 1975</i> should be relocated to the Queensland Building and Construction Commission website and accessible from the one main page.
114.	Guidelines published on the internet should clearly identify their currency and previous versions (if any) should be capable of being searched.
115.	When Government has implemented the numerous planned reforms to all of the various Acts and Regulations which regulate the building industry, all the guidelines should be reviewed for their relevancy and accuracy to ensure that current provisions and legislation are contained therein.
116.	Subject to a cost-benefit analysis, establish the Building Industry Policy Unit (BIPU) within the organisational structure of the QBCC using staff from Building Codes Queensland, which should then be disbanded.
117.	Subject to the acceptance of Recommendation 116, the QBCC should re-introduce the provision of technical advice for building certifiers.
118.	Introduce sequential numbering of building forms approved under s.254 of the <i>Building Act 1975</i> so that wherever possible they follow the natural sequence of a building project.
119.	<p>A 'whole-of-government' approach should be adopted to attract more young people into the building certification profession by:</p> <ul style="list-style-type: none"> (a) A thorough review of higher education certification courses to determine whether they are meeting industry and student expectations; (b) Providing financial incentives to employer certifiers who employ cadets; (c) The introduction of a consolidated electronic resource of all relevant laws, regulations and codes which regulate the construction of all classes of buildings in Queensland. (d) Limiting the risk and legal liability that building certifiers are exposed to in accordance with Recommendations 109

	and 110.
120.	Provided the parties agree, a pool safety inspector who does not have an unconditional licence should be permitted to undertake, for reward, the same repairs and maintenance work that the <i>Building Regulation 2006</i> allows a pool owner to perform.
121.	Government, as part of its post-report consultation (refer Recommendation 122), should call for further submissions from interested stakeholders regarding the adequacy and implementation of QDC MP2.3 and whether any amendments should be made to it and if so, what those amendments should be.
122.	Before deciding whether or not to implement any or all of the Recommendations of this report, Government should conduct further consultation with industry stakeholders.

2. HISTORY OF THE *BUILDING ACT 1975* AND PRIVATE CERTIFICATION

- [16] The *Building Act 1975* was introduced in Queensland in 1975 and prescribed, for the first time, standard building by-laws for all building work in Queensland. It commenced on 1 April 1976.
- [17] The Building Code of Australia (BCA) (now known as the National Construction Code or NCC) was introduced in the early 1990s and replaced the standard building by-laws. It introduced a nationally consistent set of minimum building standards.
- [18] On 30 April 1998 the dual system of public/private building certification commenced in Queensland with the aim of improving efficiency and flexibility within the construction industry, and introduced competition into the choice of service providers. The system also reflected National Competition Policy (NCP) reforms at the time.
- [19] There have been a number of reviews of the building legislation and the system of private certification since their introduction. These reviews have resulted in the implementation of a number of improvements including mandatory planning and regulatory training for certifiers, amendments to the certifier's code of conduct, improved documentation requirements and the introduction of on-the-spot fines for building certifiers who failed to meet their legislative obligations.

3. BACKGROUND

- [20] In August 2011, the Queensland Government commenced a further review of building certification and released the discussion paper "*Improving building certification in Queensland*"¹ for public consultation. The Government was considering the results of the consultation and proposed improvements however this was placed on hold when the Parliamentary Inquiry into the former Queensland Building Services Authority (QBSA) was announced. The Parliamentary Inquiry produced a report entitled *Transport, Housing and Local Government Committee Report No.14 Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012*².
- [21] In May 2013, the Queensland Government produced a Ten Point Action Plan responding to the Parliamentary Inquiry report, entitled *Queensland Government Response to the Transport, Housing*

¹ Improving building certification in Queensland, August 2011

<http://www.hpw.qld.gov.au/SiteCollectionDocuments/improving-building-certification.pdf>

² <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2012/5412T1818.pdf>

*and Local Government Committee Report No.14 Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012*³.

- [22] Item 9 of the Ten Point Action Plan called for a review of the role of private certifiers with an emphasis on probity, minimising conflicts of interest, ensuring appropriate quality of services and the reinforcement of an appropriate penalty regime for those failing to abide by their legislative obligations.
- [23] The Department of Housing and Public Works (the Department) shortly after the release of the Ten Point Action Plan, established an Implementation Committee consisting of industry representatives charged with the responsibility of actioning Item 9 and other matters.
- [24] In February 2014, the Queensland Division of Master Builders Australia (MBA) raised concerns received from a number of its members based in the Mackay region with the Queensland Government. The MBA advised that it had evidence that a number of homes being built in and around Mackay by 'out of town' builders did not meet the BCA requirements for building in a cyclone-prone area. Similar concerns were also raised about homes built in and around Gladstone.
- [25] The QBCC reviewed the material and information provided by the MBA and based on the evidence, decided that audits ought to be conducted in both the Mackay and Gladstone regions into both the alleged defective building work and the certification of that work.
- [26] In respect to the audits conducted in the Mackay region, 112 residential building sites were physically inspected by QBCC investigators. Of that number, 24 houses were at a stage under construction which enabled the completed frames to be inspected.
- [27] The failure rate by aspect for the frame stage inspected by the QBCC was:⁴

Table 1 – Failure rate by aspect of Frame Stage

Aspect of Frame Stage Inspection	Total % of Unsatisfactory Work
Tie-down	12%
Bracing	11%
Roof and wall framing	5%
Window installation	60%

³ <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2013/5413T2705.pdf>

⁴ QBCC Site Audits Mackay March 2014

- [28] In respect to the QBCC audits conducted in Gladstone, eighteen residential building sites were physically inspected by QBCC investigators. The audits identified deficiencies in the construction of the house frames, although these deficiencies were not considered to be major. Rather, the audit report⁵ authored by the QBCC Regional Service Centre Manager, Mr. Ted Goodsall considered that the deficiencies were more “*poor building practices lacking diligence and attention to detail*”. Mr. Goodsall suggested that the main issues requiring attention in relation to the frame stage were:
- (a) The nailing off of timber bracing and cut outs in the ply sheeting;
 - (b) Fixing of the metal bracing to the walls and truss system;
 - (c) Installation of cyclone rods and in particular installation of the rods to the concrete slab by way of chemical fixing;
 - (d) Installation of transfer blocks;
 - (e) Truss tie down.
- [29] The Queensland Government considered the results of the Mackay and to a lesser extent the Gladstone audits as unacceptable⁶.
- [30] On 2 May 2014, the author was engaged by the QBCC to assist BCQ and the QBCC to research issues, draft and settle a discussion paper and to lead the review of the *Building Act 1975* and building certification in Queensland.
- [31] On 15 June 2014, the Hon. Tim Mander, Minister for Housing and Public Works, released a discussion paper entitled ‘Review of the *Building Act 1975* and building certification in Queensland’ (the Discussion Paper)⁷.
- [32] The opportunity to provide submissions in response to the Discussion Paper closed on 25 July 2014.

4. PURPOSE OF THE DISCUSSION PAPER

- [33] The Discussion Paper outlined numerous options for improving the *Building Act 1975* and building certification in Queensland by cutting red tape, delivering greater accountability to consumers, help protect against conflicts of interest, reducing costs and delays within the building and construction industry whilst ensuring the health and safety of the community.

⁵ Ted Goodsall *QBCC Area Manager’s Summary Report, Gladstone on Certification Audit March-April 2014*

⁶ See: <http://www.abc.net.au/news/2014-03-21/mackay-building-audit-reveals-cyclone-standards-shortfall/5336012>

⁷ See: <http://www.hpw.qld.gov.au/SiteCollectionDocuments/ReviewOfTheBuildingAct1975AndBuildingCertificationInQueenslandDiscussionPaper.pdf>

[34] The potential improvements outlined in the Discussion Paper can be summarised under four main headings:

- Building Certifiers;
- Development applications and approvals;
- Inspections and certificates;
- Enforcement and miscellaneous.

5. TERMS OF REFERENCE

[35] The author has been engaged to consider:

- (a) Whether private building certification should continue in Queensland;
- (b) Whether Queensland's system of private certification adequately caters for rural and regional Queensland;
- (c) Whether the *Building Act 1975* should be amended to provide that only the owner (or a person having the benefit of the development) may engage a building certifier, to overcome potential for conflict of interest and to enable the owner to be provided with more information about certification of the building;
- (d) Whether there are sufficient numbers of building certifiers in Queensland to meet the required level of inspection of building work in Queensland;
- (e) Further to issue (d) whether the number of building certifiers in Queensland is adequate to inspect each critical stage of building work;
- (f) If private certification is to continue in Queensland, whether the levels of certification provided for in the *Building Act 1975*, and the educational standards that exist for each, are preventing the entry of individuals into the profession;
- (g) Further to issue (f) whether Queensland's system of accreditation is appropriate and whether other options should be considered;
- (h) Whether a company licence should be created for building certifiers;
- (i) Whether a code of conduct for building certifiers is still required. If yes, what options should be considered for improvement?
- (j) Whether the existing system of CPD and training for building certifiers is adequate. Is there justification for targeting of CPD to building certifiers, where gaps in knowledge have become evident?
- (k) Whether the provisions in the *Building Act 1975* that relate to licensing and disciplinary action of building certifiers should be

relocated to the *Queensland Building and Construction Commission Act 1991*;

- (l) Regarding the 'competent person' framework in the *Building Act 1975*, is the system delivering satisfactory outcomes in terms of who can be a competent person, the work that they can assess and how their work is assessed, in particular:-
 - (i) Is there evidence that the present system is being abused; and
 - (ii) What options should be considered for improving the competent person framework?
- (m) Whether the critical stages of inspection in the *Building Act 1975* are sufficient to ensure safe and acceptable building outcomes;
- (n) Further, whether it is acceptable for building certifiers to accept photographs (or other digital technology) taken by other people to approve the stages of building work provided for in the *Building Regulation 2006*;
- (o) Whether the *Building Act 1975* should be amended to provide that an owner may require a building certifier to provide additional documentation or provide further inspections;
- (p) Whether the *Building Act 1975* should be amended to make it clear that it is part of the function of a building certifier to provide compliance advice that may not be related to a building development application;
- (q) Whether the *Building Act 1975* should be amended to provide for a demerit system for building certifiers for breaches of legislation;
- (r) Whether the *Building Act 1975* should be amended to provide that disengagement of building certifiers should only occur in limited circumstances and that the process for disengagement should be administered by the QBCC;
- (s) Whether there should be a right of internal review within the QBCC for decisions relating to disciplinary breaches by building certifiers that relate to unsatisfactory conduct;
- (t) In the context of proposed changes to the *Sustainable Planning Act 2009*, should the provisions of the *Building Act 1975* that relate to lapsing of building development approvals be simplified and clarified;
- (u) Review the value and role of referral agencies for building applications so that the number of potential triggers can be reduced;
- (v) Whether the *Building Act 1975* should be amended to provide an enhanced role of local government in enforcement action. That is, once a building certifier issues a show cause notice, enforcement action is then referred to the local government and also to the QBCC (for any action against a licensee);
- (w) In the context of proposed changes to the *Sustainable Planning Act 2009*, whether local government (or an agent) should be

required to provide, at the request of a building certifier, advice that a building application complies with the requirements of the local government's planning scheme, so that this information can be relied on in the building application.

- (x) Whether the *Building Act 1975* should be amended to rename 'certificates of classification' as 'certificates of occupancy' and what the implications of this might be;
- (y) Further, whether a certificate of occupancy should designate a maximum number of occupants for the building;
- (z) Whether the *Building Act 1975* should be amended to create a new form of final certificate specifically for older class 1 or 10 buildings that may not have received an original approval or final inspection, or do not have the required documentation, such as inspection records;
- (aa) Review the 'conditions taken to be imposed' in Chapter 4, Part 5 of the *Building Act 1975* to determine whether they are necessary⁸;
- (bb) Ensure that any proposals that are put forward for consideration by the QBCC and the Department are consistent with proposals put to government as part of the current review of the *Sustainable Planning Act 2009*.
- (cc) Review the provisions of the QBCC Act to ensure consistency against the *Building Act 1975*, once final proposals are put to government.
- (dd) Any other issue considered relevant to the regulatory framework surrounding the certification of building work in Queensland.

6. REVIEW METHODOLOGY

- [36] Industry and public consultation on the Discussion Paper was performed via roadshows, commencing on 19 June 2014.
- [37] The roadshows consisted of a half-day group session with interested industry stakeholders in attendance, followed by individual or small-group consultations with stakeholders for the remainder of that day.
- [38] The roadshows were attended by 258 people.
- [39] Roadshows and individual consultations were conducted at:
 - Brisbane on 19 June 2014;
 - Sunshine Coast on 20 June 2014;
 - Logan on 23 June 2014;
 - Rockhampton on 24 June 2014;

⁸ This issue was subsequently removed from the Terms of Reference by agreement between the author, QBCC and BCQ as it was considered that it did not add any real benefit to the Review

- Roma on 25 June 2014⁹;
- Brisbane on 26 and 27 June 2014;
- Moreton Bay on 7 July 2014;
- Cairns on 8 July 2014;
- Townsville on 9 July 2014;
- Mackay on 10 July 2014;
- Toowoomba on 11 July 2014;
- Gold Coast on 14 July 2014;
- Bundaberg on 15 July 2014;
- Ipswich on 16 July 2014;
- Redlands on 17 July 2014; and
- Brisbane on 18, 21, 23 & 24 July 2014 (consultations only).

[40] In addition to publishing the Discussion Paper, at the same time BCQ also released an on-line survey which traversed identical issues dealt with in the Discussion Paper¹⁰.

[41] By the close of submissions, the Review received 195 surveys completed on-line and 100 written submissions of varying lengths and complexities. Sixty-five 65 individual or small group interviews were held and a further 24 completed surveys were provided at those interviews.

[42] **Consultation Statistics:**

Table 2 – Consultation Statistics:

	Total	Addressing Discussion Paper/ or hard copy survey submitted	Unsupported	Non-responsive
Surveys On Line	195			
Submissions on Line	100	69	17	14
One on One Consultations	65			
Surveys submitted at Consult	24			
Total Responses	384			

⁹ QBCC and BCQ staff attended the Roma roadshow without the author who was required to appear at a Parliamentary Committee hearing in an unrelated matter

¹⁰ *Review of Building Act 1975 and building certification in Queensland – Survey*. See: <http://www.hpw.qld.gov.au/SiteCollectionDocuments/ReviewOfTheBuildingAct1975AndBuildingCertificationInQueenslandSurvey.pdf>

[43] Whilst writing the Report, additional consultation was undertaken with:

- QBCC staff;
- BCQ staff;
- Building certifiers;
- Queensland Fire and Emergency Service; and
- Representatives of the Australian Institute of Building Surveyors.

[44] Submissions both written and oral have been provided by a broad cross-section of industry stakeholders including:

- Local government certifiers from:
 - Moreton Bay Regional Council;
 - Townsville City Council;
 - Mackay Regional Council;
 - Toowoomba Regional Council;
 - Gold Coast City Council;
 - Isaac Regional Council;
 - Sunshine Coast Regional Council;
 - Logan City Council;
 - Rockhampton Regional Council;
 - Brisbane City Council;
 - Goondiwindi Regional Council;
 - Lockyer Valley Regional Council;
 - Cassowary Coast Regional Council;
 - Ipswich City Council;
 - Cairns Regional Council;
 - Scenic Rim Regional Council;
 - Central Highlands Regional Council;
 - Gladstone Regional Council;
 - Hinchinbrook Shire Council;
 - Southern Downs Regional Council;
 - Tablelands Regional Council;
- Private certifiers;
- Building certifiers employed by the Government;
- Cadet building certifiers;
- Consumer representatives and individual consumers;
- Building contractors;
- Building sub-contractors;
- Representatives of the Master Builders Association;
- Representatives of the Housing Industry Association;
- Representatives of the Australian Institute of Building Surveyors;
- Representatives of the Royal Institution of Chartered Surveyors;
- Australian Institute of Architects;
- Timber Queensland;

- Representatives of the Institute of Fire Engineers;
- Fire Protection Association Australia;
- Structural engineer;
- Building designers;
- Ventilation designer;
- Energy efficiency and sustainability assessors;
- Building consultant;
- Private building and timber pest inspector;
- Queensland Fire and Emergency Service;
- Town Planners;
- Solicitor;
- Occupational health and safety practitioner;
- QBCC certification staff;
- BCQ staff.

7. OBJECTIVES OF THE *BUILDING ACT 1975*

- [45] The principal legislation governing the design and regulation of all buildings in Queensland is the *Building Act 1975* and the *Building Regulation 2006* (the building legislation).
- [46] The primary objectives of the building legislation are to safeguard public health, safety and welfare of the community now and in the future from building fires, structural failures, defective design and materials¹¹.
- [47] The building legislation establishes a statutory framework for:
- The application of the BCA (NCC);
 - The establishment of accrediting bodies for building certifiers;
 - Accreditation and regulation of building certifiers;
 - The assessment of development applications;
 - Building inspections and certification;
 - Siting requirements and works; and
 - Swimming pool fencing and its regulatory control.

8. GENERAL COMMENTS FROM THE AUTHOR

- [48] At the outset it should be noted that ‘the lot’ of a building certifier is not an easy one. In today’s modern complex world, building certifiers are required to have an in-depth knowledge of a broad cross-section of all the rules which regulate the construction of the various classes of buildings. They are required to know, understand and implement relevant provisions as they pertain to a subject building, found in:

¹¹ National Competition Policy Review of the *Building Act 1975*, Report 2003;
<http://ncp.ncc.gov.au/docs/Qld%20Building%20Act%201975.%20Review%20report%202003.pdf>

- (a) *The Building Act 1975;*
- (b) *The Building Regulation 2006;*
- (c) *The Sustainable Planning Act 2009;*
- (d) *The Sustainable Planning Regulation 2009;*
- (e) *The Fire and Emergency Services Act 1990;*
- (f) *The Building Fire Safety Regulation 2008;*
- (g) *The Queensland Building and Construction Commission Act 1991;*
- (h) *The Queensland Building and Construction Commission Regulation 2003;*
- (i) The National Construction Code;
- (j) The relevant Australian Standards;
- (k) The Queensland Development Code;
- (l) Local government by-laws;
- (m) The various guidelines produced by the Chief Executive of the Department;
- (n) The various “newsflashes” produced by the Department; and
- (o) The myriad of diverse local town planning schemes in the local government areas in which they work.

(The above list is not intended to be exclusive.)

- [49] Whilst all building certifiers must navigate this complex web of rules and regulations, the role of the private certifier is further complicated by the intricacies of having to perform the traditional role of ‘regulator’ just as local government certifiers must do, but private certifiers must also police ‘the hands that feed them’.
- [50] During the course of this Review, there has been considerable debate on the issue of a private certifier’s conflict of interest, inherent in the very position in which he or she is statutorily required to perform.
- [51] It has also struck me most profoundly during the course of this Review, that private certifiers for reasons which shall be considered in greater detail below, appear to be in a ‘race to the bottom’ in relation to their own fees.
- [52] Many private certifiers who took part in this Review seemed to struggle with what they regarded as rising work pressures, a perceived high risk of litigation, low morale and inadequate remuneration.
- [53] It is hoped that the Recommendations contained in this Report will alleviate at least some of these concerns, which if left unaddressed, could result in a failure of the certification system as we now know it.

- [54] Attached to this report and marked Annexure A is a schedule setting out the statistical results of the written submissions and the surveys completed.

9. GENERAL COMMENTS AND FEEDBACK FROM CONTRIBUTORS

- [55] The Housing Industry Association (HIA) at the outset opposed the establishment of this Review. Its representatives argued that adverse attention is again being directed toward private certifiers *“despite any data being presented to support the proposition that a genuine problem exists”*. HIA argued it was absurd that the Discussion Paper was presented in contrast to a government agenda focused on red tape reduction. It alleged that the eight previous reviews of private certification all demonstrated that the number of complaints made against certifiers compared with the number of approvals was minute.
- [56] Generally speaking the views expressed by HIA in relation to ‘review fatigue’ were replicated across the State. Whilst the vast majority of stakeholders contributed positively toward the Review, there was palpable concern by many that this Review may meet the same fate as those that had been conducted previously and that is, if the Report is released, no meaningful reform would come of it.
- [57] Many building certifiers also expressed their concerns that they had become grossly over-regulated and that they, as a profession, had become the ‘whipping boy’ of the building and construction industry. Many argued that the faults and failures of the industry were increasingly being laid at their collective feet and that past governments had continued to lump more and more responsibility for additional tasks onto their shoulders.

10. CONSULTATION ISSUES

1.0 Building Certifiers

1.1 Private certification system

Question 1.1.1: Which is your preferred option for improving the private certification system?
Option 1.1 (a) – Retain the current private certification system
Option 1.1 (b) – Repeal private certification system
Option 1.1 (c) – Introduce a hybrid private certification/local government model
Other

Background

- [58] Private certification was introduced in 1998 to reflect NCP to provide consumers, developers and the building and construction industry with greater and more flexible choices in relation to service delivery of building control.
- [59] Prior to the introduction of private certification, building control was the exclusive domain of local government. Some of the most significant complaints of local government regulated building control were the claims of delays in the process, high costs, the lack of flexibility and the absence of competition.
- [60] Since its introduction there have been a number of reviews into private certification, all of which have confirmed the benefits in retaining it, albeit with certain improvements¹².
- [61] Some of the previous reviews have highlighted the potential conflict of interest that arises between private certifiers and those that engage them, whether by a builder or owner. This potential conflict of interest arises as a result of the statutory requirement that a private certifier must, in performing a private certifying

¹² Review into building certification in Queensland – Final Report (Local Government Association of Queensland, November 2001);
Fallon, J, *Public Benefit test – The Queensland Building Act and Associated Regulations Final Report*, 20 May 2002;

<http://ncp.ncc.gov.au/docs/Old%20Building%20Act%201975%20and%20associated%20Regulations.%20PBT%20report.%20May%202002.pdf> National Competition Policy Review of the Building Act 1975, Report 2003;

<http://ncp.ncc.gov.au/docs/Old%20Building%20Act%201975.%20Review%20report%202003.pdf>; Preferred model for building regulation in Queensland (Local Government Association of Queensland, 6 October 2006)

function, *always* act in the public interest¹³. The public interest may not accord with the best financial interests of the private certifier, nor indeed the person that engaged them.

- [62] According to the records of the QBCC, there are currently 407 building certifiers licensed in Queensland, of which approximately 347 are private certifiers.
- [63] Australian Bureau of Statistics data suggests that there were 108,877 building approvals issued in Queensland last year¹⁴. The QBCC receives on average approximately 140 complaints per year¹⁵ regarding the performance of building certifiers. Of these complaints, approximately 35% result in a negative decision and disciplinary action being taken against a certifier. This equates to 1 complaint per 2222 approvals per year.
- [64] However, the Review notes that some submitters questioned the accuracy of the stated complaint statistics. For example, the Cassowary Coast Regional Council considered that there was an under-reporting of complaints because of what it regarded as insufficient action being taken by the QBCC on complaints made by it¹⁶.
- [65] All other jurisdictions in Australia currently have some form of private certification. The majority of jurisdictions have a dual model similar to Queensland, which provides a local government alternative to private certification. However, many local governments no longer provide certification services, leaving building control to the private sector. At the request of the Review, the Local Government Association of Queensland (LGAQ) was asked to conduct a survey to determine which local governments still providing building certification services. Those statistics reveal that only 18 of the 77 or 23% of local governments continue to provide building certification¹⁷.

¹³ See s.136(1) of the *Building Act 1975*; Item 1 of the Code of conduct for building certifiers, 14 November 2003

¹⁴ Based on number of approvals for individual residential dwelling units and number of jobs for non-residential building work valued at over \$50,000 during the 12 months to January 2014, Source: ABS 8731.) – Building Approvals, Australia, March 2014

¹⁵ Average complaints based on figures provided by the QBCC over the past 5 years

¹⁶ Central Highlands Regional Council made similar submissions

¹⁷ Results of the survey are contained in Annexure B

[66] Table 3 provides a comparison of the current certification systems in other jurisdictions.

Table 3 – Certification systems in other jurisdictions

State/Territory	Certification system
Australian Capital Territory	Private certification only
New South Wales	Private certification, also local government
Northern Territory	Private certification only
South Australia	Hybrid model – Private certifier or local government issues building rules consent and local government issues development approval
Tasmania	Hybrid model – Private or council certification of building code compliance, however council permit authority issues final building permit
Victoria	Private certification, also local government
Western Australia	Hybrid model - Private certification of building code compliance, however local and State permit authorities issue final building approval

Feedback outcomes

[67] Of the written submissions and surveys provided to the Review, 59% of submitters were in favour of retaining the current system, with only 8% in favour of reverting back to a traditional exclusive local government delivered model. Approximately 17% of submitters were in favour of adopting a hybrid model.

Support for status quo

[68] Those who supported maintaining the current system made the following arguments:

“Private certification: the most significant piece of micro-economic reform in 20 years”

[69] Both MBA and HIA applauded the economic benefits which purportedly flows to the industry and therefore the community, as a direct result of private certification. In its written submissions, HIA said:

“HIA can see no justifiable reasons for significantly altering the current building certification model.

The introduction of private building certification into Queensland is in HIAs view the most significant piece of micro economic reform undertaken in this state in the last 20 years. To suggest that the current system should be abandoned or hybridised displays a complete disregard for the significant and undeniable economic benefits and process efficiencies that have been delivered under the current model to all those who participate in the construction sector including consumers.

Any thought of introducing a hybrid model based on examples in Western Australia and South Australia should be tempered by the fact the current Western Australian model is considered an interim step before moving to full private certification and that the South Australian model was driven by a desire to protect local government jobs rather than developing a rigorous model and in fact HIA has been advised that changes are likely to be made to the South Australian model because of the delays being created by Local Councils not issuing final development (building) approvals in a timely matter.”

Private certification: supported by many local governments

[70] Many local governments support the continuation of private certification, albeit with a number of improvements¹⁸. During the individual consultations with local government representatives, many participants acknowledged that local governments would be reluctant to resume the responsibilities involved with an exclusive local government certification process.

[71] Many indicated that local governments simply no longer had the resources to perform this work and that consumers would be affected by reduced competition.

[72] In its written submissions, Brisbane City Council stated:

“Council does not believe that there is any need or benefit to compete openly for building certification work in Brisbane, over and above the certification functions it must provide and perform in accordance with its statutory obligation.

Returning building certification to local governments would reduce efficiency without guaranteeing better outcomes. Local governments would incur considerable costs in establishing the necessary structure, systems and processes to administer and enforce the building regulatory system in Brisbane.

Council supports incentivising good practice coupled with auditing (of both administrative and technical aspects of building certification work). Higher penalties for non-compliant building work and misconduct would result in stronger building compliance.”

¹⁸ For example, Brisbane City Council, Gladstone Regional Council, Lockyer Valley Regional Council, Logan City Council and Moreton Bay Regional Council

Private certifiers need to be supported by clear and unambiguous legislation which crystalises their role and responsibilities

- [73] The Fire Protection Association Australia (FPA Australia) argued that private certifiers work in an environment of inherent conflict between their statutory duty and the commercial imperative¹⁹. It submitted that:

"The initial obligation of building certifiers to serve the public interest is vexed with the ethical dilemma facing building certifiers who act in the private sector. These private building certifiers must execute this public interest function whilst remaining commercially competitive and meeting market expectations.

In order for a regime based on private certification to succeed in delivering the commercial efficiencies for approval that the construction industry now demands, building certifiers need to be supported by clear and unambiguous legislation. Such legislation needs to crystallise (sic) their role and responsibilities to inform them and the other practitioners and parties that they interact with in the process of performing their function."

- [74] Other submitters similarly expressed the importance of public information dissemination so that the role of building certifiers could be better understood in the community²⁰.

Conflicts of interest could lead to inadequate fire safety, placing people at serious risk

- [75] The Queensland Fire and Emergency Service (QFES) in their written submissions warned of the possibility of loss of life as a result of the competing commercial tensions experienced by many private certifiers. They stated:

"In many cases it is considered unlikely that private certifiers can make the necessary building regulatory decisions without being potentially influenced by the commercial implications of that decision. This could lead to inadequate fire safety, placing people at serious risk.

QFES believes that the commercial relationship between the private certifier and their client has a fundamental bearing on this issue. This is because it may be extremely difficult for a private certifier to effectively regulate the party that has directly employed them and that is the source of their income and livelihood.

There is a substantial amount of anecdotal evidence in relation to commercial pressure and conflicts of interest. Unfortunately, given the

¹⁹ Many submitters including building certifiers, local governments and the Queensland Fire and Emergency Service acknowledged in their written submissions, during the roadshow presentations and during individual interviews that private certifiers were subjected to commercial tensions in the performance of their duties

²⁰ Similar submissions were made by building designer Joanne Galea

nature of the issue, clear written evidence is scarce. Nevertheless, the potential for the application of commercial pressure and for conflicts of interest in the current certification system is self-evident.

Given the above, QFES believes that consideration should be given to investigating different methods of procuring the services of a private certifier, in order to assess the viability of any available alternative models where private certifiers are not directly engaged or employed by the parties that they are essentially required to regulate."

Conflicts of interest are not confined to private certifiers

- [76] Mr. Ain Kuru operates a private certification business, although he is not himself a private certifier. In written submissions he argued that the potential for conflict of interest for private certifiers:

"... is not balanced as it does not address the problems with the previous local government system where there was considerable incompetence and corruption."

- [77] The Review received several submissions from private certifiers who were previously employed as local government certifiers, that whilst in the employ of local government, their roles were subjected to political interference from councilors and mayors seeking certain outcomes from the building control process.

Private certification has led to cost and time savings for industry

- [78] Not surprisingly, a number of builders, designers and their member associations vociferously supported private certification. Glen Place a building contractor and designer said in his written submissions:

"There can be no doubt that private building certification has been of great benefit to the building design profession and the building industry in general.

The industry operates in a highly regulated but volatile environment. Prior to 1998 approval timeframes posed a serious problem for the industry in a number of local government areas in Queensland. Prior to private certification the approval times were neither short nor consistent. When local government carried out the certification process there was no guarantee that the local government certifier would carried out (sic) any inspections except for the final. Even then finals were not always completed.

Private building certification has generally shortened approval times or at least given applicants some certainty. The flexibility and potential efficiency of Queensland's building certification system remains important to the building industry. With the introduction of inspection guides and checklists for building certifiers I believe the approval times could be shortened even more."

To do anything other than retain the current system will lead to unnecessary cost, red tape and delay

- [79] The Australian Institute of Building Surveyors (AIBS) urged maintaining the status quo because to do otherwise would only result in an increase in:
- Red tape;
 - Time frames for approvals;
 - Costs;
 - Demarcation disputes between local government and private certifiers.

Retain the current system but make private certifiers more accountable

- [80] Timber Queensland extolled the virtues of the current system arguing that it delivered “*significant benefits to the building industry and consumers in terms of economics and time efficiencies in the building process*”. However, it acknowledged that the current system could be improved by making the following changes:

- Where appropriate, certifiers should be engaged directly by homeowners (or the homeowners appointed agent). It was suggested that this would assist in reducing potential conflicts of interest, which it considered were “*creeping into the certification process*”;
- Homeowners should have direct access to all relevant inspection documentation and in particular that relating to mandatory inspections;
- Disengagement of building certifiers should only be permitted in special circumstances and at the discretion of the QBCC;
- The building legislation needs to be more precise on the number of inspections required, what is to be inspected and who is to carry out each inspection;
- The building legislation needs to be more precise on what design documentation is required to be provided to certifiers for the certifier to be able to adequately discharge their responsibilities;
- Mandatory inspections should only be carried out by an appropriately licensed or registered building practitioner, i.e. building certifier or engineer, and that this has to be undertaken by their physical attendance at the building site.

Retain the current system but ensure that local government is on a level playing field with private certifiers

- [81] The Review received several submissions that private certifiers were being forced to work in an anti-competitive environment

where local governments were offering certification services at below cost and that this was significantly impacting upon small private certification businesses.

[82] Private certifier Clayton Baker in his written submissions said:

"[Local governments] are also in a position to utilise Council resources to compete with private practice. For example some Councils in this area have flat inspection fees for work anywhere within the local government area regardless of the distance to and from the site. Others charge additional fee's to private certifiers when lodging referral applications when they don't charge the same fee to customers who use the Council's Building Department. This unfair competition has a negative effect on our industry because it sets the minimum fee which is based entirely on unrealistic and financially sound principles of pricing. If Councils want to compete with private practice, its ratepayers should be made aware that these departments are doing so and they be made to operate on a strict competitively neutral basis and not be supported by Council funds. Councils should also be made to comply with the Competition Policy with respect to the use of Council resources to compete with private practice. Councils do have a role to play in the regulation of the building industry, however the point I'm making is to do with Councils competing with private practice unfairly."

Local government certification

[83] As the statistics in Annexure A reveal, there was significantly less support for returning certification back to local government, even amongst local governments themselves. However, given that there were very few consumer representatives that provided submissions to the Review, a simple examination of the statistics is unlikely to be representative of the community's views at large²¹.

Private certification is fundamentally flawed by virtue of the conflict of interest between the certifier and the builder

[84] Don Jender, a homeowner condemned the current system. He said:

"... the system of building certification using private certifiers/engineers who are engaged and paid by the builder is fundamentally flawed by conflict of interest, as the certifiers are beholden to the builder for future work. It is a cosy relationship which excludes the homeowner, who is supposed to get security from the certification process. The homeowner has no part in it, even though he pays for it indirectly. Also the homeowner rarely has the expertise to assess whether the building or certification work has been done properly."

²¹ Written submissions of the Neighbourhood Action Group – Sunnybank, Robertson and Macgregor

- [85] Similar submissions were made by the Neighbourhood Action Group – Sunnybank, Robertson and Macgregor which supported a return to an exclusive public certification system.

Not all local governments want to retain the current system

- [86] Submissions made on behalf of the Cassowary Coast Regional Council considered that all certification should be performed by local government. However, the submissions acknowledged that if private certification was to remain, it made the following suggestions for improving the current system:

- Inspection documentation should be provided by the private certifier during inspection stages to ensure that local government has a complete file at any stage of the development;
- Provide an incentive to private certifiers to ensure that buildings are finalised;
- Private certifiers should be more willing to undertake enforcement action against a builder.

The system of local government certification was not without its own problems

- [87] Mr. Claude McKelvey, a private certifier who used to work as a local government building inspector prior to the introduction of private certification argued that local government certification had its own unique problems. He said:

“We know from having worked in councils previously that there was little concern over whether inspections were requested or undertaken. Brisbane City Council simply marked the status of unfinalised files as ‘NRNI’ (not requested, not inspected) and filed them in records storage. Where did owners take their grievances under the old system?”

Limited support for hybrid models

- [88] A number of submitters considered that one of the main disadvantages of the current certification system was the complexity involved in private certifiers having to navigate multiple and often complex planning schemes²² in what is allegedly sometimes an adversarial environment with local government²³. Seventeen per cent of submitters considered that a hybrid model which reverted the planning responsibilities back to local government would achieve the best outcomes.

²² See for example the written submissions of private certifier Darren Wright

²³ Written submissions of private certifier Claude McKelvey

- [89] A small number of concerns were raised about the efficiency of introducing a hybrid model and whether a model that requires both private certifiers and local governments to work closely together would work in reality.

Hybrid model could reduce conflict of interest

- [90] The Royal Institute of Chartered Surveyors (RICS) argued for a further supervisory role for the QBCC whereby it would have the final check and confirmation over all approvals, thereby it was suggested that any perception of a conflict of interest would be negated.

Other hybrid model

- [91] Principal advisor to the Department, Russell Bergman suggested as an alternative that the certification of Class 1a, Class 1b and Class 10 buildings be referred back to the exclusive jurisdiction of local government with the balance of Classes remaining under the current system, ie, local government or private certification. Mr. Bergman opined that such a model would promote the training of cadet certifiers, would provide specialist certifiers in the housing sector and importantly would provide better inspection outcomes than is currently provided under the private certification sector.

Appointment of certifier by “independent nominating body”

- [92] Private certifier Mr. Styles Magwood suggested that in order to overcome any perception of a conflict of interest, that private certifiers could be appointed by an “independent nominating body” overseen by a government organisation.

Lack of support for building certifiers

- [93] Throughout the performance of this Review, it was made clear to the Review that some private certifiers are suffering economically and emotionally under the sometimes stressful circumstances in which they work. Some private certifiers complain of having too high a work load whilst others argue they don't have enough. That is perhaps not surprising in a free-market economy. Private certifier Darren Wright in his written submissions stated:

“As Certifier’s we operate in a field of confusion, time constraints, convoluted legislation, lack of support and are left to our own devices until a problem occurs.

The QBCC (Queensland Building Construction Commission), previously the BSA has a fully hands off approach with only some technical talks provided

typically for Builders but of some relevance to Certifiers, the last technical advice issued was “CertNews” around 2006.

Added to the issue of casual Government administration is the issues of how Certifiers are administering ourselves through our own resources and bodies (AIBS & RICS), a plethora of media articles provide a clear view we are not doing too well, we are selling ourselves short and in doing so are damaging the future of our industry.”

- [94] Similar submissions were made by QFES that supported the need for suitable technical advisory services to be provided to building certifiers. I shall return to this issue again below at section 6.1.8 (See Recommendations 117).

Consideration

How we compare

- [95] Annexure C hereto is a brief examination of aspects of the various forms of building control utilised in:

- British Columbia, Canada;
- Alberta, Canada;
- England, United Kingdom;
- Wales, United Kingdom;
- Northern Ireland, United Kingdom;
- Scotland, United Kingdom;
- Japan;
- Berlin, Germany;
- California, USA;
- Kentucky, USA;

Due to language constraints, examination of some of these building control systems has been limited²⁴.

- [96] Annexure C examines the following aspects of the various building control models:

- The regulatory body responsible for building control;
- The role of the regulatory body;
- Whether there is a public and/or private system of building approvals;
- Who can make an application;
- Who assesses an application;

²⁴ The Review acknowledges with gratitude, the research provided on this international examination of building control systems by QBCC Senior Audit and Investigation Officer Wayne Blackman and additional research performed by Peter Hope in *International building regulation and enforcement frameworks* QBCC, August 2014

- Whether there are mandatory inspections;
- Who performs the inspections;
- Costs.

[97] Annexure C identifies that the various building control models throughout the world are quite different, each with their own advantages and disadvantages, but no one model is so much better that it would justify wholesale changes to the current system in Queensland.

Conflicts of interest

[98] If one were to conduct a risk benefit analysis of the system of private certification from the vacuum of a legal perspective, the risks associated with conflicts of interest are significant. Through no fault of building certifiers, the Legislature saw fit in 1998 to dramatically alter the way in which building control was regulated in this State.

[99] Section 10 of the *Integrity Act 2009* (Qld) provides a definition for the term “conflict of interest issue”:

Meaning of conflict of interest issue and references to interest or conflict of interest

- (1) A **conflict of interest issue**, involving a person, is an issue about a conflict or possible conflict between a personal interest of the person and the person’s official responsibilities.
- (2) A reference to an **interest** or to a **conflict of interest** is a reference to those matters within their ordinary meaning under the general law, and, in relation to an interest, the definition in the Acts Interpretation Act 1954, schedule 1 does not apply.

[100] Strictly speaking, it is doubtful that the *Integrity Act 2009* applies to a private certifier, but the definition is instructive at the least.

[101] The Encyclopaedic Australian Legal Dictionary defines “conflict of interest” as:

conflict of interest

1. A situation where a person has a personal interest in a matter which is the subject of a duty or decision of that person.
2. A situation where the interest of an individual or business entity comes into conflict with or opposition to those of another.

[102] A private certifier operating in Queensland usually trades either as a small or micro business enterprise. Many private certifiers work in their own small businesses and employ small numbers of staff which may include other certifiers, cadet certifiers and

administration staff. Private certifiers are not immune to the vicissitudes of operating a small business. Just as a builder, baker or candlestick maker must ensure that they earn more money than they spend, that the business is capable of paying its debts as and when they fall due, so too must a private certifier. However, unlike the aforementioned businesses, a private certifier is in a unique position by virtue of his or her statutory functions which they perform.

- [103] Private certifiers are required at all times whilst performing their certifying function, to act in the public interest. A breach of this requirement is an offence under s.136 of the *Building Act 1975*, punishable by a maximum penalty of 1665 penalty units (i.e. \$189,560.00²⁵). A finding of not having acted in the public interest may satisfy the test of the certifier having engaged in professional misconduct²⁶ and could result in licence suspension or cancellation²⁷. The issue of the disciplining of building certifiers is considered below at section 1.7.1.
- [104] During the course of the roadshows conducted throughout the State and during individual interviews, the Review received consistent anecdotal evidence of building certifiers conceding that they had from time to time been placed in difficult positions by building contractors and to a lesser extent by consumers. The Review heard it was not uncommon for certifiers to be threatened with the withdrawal of further work or even disengagement by building contractors if for instance a stance of the certifier was maintained in relation to a regulatory decision.
- [105] Similarly, the Review heard anecdotal evidence of pressures being applied to certifiers by home-owners who perhaps for differing reasons sought to illicit favourable outcomes during the certification process.
- [106] It is important to note however, that no physical evidence was provided to support these contentions. Notwithstanding the lack of hard evidence, given the consistency and number of allegations made throughout the State, the Review considers that such practices are occurring in the Queensland building and construction sector. However, it is not suggested that the conduct is wide spread. Many private certifiers explained that whilst they had been subjected to such pressures in the past, understanding the associated risks involved, they had ceased dealing with less scrupulous building contractors and now only work with building

²⁵ Section 2B of the *Penalties and Sentences Regulation 2005* provides a penalty unit in the sum of \$113.85 (which is then rounded down to the nearest dollar)

²⁶ See the definition of “professional misconduct” in Schedule 2 of the *Building Act 1975*

²⁷ See s.211(2) of the *Building Act 1975*

contractors or owners who value private certifiers who “play a straight bat”.

- [107] Private certifiers are without doubt placed in a *potential* conflict of interest every time they are engaged by a builder or building owner. The wording contained in the Code of Conduct for building certifiers places private certifiers in an invidious position. Item 4 of the Code of Conduct provides:

A building certifier must:

...

Not perform building certifying functions where there is the potential for a conflict of interest. [Emphasis added]

- [108] Yet, by virtue of the statutory function which they provide, that is acting in the public interest in the performance of their certifying function, every private certifier whilst so engaged is doing so whilst there is the *potential* for a conflict of interest. The very fact that private certifiers are engaged and more often than not paid by the persons they are statutorily bound to police creates a *potential* conflict of interest.
- [109] Section 136(2)(e) of the *Building Act 1975* provides that a contravention of the Code of Conduct, constitutes a private certifier not having acted in the public interest.
- [110] It is however important to note that s.137 of the *Building Act 1975* requires that a private certifier must not perform a private certifying function if, in performing the function, the certifier *has a conflict of interest*. That is, under s.137 of the *Building Act 1975*, there is no requirement not to perform private certifying functions if there is the *potential* for a conflict of interest. There is therefore a tension between the requirements under the *Building Act 1975* and those under the Code of Conduct. This should be addressed by removing the reference to the word “*potential*” in the Code of Conduct.
- [111] To alleviate the tension between commercial reality and the terms of the Code of Conduct by which a private certifier must abide, Government must either amend the *Building Act 1975* to remove the *potential* for conflict of interest by either:
- (a) Reverting building control back to the exclusive jurisdiction of local government; or
 - (b) Introducing a hybrid model which removes the *potential* conflict of interest; or
 - (c) Retain the private certification system with improvements.

Local Government building control

- [112] At the outset of this consideration reference was made to conducting a risk benefit analysis of private certification from within a legal vacuum. Of course, there are many other competing factors to consider, such as the economic benefits which flow from the private certification reforms introduced in 1998, not to mention the practical realities of winding back what is now a well entrenched service delivery model.
- [113] The Review statistics demonstrate that less than 8% of submitters were in favour of returning building control back to the exclusive jurisdiction of local government. Whilst these statistics are likely to be influenced by the lack of consumer participation in this process, based on the submissions received during the Review, returning building control exclusively back to local government is likely to:
- Increase approval times;
 - Increase certification, building and finance costs predominantly arising from delays caused by lack of competition and resultant reduced service levels;
 - Decimate the lives and businesses of 347 private certifiers and their staff, families and to a lesser extent the communities reliant upon those small businesses;
 - Lead to an exodus of participants from the industry who may be unwilling to return to local government employment; and
 - Result in potentially significant skill shortages of building certifiers throughout the State, arising from the exodus of participants.
- [114] Whilst from a purely legal perspective, local government directed building control has significant attraction in ameliorating the possibility of conflicts of interest, the Review is not satisfied that the industry or the community would be best served by returning to this model.

The different hybrid models

- [115] A number of different hybrid models were proposed by submitters. It is somewhat difficult to accurately identify the level of support for the different hybrid models because of the way in which these statistics were recorded, but the level of support for one type or another of a hybrid model is in the order of 17-28%. In summary, the different hybrid models were:
- Principally, a hybrid model that sees the reversion of planning responsibilities back to local government;
 - The QBCC hybrid model;

- The housing hybrid model;
- The independent nominating body hybrid model.

[116] A hybrid model that relies upon the reversion of planning responsibilities back to local government would likely result in similar, albeit ameliorated outcomes to a return to exclusive local government building control. That is, it is likely to result in:

- Increased approval times;
- Increased certification, building and finance costs predominantly arising from delays caused by lack of competition and resultant reduced service levels;
- Significant disruption to the lives and businesses of 347 private certifiers and their staff, families and to a lesser extent the communities reliant upon those small businesses;
- A number of participants leaving the certification industry who are unwilling to return to local government employment.
- Skill shortages of building certifiers throughout the State, arising from the exodus of participants.

[117] This hybrid model received support from submitters in the order of 17%.

[118] The QBCC hybrid model suggested by RICS would add significantly to red tape and greatly increase costs to the QBCC if every building development approval granted by a private certifier is to be checked over for its accuracy. Even if that check is only a “tick and flick” procedure, the costs of providing this service over 108,000 building applications would be very substantial. It is also questionable whether such a basic checking mechanism would in actual fact reveal any defects in the private certifier’s work.

[119] The Review is also not convinced that the ‘housing hybrid model’ suggested by Mr. Russell Bergman would have a much different result than a wholly subsumed local government model. To remove the residential sector from private certification would very significantly impact on the viability of many small private certification businesses and would result in lack of competition and efficiencies that drove its implementation in the first place.

[120] Finally the Review rejects the ‘independent nominating body hybrid’ model proposed by Mr. Styles Magwood. Whilst the submitter did not draw any similarities himself, it appears that the proposal is modeled on the Authorised Nominating Authority (ANA) system of appointing adjudicators under the *Building and Construction Industry Payments Act 2004* (BCIPA). The Government has recently amended the BCIPA to remove the function of ANAs

appointing adjudicators²⁸ following an earlier statutory review²⁹. Replicating a system which has been recently criticised and removed from BCIPA because of the perceptions of a lack of probity would not be regarded as best practice. It ought not be followed in the appointment of a private certifier.

Retain the current system of private certification with improvements

- [121] The advent of private certification has delivered significant benefits to the building and construction industry through intense competition, in terms of both value for money for certification services and better more flexible services than when it was offered exclusively by local governments. The statistics available to the review suggest that there is only one confirmed complaint for every 2222 approvals each year. By any account, this is a low rate of complaints.
- [122] The current private certification system is by no means perfect. However, the issue of conflicts of interest, perceived or actual should be properly addressed. The suite of recommendations contained in this report, if adopted by Government will, improve the system to become the nation's best practice building control system, balancing the interests of all building industry stakeholders, whilst offering appropriate protective measures for the public who occupy the built environment.

Question 1.1.1 – Recommendations

[123]

1.	Retain the current system of private certification with appropriate improvements.
2.	The Code of Conduct for building certifiers should be amended to remove reference to the phrase “potential conflict of interest” and be replaced with “conflict of interest”.

²⁸ See the *Building and Construction Industry Payments Amendment Act 2014*

²⁹ See the Final Report into the Discussion Paper – Payment dispute resolution in the Queensland building and construction industry, Andrew Wallace May 2013, 128-166

Question 1.2.1: Should it be made mandatory for an owner to engage a building certifier?

Background

- [124] The conflict of interest issues discussed in Section 1.1.1 above arise in part as a result of the fact that in Queensland there are no rules about who can engage a building certifier.
- [125] Consequently, building certifiers are often engaged and paid by the people who they are statutorily required to police.
- [126] In addition, where building certifiers are engaged by the builder, there is anecdotal evidence before the Review that certification documentation such as building inspection reports are being withheld from the owner until the building has been completed and the final payment has been made. This issue is considered below at section 1.2.4 (Recommendations 9 and 10).
- [127] Currently, a building owner has no statutory entitlement to request a building certifier to provide certification documentation, although many private certifiers during the roadshows and individual consultations reported that they do this as a matter of good practice. However, during the course of individual interviews, it has come to the attention of the Review that some but by no means all private certifiers, withhold this documentation from building owners at the request of the builder. This serves to act as leverage on the owner to pay the builder its scheduled progress and final claims.
- [128] The ability for a builder to influence a private certifier to withhold the certification documentation adds further weight to the contention that some private certifiers have “lost their way” and are inappropriately conflicted between their statutory duties under the *Building Act 1975* and their commercial interests.

Feedback outcomes

- [129] Of the written submissions and completed surveys provided to the Review, 35% of submitters considered that it should be made mandatory for an owner to engage a certifier, whilst 41% disagreed, 13% had other suggestions on how to resolve the issue and 11% did not address the question.

Support for change

The call for tripartite agreements

- [130] In written submissions, one local government employee who wished to remain anonymous, argued in favour of mandatory owner engagement. However, he also argued that in the alternative, a tripartite agreement between the owner, builder and certifier could be established.

Owners would have better access to information

- [131] The Cassowary Coast Regional Council in written submissions argued that owners would have better access to information and the services provided by private certifiers would become more transparent if owner engagement became mandatory.
- [132] Representatives of the Neighbourhood Action Group – Sunnybank, Robertson and Macgregor argued that mandatory owner engagement would empower building owners to “shop around” and make informed decisions about which private certifier would be most suited to the development.
- [133] Private certifier Styles Magwood guardedly accepted that there was some merit in mandatory owner engagement for Class 1 buildings and Class 10 buildings. He also suggested that an independent body should nominate certifiers for Class 2-9 buildings and associated Class 10 buildings.

Support for status quo

Owners will probably act on the recommendation of the builder anyway

- [134] Local government building compliance officer, Anna Sissman rejected the suggestion that owners should be required to engage certifiers. She said:

“I don’t think that mandatory owner engagement is the solution to the ‘conflict of interest’ issue that is present within the Building Certification industry. For the most part, the owners rely heavily on the advice and recommendations of their builder. Consequently, they would simply refer to their builder for advice regarding which certifier should be engaged. The builders would still hold the power, I believe.”

Owners lack sufficient knowledge to engage a building certifier

- [135] Mr. Ain Kuru in his written submissions opposed the introduction of mandatory engagement by building owners. He stated:

"In most domestic situations, the owner does not have sufficient knowledge to enter into a contract with a private certifier. This matter was investigated in some detail by the 2003 NCP [National Competition Policy] review of the Building Act. The NSW system where the owner does engage the certifier, does not work effectively as the owner generally ends up engaging the certifier recommended by the builder.

It should be noted that by encouraging owners to engage certifiers will increase the potential for corruption as owners are more likely to seek concessions than builders. This is because the owner is less likely to understand the rules, and more likely to benefit financially from an incorrect assessment."

- [136] In rejecting the proposal, AIBS referred to the report entitled 'Building Certification and Regulation – Serving a new planning system for NSW, May 2013'³⁰ 'Maltabarow Report'. AIBS argued that forcing owners to engage building certifiers would lead to unnecessary delays. In relation to the domestic sector, AIBS argued:

"... members are indicating that in their experience home owners do not understand the approval process and are regularly on the phone asking what to do and the certifier ends up walking them through the building application process which causes excessive red tape in the logistics associated with managing an application."

- [137] Similar submissions were made by private certifiers Claude McKelvey, Fred Feather and Neil Oliveri.

Owner mandatory engagement may have unintended consequences

- [138] FPA Australia argued that there is no, one size fits all solution in relation to who should engage a private certifier. They submitted that:

"Restricting engagement to only owners might appear to break any perceptions regarding a lack of independence, however in reality this is a superficial treatment of the issues and on balance, may be more of a hindrance than being helpful."

- [139] Similarly, the HIA argued that mandatory owner engagement is a flawed concept. It argued:

"Enforcing mandatory owner engagement will create more problems and challenges than it is perceived it will address. In the domestic situation most people build only one or two houses in a lifetime. It is unreasonable to expect them to become familiar with the complex myriad of procedures associated with the building approval process for the one or two occasions

³⁰ See: https://majorprojects.affinitylive.com/public/4699af15dd6daca40c4a59f1b91f4a86/Maltabarow_report.pdf

they may build a house (See the National Competition Policy Review which concluded similarly). Additionally, HIA members involved in projects where owners have contracted the certifier have found themselves on the receiving end of enforcement action because owners failed to pass on critical information from the certifier.”

- [140] The LGAQ similarly did not support mandatory owner engagement.

Owners don’t want to be involved in the process

- [141] Private certifier Tony Jaques doubted whether mandatory owner engagement would work. In his written submissions, he stated:

“It is my experience that most owners just want to get on with the job and do not want to be involved in the process. ... Since commencing we have opened approximately 750 files and have only received two phone calls from owners upon receipt of the notice [of engagement].”

Owner consent should be mandatory

- [142] Cairns Regional Council (CRC) did not “wholly support” mandatory owner engagement. It argued this would lead to “logistical difficulties” and delays. Notwithstanding this, CRC in its written submissions suggested that owner *consent* to the engagement should be mandatory.

Stronger auditing powers

- [143] Private certifier Richard Shamm argued that it was more appropriate for the QBCC to be given stronger auditing powers over building certifiers to examine conflicts of interest rather than to break up long standing commercial arrangements between builders and certifiers.

Consideration

Notice of engagement is inadequate

- [144] Presently, building certifiers must within 5 business days after engagement, issue the building owner with a Form 18 – Notice to the owner that a private certifier has been engaged³¹. However this of course does not alleviate in any way the perceptions of conflict of interest between certifier and the builder. It simply acts as a notification that a private certifier has been engaged. Arguably, the terms used in the *Building Act 1975* only serve to promote this perception of conflict. For example, s.138(5) provides:

³¹ See s.143(b) of the *Building Act 1975*

*The person for whom private certifying functions are agreed to be performed under an engagement of a private certifier is the certifier's **client**.*

- [145] The use of such unfortunate phraseology within the *Building Act 1975* itself only serves to promote a misconception that when engaged by the builder, a private certifier's contractual duty might be seen to override his or her statutory duty to act in the public interest³² which of course it does not. However, notwithstanding the overriding statutory obligation, during the course of the roadshows and individual interviews, it became apparent that many private certifiers perceived that s.138(5) of the *Building Act 1975* justified a perception that the building control process had nothing to do with an owner of a building and that the private certifier only had to deal with his "client" who is more often than not, the builder.
- [146] The use of the term "client" in the *Building Act 1975* when referring to the engagement and on-going responsibilities of the private certifier should be replaced with another term that connotes somewhat less of a fiduciary relationship, such as "applicant" or "engaging party".

The NSW experiment

- [147] In NSW, "only the person having the benefit of a development consent" may appoint a "principal certifying authority"³³. Section 109E(1A) of the *Environmental Planning and Assessment Act 1979* (NSW) also provides:

"Despite subsection (1), such an appointment may not be made by any contractor or other person who will carry out the building work or subdivision work unless the contractor or other person is the owner of the land on which the work is to be carried out."

- [148] Maltabarow argued that there was case to be made for this requirement to be withdrawn. At p.33, Maltabarow stated:

"The requirement for the PCA to be appointed by the beneficiary of consent arose from the Campbell Inquiry, to address concerns about certifier shopping and potential conflicts in the builder/certifier relationship.

Against this consideration is the requirement for a direct relationship and clear communications between the builder and certifier, not least to ensure that inspections are carried out on a timely basis. This is most relevant to the "Mum and Dad" end of the spectrum, where additional risks may manifest if the owner is mandated to become a contracting party (as noted

³² See s.136(1) of the *Building Act 1975*

³³ See s.109E of the *Environmental Planning and Assessment Act 1979* (NSW)

earlier in this report, contracting does not appear to be an issue at the higher end of the market). One such risk could occur when a certifier may have missed an inspection. The builder may argue that the owner failed to advise of the required inspection (keeping in mind that “Mum and Dad” owners are unlikely to be fully engaged in the building process and the appointment requirement [pursuant to statute] is for the owner to be the conduit of communication between the builder and the certifier). Accordingly, there are clear practical difficulties with this arrangement.

Add to this the analysis in section 7.2 which demonstrates that the primary obligation of the certifier is to the Council (as consent authority). This analysis also points out that “Mum and Dad” owners are hardly natural or engaged contracting parties. Accordingly, the contract case appears even weaker.

The risks posed by inappropriate relationships between certifiers and builders would seem to be better addressed by modifying the consent application process (as suggested in section 3.7) and ensuring an effective regime of compliance for certifiers.”

- [149] The issue of conflict of interest and owner engagement of private certifiers has been discussed for almost as long as the advent of private certification. In the report entitled *National Competition Policy Review of the Building Act 1975, 2003*³⁴, the authors rejected the concept of mandatory owner engagement. They found that:

“A requirement to only allow owners to engage certifiers is not favoured. It is unlikely in many instances home buyers will engage a certifier other than recommended by a building contractor. In addition, in the case of house and land packages, the owner is the developer or building contractor. Instead, the Review Committee recommends building certifiers should be required to advise an owner who is doing the certification work for their building and who is responsible for mistakes and how these are addressed.”

Tripartite agreements

- [150] The imposition by government of mandating tripartite agreements to govern the relationship of owner, builder and certifier is likely to create many more problems than it would resolve. The contractual rights and obligations between owner and builder, builder and certifier and owner and certifier (if applicable) is complex enough without intertwining all these into one contract. The Review does not support the mandating of tripartite agreements to govern these relationships.

³⁴ See: <http://ncp.ncc.gov.au/docs/0ld%20Buidling%20Act%201975%2C%20Review%20report%202003.pdf> , 18

The need for better information

- [151] There is undoubtedly a need for better information to be shared between the building certifier and building owners, particularly in the residential construction sector. Consumer groups complain that the current engagement system is disempowering and favours builders and certifiers at the expense of homeowners. This issue will be considered in more detail at Section 1.2.2 and 1.2.3 below.

Mandatory owner engagement is unlikely to be successful in Queensland

- [152] For similar reasons provided in the Maltabarow report, mandating the engagement of building certifiers exclusively by owners, is likely to fail to address the issues surrounding the perceived conflicts of interest and is in fact likely to result in unintended consequences for the following reasons:
- Building owners, particularly ‘mums and dads’ are very likely to adopt the use of their builder’s recommended certifier anyway³⁵;
 - The vast majority of building owners, particularly ‘mums and dads’ will simply not have the technical knowledge to understand what is involved in the engagement and on-going contractual relationship with a private certifier;
 - Inexperienced owner engagement and on-going involvement is likely to increase the costs of certification as private certifiers will be required to spend more time assisting building owners through the certification and construction process;
 - Many building owners, particularly ‘mums and dads’ would simply not be interested in assuming the role. First and foremost, building owners want to see the finished product and most are not interested in the process that delivers that product;
 - Owner engagement may result in significant confusion and demarcation disputes between the owner and the builder. The owner, who may only build once or twice in a life time, will not have the experience, knowledge or skills required to coordinate the private certifier around the builder’s construction program to ensure that inspections are conducted as and when required. This could have significant adverse consequences upon the building project program and could result in costly delays for the builder and therefore the owner as well;
 - Mandatory owner engagement is very likely to increase pressure on certification costs as private certifiers will no longer have the ability to work with preferred suppliers.

³⁵ As was also submitted by Goondiwindi Regional Council in its written submissions

Mandatory consent of the property owner

- [153] The submission from Cairns Regional Council that would require owner consent to the building development application has considerable merit. It is almost inconceivable that a building development application could be assessed and granted without the express consent of the property owner. For example, a building development application could be made to a private certifier for the demolition of a building. Whilst the private certifier is required to issue the owner with a Form 18 advising of his or her engagement, the application could theoretically be approved without the owner's consent.

Review of auditing powers

- [154] The QBCC ought to review and implement its auditing powers with a view to among other things, taking action against certifiers who breach the Code of Conduct by performing certifying functions where there is an *actual* conflict of interest. Further discussion is made below in relation to the auditing powers of the QBCC.

Question 1.2.1 – Recommendations

[155]

3.	It should not be made mandatory for an owner to engage a building certifier.
4.	It should be made mandatory for a building development application to be accompanied by the owner's written consent for the application. This could be done by an amendment to the Form 1 Application, which would require the approval signature of the building owner.
5.	The use of the term "client" in the <i>Building Act 1975</i> when referring to the engagement and on-going responsibilities of the private certifier should be replaced with another term that connotes less of a fiduciary relationship, such as "applicant" or "engaging party".

Question 1.2.2: If it should not be mandatory for an owner to engage a building certifier is there a need to make owners more aware of their ability to engage a certifier?

e.g. through signposting provisions in building contracts?

Background

[156] Given the inter-connectedness with the previous question, it is not necessary to provide additional background to Questions 1.2.2 – 1.2.4. Further, many of the issues raised by submitters in response to Questions 1.2.2-1.2.4 have been considered above in Question 1.2.1.

Feedback outcomes

[157] Of the written submissions and completed surveys provided to the Review, 46% of submitters considered that there is a need to make owners more aware of their ability to engage a certifier, whilst 23% did not, 7% had other suggestions on how to resolve the issue and 24% did not address the question.

Support for change

[158] AIBS representatives argued that owner awareness of an entitlement to engage building certifiers could be achieved by introducing signposting provisions in domestic building contracts³⁶.

[159] Similarly, FPA Australia supported mandatory disclosure to building owners signposted within building contracts. FPA Australia argued that owners should be informed that either they or their agents:

- Should be able to appoint the building certifier of their choice;
- Are entitled to copies of inspection reports and enforcement documentation;
- Should receive a copy of the building development approval and “occupancy approval”;
- Are unable to “simply swap” private building certifiers where there is disagreement.

FPA Australia also called for a public awareness campaign to be conducted by the QBCC as to the role of building certifiers.

³⁶ Similar submissions were made by private certifier Neil Oliveri

Support for status quo

- [160] Mr. Ain Kuru was opposed to building owners being able to engage building certifiers because he thought that many owners would not understand the certification process and this would lead to unnecessary confusion and ultimately greater workloads for building certifiers.

Other suggestions

- [161] Private certifier Liz Woollard suggested that the basic details of a job, its location and type of work should go into a “centralised database” where private certifiers could provide quotes for certification services. She asserts that this system would stop builders from recommending particular certifiers and result in a fairer distribution of work. She argues that with a better disciplinary system, her proposal would result in less mistakes caused by excessive workloads.
- [162] Mr. Russell Brandon of the Building Designers Association of Queensland (BDAQ) disagreed with the proposal to alert owners via signposting in building contracts. He thought it was more appropriate that owners of domestic building work be made aware of their entitlements via fact sheets, prior to building contracts being entered into.

Consideration

Status quo

- [163] If the Government adopts Recommendation 6 (below), it is expected that in most instances, building owners particularly in relation to the construction of domestic building work would not engage their own building certifier. Most owners would follow the advice given to them by their preferred building contractor. However, that is not a sufficient reason not to empower building owners from being made aware of the choices that are open to them.
- [164] The *Building Act 1975* already empowers building owners to engage their own choice of building certifier³⁷. Recommendation 6 simply serves to better alert building owners that they have that choice.

³⁷ Section 138 of the *Building Act 1975*

Other suggestions

- [165] The Review does not support the “centralised database” model suggested by Liz Woollard. There is insufficient evidence to suggest that the current competitive model is so fundamentally flawed that government should intervene to the extent that it facilitates competition between building certifiers. This represents unnecessary government intervention in a competitive market and would serve to increase government red tape for little if any appreciable benefit.
- [166] The Review also does not support the suggestion made by Russell Brandon of the BDAQ. The use of fact sheets alone is unlikely to draw sufficient attention to the fact that building owners are able to engage their own building certifier.

Signposting in regulated contracts

- [167] Currently, the *Domestic Building Contracts Act 2000* (DBCA) regulates domestic building work and domestic building contracts.
- [168] As part of its red tape reduction program to reduce regulation by 20% by 2018³⁸, the Queensland Government recently introduced legislation³⁹ to the Parliament which will repeal the DBCA.
- [169] If passed by the Parliament, the Queensland Government intends to amend the provisions of the *Queensland Building and Construction Commission Act 1991* (QBCC Act) by inserting the relevant parts of the DBCA it wishes to retain.
- [170] Sections 13(3) and 14(3) of Schedule 1B of the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* set out the statutory requirements for level 1 and level 2 regulated contracts respectively.
- [171] A level 1 regulated contract is a regulated contract for the performance of domestic building work valued at under \$25,000.00.
- [172] A level 2 regulated contract is a regulated contract for the performance of domestic building work valued at \$25,000.00 and over.
- [173] Sections 13(3) and 14(3) of Schedule 1B of the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* should be amended to include a requirement that level 1 and

³⁸ See <http://www.treasury.qld.gov.au/office/services/regulatory-reform/reducing-the-regulatory-burden.shtml>

³⁹ The *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014*

level 2 regulated building contracts contain a conspicuous notice advising that a building owner has the right to engage:

- (a) Their own building certifier; and
- (b) The building certifier (of their choice) to undertake more than the minimum mandatory inspections at an agreed schedule of costs.

To provide greater awareness of these opportunities, it is advisable that the amendments require that the conspicuous notice be separately signed or initialed by the building owners.

[174] In addition, pursuant to s.18 of Schedule 1B of the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014*, in relation to level 2 regulated contracts, a building contractor must give the building owner a copy of the Consumer Building Guide before the owner signs the contract.

[175] The Consumer Building Guide should contain a conspicuous notice which alerts a building owner that:

- They may engage their own building certifier; and
- They may engage the building certifier (of their choice) to undertake more than the minimum mandatory inspections at an agreed schedule of costs.

Question 1.2.2 – Recommendations

[176]

- | | |
|----|---|
| 6. | <p>There is a need to ensure that owners are made aware of their ability to directly engage a building certifier and that with the certifier's agreement, the engagement may involve more than the minimum mandatory inspections. This may be effected by alerting owners via a conspicuous notice contained in:</p> <ul style="list-style-type: none">(a) Contractual provisions in level 1 and level 2 regulated building contracts by making amendments to ss.13(3) and 14(3) of Schedule 1B of the <i>Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014</i>. To provide greater awareness of these opportunities, it is advisable that the amendments require that the conspicuous notice be separately signed or initialed by the building owner(s); and(b) The <i>Consumer Building Guide</i> referred to in schedule section 18 of the <i>Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014</i>. |
|----|---|

Question 1.2.3: Should owners have an increased ability to request information or inspections from a certifier?

Feedback outcomes

- [178] Of the written submissions and completed surveys provided to the Review, 57% of submitters considered that owners should have an increased ability to request information or inspections from a certifier, whilst 19% did not, 10% had other suggestions on how to resolve the issue and 14% did not address the question.

Support for change

- [179] The Cassowary Coast Regional Council submitted that non-compliance notices should be included in the list of inspection documentation made available by the building certifier on request by the building owner.
- [180] Building designer Joanne Galea was not opposed to the concept, but considered that any additional inspections requested should be on a “user pays” basis. However, like other submitters, she raised concerns that building certifiers were not “quality controllers” and that the need to maintain their role as “building work compliance” officers needs to be maintained. Ms. Galea considered that quality control was however best achieved by owners engaging their building designer to administer the building contract.
- [181] Logan City Council (LCC) supported owners’ entitlement to request additional information and inspections because it provides flexibility to secure the role of the building certifier to assist them to ensure that the owner’s expectations are met. However, LCC considered that it should be made mandatory for building certifiers to provide inspection documentation to building owners (see Question 1.2.4).

Support for status quo

- [182] The AIBS did not support the ability of an owner being able to *insist* on other types of inspections to facilitate supervision or quality assurance by building certifiers. AIBS asserted that this supervisory function is best delivered by a superintendent or independent consultant. However, AIBS did support changes to enable an owner to be able to *request* additional stages or aspects to be included in the inspection regime for the approval.
- [183] Private Certifier Claude McKelvey opposed the suggestion. He considered that by requiring certifiers to provide information or to

perform further inspections, building certifiers would be drawn into arguments involving the builder's quality of workmanship.

[184] A private certifier responding to the survey said:

*"We use to provide all inspection documents to the home owner (for about 2 years) at each stage of the inspection. We stop (sic) this as we found the homeowners didn't have a clue what it all meant and they thought there (sic) home was not being built correctly when they same a reminder to the builder on the inspection form."*⁴⁰

Consideration

Provision of documentation

[185] As demonstrated by the Review statistics, there was significant support from stakeholders to enable a homeowner to obtain further information and inspection documentation from a building certifier. However, for the reasons expressed when considering Question 1.2.4, it is considered that the best way to deliver that information is by way of making it mandatory for the building certifier to supply it.

Final Inspection Request

[186] During an individual consultation it was brought to the attention of the Review that if a builder had engaged a building certifier but later died, became insolvent, disappeared or was in dispute with the owner, the owner had no entitlement to request that a final inspection be performed to finalise the building approval process. The argument relied upon was that when engaged by the builder, the builder is the certifier's "client". In effect, what was argued was that the building owner has no legal standing to seek a final from the certifier. This is entirely unacceptable.

[187] The Review also received anecdotal evidence that some builders refuse to provide approval and inspection documentation to a building owner until they are paid their final claim. This is inappropriate leverage sought to be used against building owners and is contrary to the provisions currently contained within s.39 of the *Domestic Building Contracts Act 2000*.

⁴⁰ Similar submissions were made by local government building compliance officer Anna Sissman

Additional user-pay inspections by agreement

- [188] Many submitters to the Review have commented upon the fact that there is a considerable amount of misunderstanding within the industry and particularly the broader community about the role of a building certifier. This accords with the author's own experience as counsel cross-examining building certifiers. Often, building certifiers themselves are incapable of articulating what their actual role is.
- [189] Perhaps unsurprisingly, the community at large does not seem to be able to comprehend the difference between someone who is able to inspect building work from a building control perspective, that is whether it has been built in accordance with the NCC, relevant Australian Standards (AS), the Queensland Development Code (QDC) and local government ordinances and someone who is able to inspect building work to ensure quality control. In the author's experience as counsel appearing in Court or in the Queensland Civil and Administrative Tribunal (QCAT), the perception amongst many in the community is that if building work has been passed by the building certifier, then it should have been built correctly.
- [190] Whilst there is a distinction between the two roles, the Parliamentary Committee which reviewed the QBSA and the Government's resultant Ten-Point Action Plan identified the need to review the role of the private certifier with an emphasis on *"probity, conflicts of interest, quality and [establishing] an appropriate penalty regime for failure to perform"*.
- [191] It is this unsettled distinction between the regulatory function of a building certifier and the work that would once have been performed by a 'clerk of works' or an architect which has caused and continues to cause a great deal of confusion and disquiet.
- [192] Traditionally, building owners have been able to engage an architect to design and project manage a construction project. These services were often charged out at a percentage of the build cost. The services were generally offered on larger projects or 'high-end' homes. For smaller, less expensive homes or 'project-homes', owners are reliant upon the skills of the builder, its employees and subcontractors and where available, the builder's supervisor to ensure quality control. Quality control measures attained at the non-high end of the sector can be quite sporadic. If all projects, irrespective of size and cost could utilise the services of an architect or clerk of works, it is very likely that quality control would be less of an issue. Unfortunately however, economic factors dictate that most domestic building projects will not be administered by an architect or clerk of works.

- [193] There is an opportunity to provide homeowners where there is no architect or project manager involved a greater degree of comfort to know that their home is being built not just to the appropriate regulatory standard, but to know that it is of an appropriate standard and quality. After all, the construction of a home or renovation is one of, if not the biggest investments that a consumer will make in his or her lifetime. It is entirely appropriate that the consumer has the confidence to know, not just that their home will not fall down, but that it has been properly built to a good and workmanlike standard.
- [194] To that end, a building owner should be able to engage a building certifier for an agreed fee to conduct additional inspections over and above the minimum mandatory inspections. For instance, if a building owner wishes to engage a building certifier to act as a form of quality control check on the work performed by the builder, that could be negotiated with the building certifier for a pre-determined schedule of fees. Additionally, there is no reason why a building owner of Class 2-9 buildings could not request more inspections than a certifier would normally provide under the risk-based assessment model⁴¹.
- [195] It is envisaged that a building certifier would not have to perform these additional inspections if they wanted to only continue in the regulatory building control space. If a building certifier did perform these ancillary inspection services whilst engaged as the relevant building certifier, then this additional work, whilst not technically certification work, should fall within the disciplinary procedures administered by the QBCC as though the work was certification work. To do otherwise would create unnecessary jurisdictional arguments.

Question 1.2.3 – Recommendations

[196]	
7.	<p>Regardless of who has engaged the building certifier, if requested in writing by a building owner, the building certifier must within 5 business days of the request inspect the building for the purposes of conducting a final inspection and if satisfied that:</p> <p>(a) The provisions contained within s.99 of the <i>Building Act 1975</i> have been satisfied, issue the owner with a final inspection certificate in respect to class 1 and 10 buildings; or</p> <p>(b) The provisions contained within s.102 of the <i>Building Act 1975</i> have been satisfied, issue the owner with a</p>

⁴¹ See Guidelines for inspection of class 2 to 9 buildings at:
<http://www.hpw.qld.gov.au/SiteCollectionDocuments/guidelines-inspection-of-class-2-to-9-buildings.pdf>

	certificate of classification in respect to class 2-9 buildings.
8.	An owner upon agreement with the building certifier, should be able to engage the building certifier to undertake more than the minimum mandatory inspections for an agreed cost, with such costs to be set out in the contract between the building certifier and the owner.

Question 1.2.4: Do you support mandatory requirements for a certifier to provide inspection documentation to the owner?

Feedback outcomes

[197] Of the written submissions and completed surveys provided to the Review, 58% of submitters supported the introduction of mandatory provisions requiring certifiers to provide inspection documentation to building owners, whilst 18% did not, 10% had other suggestions on how to resolve the issue and 14% did not address the question.

Support for change

[198] Ms. Anna Sissman a local government building compliance officer thought that it should be mandatory for building certifiers to provide inspection documentation to building owners⁴². She considered that by making the provision mandatory would lessen the impost on building certifiers.

[199] AIBS also supported this change, however they also argued that local government certifiers should also have to provide inspection documentation to building owners to ensure there was a level playing field.

[200] Logan City Council preferred the mandatory provision of inspection documentation to the building owner. It argued that building owners generally remain relatively uneducated about the “*complex building certification process*” and that this option would assist their understanding and ensures that they receive critical inspection and ‘final’ documentation as well as any details regarding work that required rectification or completion by the builder. LCC advocated for the requirement that the applicant to a building development application should be required to obtain the consent of the owner and suggested that the owner ought to have to sign the Form 1-Application Form.

[201] MBA supported the proposal requiring the building certifier to provide all relevant inspection documentation to both the owner and the builder throughout the construction process.

⁴² Similar submissions were received from Cassowary Regional Council and Gladstone Regional Council

Support for status quo

- [202] Mr. Ain Kuru argued against mandatory provisions requiring inspection documentation to be provided to building owners. He suggested that inspection results can be misleading in that the inspected work may be incomplete rather than non-compliant. However, he did acknowledge that where an inspection report identified non-compliant work which had not been corrected within 20 days, the inspection report should be provided to a building owner.
- [203] Private Certifier Claude McKelvey also rejected the suggestion arguing that reasons affecting the availability of certificates are usually related to the builder or owner who has engaged the subcontractors and whether those subcontractors have been paid at that relevant time. He also raised the issue of the prevalence of incorrectly completed Form 15s and 16s impacting upon the ability of the certifier to issue a certificate. Importantly, Mr. McKelvey also argued that the mandatory provision of inspection documentation would be an overly burdensome task and contrary to the red tape reduction objectives of the Review.
- [204] Similar 'anti-red tape' submissions were made by local government certifier Laurence Eves who, whilst opposed to mandatory provisions, did not object to the owner being able to request the documentation. He suggested that a 'tick box' could be inserted onto the Form 1 to facilitate this transfer of information.

Consideration

Mandatory provision of inspection documentation

- [205] There is little doubt that the current process of building certification has resulted in the disempowerment of building owners where they are not the engaging party. Further to Recommendation 4, that is, where the building owner's consent must be obtained, the mandatory supply of inspection documentation by the building certifier to the building owner is likely to improve information flow to the owner. If the building owner chooses to ignore that information, that is of course a matter for it.
- [206] The Review also rejects the proposition that the mandatory provision of inspection documentation is unnecessary red tape for building certifiers. There should be negligible impact on building certifiers once they adjust their electronic systems to provide that owners should be automatically provided with such documentation.

Current provisions inadequate

- [207] Section 99 of the *Building Act 1975* provides that a building certifier being satisfied that the building work has reached the final stage, must provide to the building owner a final inspection certificate and a copy of any other inspection documentation within 5 business days of acceptance of the inspection documentation relied upon by the certifier. Similar provisions apply in s.102 of the *Building Act 1975* in respect to Class 2-9 buildings for Certificates of Classification.
- [208] However, the current provisions do not adequately cater for the provision of documentation whilst the building work is underway.

QBCC reforms to tie payments to the provision of documentation resulting in better payment outcomes for subcontractors

- [209] The Review accepts the submission that the supply of inspection documentation from the building certifier can and often is, impacted upon by the supply of information to the builder from its subcontractors. However, the Queensland Government is seeking to address this issue by making amendments to the QBCC Act. Section 14(5) of Schedule 1B of the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* provides that a 'level 2 regulated contract' must contain a provision that states that the contractor may not claim payment for the completion of any stated stage, unless the contractor has given the owner all certificates of inspection relevant for the stage.
- [210] If the builder is unable to claim for a relevant stage because a subcontractor or supplier has not provided any relevant certification, the market will sort that matter out. Importantly, this will provide for better security of payment outcomes for subcontractors because they will be able to utilise the withholding of aspect certificates from the builder until they are paid their contractual entitlements.

Question 1.2.4 Recommendations

[211]

9.	Regardless of who has engaged the building certifier, the building certifier must provide the building owner with all inspection documentation, including non-compliance notices within 5 business days of the relevant stage being reached.
10.	The Review notes and supports the provisions contained in s.14(5) of Schedule 1B of the <i>Queensland Building and</i>

	<i>Construction Commission and Other Legislation Amendment Bill 2014</i> which provides that a 'level 2 regulated contract' must contain a provision that states that the contractor may not claim payment for the completion of any stated stage, unless the contractor has given the owner all certificates of inspection relevant for the stage.
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Question 1.3.1: Which is your preferred option for strengthening the disengagement process?
Option 1.3(a) – Disengagement approved by the Commission in strict circumstances;
Option 1.3(b) – Standard clauses in certifier engagement contracts;
Other

Background

[212] In Queensland there are no restrictions on the grounds upon which a private certifier may be disengaged and only limited restrictions on when the disengagement takes effect⁴³.

[213] Concerns have been raised that the current legislative regime makes it too easy for an applicant to disengage a building certifier in circumstances where for example the building certifier has not been willing to assess proposed building work to a class desired by the building owner or alternatively where a building certifier has been unwilling to approve building work as having complied with regulatory standards. In those circumstances, the person who engaged the building certifier can simply disengage the certifier by giving notice in the approved form and provide a copy of the disengagement notice to the relevant local government within 5 business days after the disengagement takes effect.

[214] Similarly, a building certifier who may be struggling with a difficult builder and/or building owner can simply disengage from the certification process leaving the applicant to have to find a replacement certifier and the building owner with additional costs in doing so.

[215] As demonstrated in Table 4 below, with the exception of Western Australia and Queensland, all other Australian states and territories have some independent decision maker determine whether a private certifier should be disengaged.

⁴³ See s.144 of the *Building Act 1975*

Table 4 – Certifier disengagement requirements in other jurisdictions

State/Territory	Requirements for disengagement of a certifier?
Australian Capital Territory	Yes – certifier must seek permission from the Registrar to disengage, however no restrictions on an owner disengaging.
New South Wales	Yes – approval must be sought from the Building Professionals Board unless all parties i.e. the person with the benefit of the consent (usually the owner), the current principal certifying authority (PCA) and new proposed PCA, agree to the disengagement.
Northern Territory	Yes – requires agreement from owner and certifier and written approval from Director, Building Control.
South Australia	Yes – applicant must seek permission from the Minister, however there are no restrictions on certifier disengaging, except that another certifier cannot be engaged without consent of Minister.
Tasmania	Yes – consent must be obtained by the Director of Building Control where the owner wants to change their building surveyor, or their building surveyor has died, disappeared or is unable to perform their functions. There is also a procedure for the “referral” of matters where the owner and two building surveyors agree to transfer a matter. Three years after their engagement, a building surveyor may resign without the permission of the Director.
Victoria	Yes – written consent must be obtained from the Victorian Building Authority.
Western Australia	No - requirements or restrictions.

[216] The lack of regulation in the disengagement process in Queensland adds to the perception of a conflict of interest in that the current process requires a building certifier to execute his or her certifying function, whilst always acting in the public interest, yet they operate under the constant threat of disengagement.

Feedback outcomes

[217] Of the written submissions and completed surveys responding to this question, 34.65% of submitters supported amendments to the *Building Act 1975* making it mandatory for disengagement to be approved by the QBCC in strict circumstances, whilst slightly more

submitters 36.40% thought the best way of dealing with disengagement was to provide for it in standard clauses in certifier engagement contracts. Approximately 15% of submitters had other suggestions on how to resolve the issue and 14% did not address the question.

- [218] It is important to note at this juncture that there are concerns regarding the statistical reliability of the survey figures compiled for this question. When the Review survey was first published on the internet, Question 1.3.1 was inadvertently omitted⁴⁴. Sixty surveys that were submitted to the review did therefore not address this question.

Support for QBCC involvement

QBCC involvement would stop ‘certifier shopping’

- [219] Local government building compliance officer Anna Sissman supported a disengagement model which required the approval of the QBCC. In her written submissions to the Review she said:

“This would be a great inclusion to our legislation. The ability to have a non-bias third party review the matters raised and act as an umpire, would be great. I believe this would stop shopping around by builders, owners & applicants, whilst giving certifiers piece of mind that their decisions are correct (not over the top).

As a Building Certifier, we are sometimes told that the decisions we make are “just too picky” and they threaten “I’ll just disengage and go and get someone else to sign it off”. Single operator Private Certifiers may feel pressured by these threats, to sign off work that is substandard.

I do think it would be beneficial to limit the number of times the ‘umpire’ can be called in, to prevent unnecessary delays. Any party (owner, builder, certifier) should be able to initiate the disengagement process. There would also need to be reasonably short timeframes in place for the QBCC to make the decision, at a nominal cost to the party initiating disengagement.”

Restrict QBCC involvement to where there is no agreement between the parties

- [220] AIBS offered qualified support for QBCC involvement in the disengagement process. It argued that QBCC adjudication should only be required where there was no agreement between the parties. In circumstances where there is incapacitation, death or bankruptcy of a party, AIBS argued that the *Building Act 1975*

⁴⁴ The omission was immediately corrected when it came to the attention of the Review. 228 out of 288 survey responses however did address the question

should provide for “*automatic discontinuance*” of a building certifier.

QBCC should choose replacement certifier

- [221] One local government employee who wished to remain anonymous agreed that the QBCC adjudication model was preferred but further argued that the replacement private certifier should be chosen by the QBCC and that the additional costs of the replacement certifier ought not have to be borne by the owner.⁴⁵

Current disengagement process disrupts the flow of documentation and inspections

- [222] Cairns Regional Council supported the QBCC adjudication model. It argued that based on previous experience, disengagement of private certifiers had disrupted the flow of important documentation and inspection services resulting in increased costs and delays for all parties. With the QBCC managing the disengagement process, it was considered that there would be fewer attempts to disengage over trivial disagreements.

Current disengagement process devalues the certifier's role

- [223] Private Certifier Clayton Baker also supported the QBCC model. In his written submissions he said:

“The current process wherein a client can disengage a Certifier at a whim devalues the role that the Certifier plays a regulator (sic). Builders/designers/architects and owners can all disengage the Certifier for a project if they are not happy with their decision making. Whilst this isn’t the intent of the current system, ‘Certifier shopping’ is something I have experienced. I agree with Option 1.3 (a).”

- [224] Similar support was found in the written submissions of FPA Australia who wrote:

“FPA Australia considers that option 1.3(a) of the Discussion Paper is appropriate. Changing building certifier should only be at the discretion of the regulator and only in extraordinary circumstances. It is nonsensical to suggest that the appointment of a statutory decision maker could be determined by the consumer who could simply change decision makers if the decision they receive is not favourable. This issue is an example of where the regulations must support private building certifiers and give them confidence to implement the regulatory requirements without fear of losing projects or inadvertently jeopardising their reputation for merely doing

⁴⁵ Similar submissions were made in relation to a requirement for the refund of unused fees by Goondiwindi Regional Council and Ipswich City Council

their job. It would also assist in a controlled approach to appointing a new private building certifier when the appointed certifier is suddenly unavailable due to health or business issues."

The current process is too flexible

- [225] The HIA also supported the QBCC adjudication model arguing that the current process "*provides too much flexibility for parties to disengage.*"

The QBCC adjudication process sends a clear message that the certifier is the regulator

- [226] Similarly, the MBA argued that the QBCC adjudication model "*sends a clear message to industry and the general public that the certifier is a regulator, there to protect the public interest*".

QBCC adjudication process will make certifiers more accountable

- [227] QBCC Senior audit and investigation officer Philip Godfrey considered that a more formal transparent approach to disengagement via the QBCC would be less attractive to certifiers who use disengagement as a means to avoid performing their certification functions.

Support for standard clauses in certifier engagement contracts

- [228] When reviewing the written submissions in respect to this question, a number of submitters dealt with this question on a broad basis, namely whether a standard form certification engagement contract should be created. This was not the intent of the question posed in the Discussion Paper. The Review considers that the intent of the question was whether the *Building Act 1975* should be amended to restrict disengagement to strict circumstances adjudicated by the QBCC, or whether the grounds of disengagement should be confined to standard form provisions in building certifier contracts. For the record, many submitters objected to the prospect of a standard form certifier engagement contract.

Terms of disengagement should be left to the parties to agree in the contract

- [229] On the other hand, private certifier Richard Shann opposed QBCC involvement. He considered that the issue should be left to the

parties to resolve by the introduction of standard clauses in certifier engagement contracts.

Support for other reforms

One certifier per application

- [230] AIBS argued that the current process enables applicants to engage more than one private certifier at a time on the one application/approval. AIBS suggested that some of these applicants are effectively certifier shopping by accepting the more favourable outcome from one certifier and disengaging the other. Similarly, AIBS members reported that some applicants were also running concurrent applications with both local government and private certifiers and seeing which is most favourable to their needs and disengaging the other.

QBCC should be notified of disengagement

- [231] Mr. Claude McKelvey rejected the QBCC adjudication model. He argued in his written submissions that there was no evidence that “*certifier shopping*” is such a widespread practice so as to require the mooted changes. Mr. McKelvey considered that constant changes to the *Building Act 1975* necessarily entailed more work for private certifiers for which they could not charge. However, he did suggest that the *Building Act 1975* could be amended to require the original building certifier to provide the disengagement notice to the QBCC as well as the local government to enable the QBCC to collect data and monitor outcomes.

Consideration

- [232] During the roadshows and individual interviews, the extent of ‘inappropriate disengagement’ of private certifiers whether by the certifiers themselves or by builders or owners appeared to be low. It appeared during the roadshows at least, that the issue of disengagement may have been more of a perceived problem than an actual one with few participants acknowledging that they had either disengaged or that they had been disengaged. However caution needs to be exercised here, as some certifiers may have been reluctant to acknowledge in a public forum of their peers that they had either disengaged or that they had been disengaged.
- [233] That said, the written submissions of stakeholders reveals that a little over one third of submitters who responded to this question consider the issue to be problematic enough to warrant legislative intervention.

QBCC adjudication model has multiple benefits

- [234] If one starts the examination of this issue from the premise that a building certifier is performing a regulatory function in the assessment of building development applications and the inspection of building work to ensure that it complies with regulatory standards, the question needs to be asked why a system that promotes “*certifier shopping*” should be permitted to continue.
- [235] The QBCC adjudication model has a number of significant benefits:
- It gives greater legislative authority to the role of private certifier. Once appointed, a disaffected party cannot move to disengage the certifier at a whim;
 - It provides a greater degree of certainty to the certifier that he or she cannot simply be replaced because they are fulfilling their statutory requirements, namely performing their certifying function in the public interest;
 - It promotes certifier accountability and continuity because certifiers will not simply be able to disengage themselves if the ‘going gets tough’; and
 - The fact that the decision as to whether disengagement should be approved is made by the building industry regulator is likely to lead to few applications being made by builders or certifiers, because to do so, particularly if there were repeat applications, would serve to draw attention from the QBCC.

QBCC adjudication preferable over mandatory contractual provisions

- [236] Amending the *Building Act 1975* to restrict the disengagement process to a decision made by the QBCC provides greater certainty to the industry rather than requiring mandatory contractual provisions which is likely to lead to disputes involving contract interpretation. The insertion of mandatory contractual provisions in a certification engagement contract may also lead to tacit approval of the disengagement if there is some degree of ambivalence from the other party.

Automatic disengagement is not preferred

- [237] The Review does not accept the submission that disengagement should be automatic in some instances, such as a purported death, incapacity, insolvency, by agreement of the parties or a host of other reasons. There is merit in maintaining a position that these circumstances should still be proven to the QBCC, who on the balance of probabilities should be satisfied that the current private certifier is in fact deceased or incapable of discharging their duties.

[238] In some circumstances, where for instance a builder engaged a certifier, it may not be in the public interest or the interests of the building owner to allow disengagement of the certifier just because the builder and certifier happen to agree that they can no longer get along. If consent, for instance triggered an automatic right, the public interest would not be well served by allowing the certifier to disengage in some instances. For example, where the building owner did not consent to the disengagement and no appropriate means had been agreed to compensate the building owner for any costs arising out of the disengagement.

Applicant should be free to engage its own replacement certifier

[239] The Review does not support the suggestion that if the QBCC grants a disengagement application, that it should appoint a replacement certifier. There is no justification for government taking that entitlement from an applicant to a building development application.

Establishment of QBC Board policy

[240] Section 144 of the *Building Act 1975* should be amended to require an application for disengagement to be made by either the applicant for the building development approval or the building certifier and that such application is to be made and determined by the QBCC for a reasonable scheduled fee in accordance with a published Queensland Building and Construction Board (QBC Board) policy⁴⁶.

[241] The QBC Board should develop a policy which would establish guidelines and factors to which the QBCC must take into consideration when determining whether or not to grant the application, including:

- Provision for the granting of the application in circumstances where the applicant has established on the balance of probabilities that the private certifier is incapable of discharging their duties whether for example by reason of the death, incapacity, insolvency, disappearance of the private certifier or the applicant to the building development approval, or on such other reasonable grounds determined by the QBCC;
- Require the decision maker to at all times act in the public interest, but would allow the decision maker to take into consideration the consent to the disengagement by the builder, the building owner and the private certifier;

⁴⁶ Pursuant to s.11 of the QBCC Act, the Queensland Building and Construction Board has the power to make and review policies governing the administration of the QBCC Act

- Whether the disengaged private certifier should refund all or part of the certification fees paid;
- Enable the QBCC to charge a reasonable flat scheduled fee for the costs of deciding the application;
- Enable the QBCC to obtain such third party advice as is reasonably required to assist it in deciding the application, the costs of which should be borne equally by the applicant and the certifier ('the parties') or in such proportions decided by the QBCC;
- Require a decision to be made on the application within 5 business days after receipt of the application, or such longer period as may be agreed by the parties, or failing agreement, the application should be deemed to have been refused if not made and communicated to the parties within 5 business days after the application is made.

Appeal rights reserved

[242] Any decision made by the QBCC in respect to disengagement would be reviewable to the QBCC's Internal Review Unit in the first instance and then ultimately, if that proved unsuccessful, to QCAT. Amendments would therefore be required to s.86(1) of the *Queensland Building and Construction Commission Act 1991* to facilitate that review.

One certifier per application

[243] It is desirable for all stakeholders in the industry that certifier shopping be eradicated. To that end, the Review agrees with the submission made by AIBS that calls for legislative intervention to prevent more than one certifier (whether local government or private certifier) to be engaged per application/approval.

Question 1.3.1 Recommendations

[244]

11.	Section 144 of the <i>Building Act 1975</i> should be amended to require an application for disengagement to be made by either the applicant for the building development approval or the building certifier and that such application is to be made to and determined by the QBCC for a reasonable scheduled fee in accordance with a published Queensland Building and Construction Board policy.
12.	The QBC Board should develop a policy which would establish guidelines and factors to which the QBCC must take into consideration when determining whether or not

	<p>to grant an application for disengagement, including:</p> <ul style="list-style-type: none"> (a) Provision for the granting of the application in circumstances where the applicant has established on the balance of probabilities that the private certifier is incapable of discharging his or her duties whether for example by reason of the death, incapacity, insolvency, disappearance of the private certifier or the applicant to the building development approval, or on such other reasonable grounds determined by the QBCC; (b) Require the decision maker to at all times act in the public interest, but would allow the decision maker to take into consideration the consent to the disengagement by the builder, the building owner and the private certifier; (c) Enable the QBCC to charge a reasonable scheduled fee for the costs of deciding the application; (d) Enable the QBCC to obtain such third party advice as is reasonably required to assist it in deciding the application, the costs of which are to be borne equally by the applicant and the certifier ('the parties') or in such proportions decided by the QBCC; (e) Require a decision to be made on the application within 5 business days after receipt of the application, or such longer period as may be agreed by the parties, or failing agreement, the application should be deemed to have been refused if not made and communicated to the parties within 5 business days after the application is made.
13.	Any decision made by the QBCC to grant or refuse an application for disengagement may be reviewed in the first instance to the Internal Review Unit of the QBCC and then if unsuccessful, ultimately to QCAT. Amendments would therefore be required to s.86(1) of the <i>Queensland Building and Construction Commission Act 1991</i> to facilitate that review.
14.	To prevent "certifier shopping", the <i>Building Act 1975</i> should be amended to prevent more than one building certifier (whether local government or private certifier) to be engaged per application/approval.

1.4 Licensing and accreditation

Question 1.4.1: Do you support the introduction of a fourth 'inspector' level of building certifier?

Background

[245] Currently in Queensland there are three levels of building certifiers:

- Building certifier – Level 1 can perform building certifying functions on all classes of buildings and structures⁴⁷;
- Building certifier – Level 2 can perform certain building certifying functions on buildings and structures no more than 3 storeys high or with a floor area of not more than 2000m² without the supervision of a building certifier – Level 1, and can also help in assessing and inspecting all classes of buildings under the supervision of a building certifier – Level 1⁴⁸; and
- Building certifier – Level 3 can only perform building certifying functions on class 1 or 10 buildings or structures (such as houses, garages and sheds)⁴⁹.

[246] The QBCC has advised the Review that there are currently 407 building certifiers in Queensland. This equates to about one third of the number of building certifiers operating in New South Wales (1298 certifiers) and in Victoria (1206). The difference in the number of certifiers operating in Queensland and those in the southern states may in part be explained by the fact that unlike New South Wales and Victoria, in Queensland there is no certifier licence category for inspectors.

[247] Concerns have been raised that the current workload for building certifiers is too high and that this may lead to errors or worse, that some certifiers may cut corners to maintain their work commitments.

[248] Allowing suitably experienced people from within the industry to become licensed as fourth 'inspector' level building certifiers, may not only alleviate pressure on the current building certifiers, it also creates a different pathway into the building certification profession.

⁴⁷ See s.152 of the *Building Act 1975*

⁴⁸ See s.153 of the *Building Act 1975*

⁴⁹ See s.154 of the *Building Act 1975*

Feedback outcomes

- [249] Of the written submissions and completed surveys responding to this question, 49% of submitters supported amendments to the *Building Act 1975* introducing a fourth ‘inspector’ level of building certifier, whilst 29% were opposed. Approximately 12% of submitters had other suggestions on how to resolve the issue and 10% did not address the question.

Support for change

Support, but strict requirements needed

- [250] A local government employee supported the introduction of the fourth ‘inspector’ level of building certifier. She said:

“I like the idea of retaining the knowledge of builders, who feel that they are at a point in their careers where they can no longer work on the tools. However, I think that there should be some very strict prerequisites for a person seeking the fourth inspector level of Certifier. Namely, the person must have been licensed builder for a certain period of time, and hold a tertiary qualification of some kind, and be subject to CPD requirements.

I think the TAFE courses required for the level 3 building certifiers would be suitable, rather than a simple short course in carrying out inspections. The person needs to have an understanding of the Building Certification profession as a whole, rather than simply just the inspecting function.”

- [251] AIBS supported the concept in principle with a number of qualifications including:

- The fourth level of ‘inspector’ must be licensed by the QBCC and be subject to disciplinary action by the QBCC;
- The ‘inspector’ should only be engaged by a private or local government building certifier (level 1 – 3);
- The ‘inspector’ must maintain appropriate professional indemnity insurance;
- The ‘inspector’ is a natural person;
- The ‘inspector’ must possess the appropriate skills, knowledge and experience for the work being inspected;
- The evolution of a level 4 ‘inspector’ needs proper consideration and appropriate consultation with the professionals that will use them;
- The formulation of a new regulatory level even if only for inspection, needs to demonstrate a robust investigation into a cost benefit analysis to the industry;
- AIBS requested to be involved in the development of this license class as it directly affects its profession and members;

- If the fourth level of inspector regime is not correctly structured, there is a real risk that building certifiers may not use them;
- There needs to be a well mapped out pathway for training formulated in consultation with AIBS and other peak body industry organisations.

Reform would lead to greater accountability

- [252] Private certifier Clayton Baker welcomed the prospect of the introduction of a fourth ‘inspector’ level of building certifier as he considered that it would require inspectors to be more accountable for their actions than cadet certifiers are presently. He also said:

“I would like to see the qualification and experience component of this licence however include a mandatory period of training spent with a Building Certifier. That is a person gaining RPL [recognition of prior learning] for this new inspector level due to a trade background still requires training in the legislative aspects relevant to carrying out inspections which aren’t covered in their trade qualifications or experience. For example a carpenter may be proficient at knowing how a footing should be prepared however they may not be aware of the siting or building next to infrastructure requirements of the QDC, or local planning constraints. I agree with Option 1.4 (a).”

The State has a distinct lack of certifiers

- [253] Gladstone Regional Council (GRC) also supported the proposal arguing that the state as a whole suffers from “*a distinct lack of certifiers*”⁵⁰. Whilst GRC continues to offer certification services, it suggests that its ability to continue to offer these services is compromised by the lack of younger people attracted to the profession. GRC considers that the introduction of the fourth ‘inspector’ level of building certifier will assist local governments with compliance issues, technical advice to customers and builders, whilst allowing persons who have worked for local governments for many years to obtain recognition and responsibility.

- [254] Similarly, Goondiwindi Regional Council (Goondiwindi RC) supports the suggestion. It argued:

“There is concern within the certifying industry about the lack of younger people entering the profession and there are a number of possible reasons for this. There is a need for easier career path for people to enter the profession and work their way through the Licensing levels. With many LGAs having limited certification roles the ability for cadetships has been

⁵⁰ Similar submissions were made on behalf of Matrix Certification

lost and with many single private certifiers operating there is less likely to be grounds for apprentices/cadets to be employed by these certifiers.

Option 1.4(a) - support this concept of a fourth "Inspector" level to attract skilled people into the profession."

Good for rural and remote Queensland

- [255] Local government contract building certifier Jason Burger, who works in remote and far north Queensland also supported the proposal. In his written submissions, Mr. Burger said:

"The introduction of a fourth "Inspector" level of certification would be good for the growth of the industry and of benefit in remote areas due to the distance required to travel to complete inspections. Having someone being able to carry out the inspection functions would assist in not only trying to be in two places at once but allowing more time for the certifiers to carry out assessment work.

Many builders/contractors as they enter the late stage of their careers struggle with the physical demand on their bodies and are looking for alternative career options. Occasionally I am asked what it takes to become a certifier. Once you tell them the level of studies required and that the current accreditation regime does not take into account recognition of prior learning or practical experience, many of them state they would never bother at their age."

Inspector should be able to work in own business

- [256] Local government certifier Laurence Eves also supported the introduction of a fourth 'inspector' level building certifier provided they are appropriately qualified and trained. Importantly, Mr. Eves also argued that the 'inspector' should be entitled to perform their inspection functions as part of their own business and not have to be employed by a building certifier. However he gave this salutary warning:

"It is absolutely critical that the credibility and professionalism of the industry is not watered down by this approach."

Certifiers overworked and underpaid

- [257] Private certifier Neil Oliveri acknowledged the various pressures being faced by private certifiers under the current three level licensing scheme of certifiers. In written submissions, he said:

"I agree with the general statement that certifiers are over worked and generally underpaid in Queensland. 'The race to the bottom' has been described in many publications of late and has unfortunately become the

status quo in Queensland.

...

Introducing a fourth level of certifier – an ‘inspector’ class would have its benefits in increasing the number of competent persons available to undertake inspections for certifiers. It is generally agreed that inspections are the most under resourced area for private certifiers.”

Level four ‘inspectors’ should only be engaged by Level 1 or 2 building certifiers

- [258] Local Government certifier Russell Springall argued in favour of the fourth ‘inspector’ level building certifier proposal. Importantly however he stressed that only level 1 and 2 building certifiers should be able to employ a fourth level ‘inspector’⁵¹. He argued:

“... Level 3 Certifiers were introduced to ease the burden on Level 2 and 1 Certifiers and allegedly free up their more experienced time to concentrate on the more complex building types.

If Level 4 Building Inspectors were limited to work only for Level 2 and 1 Certifiers they would be exposed to a broader skill set in their employers. This would also result in Level 3 Certifiers considering upskilling themselves if they wish to expand their respective businesses. If this model was implemented then it would be fair to say we would ultimately see additional Level 2 Certifiers come into the market. Without this model the higher level certifiers may well continue to decline.”

Reform has industry association and consumer support

- [259] The HIA gave broad support for the concept but noted that it ran contrary to previous BCQ policy. In its written submissions, HIA argued:

“HIA would support initiatives that facilitate the engagement of appropriately qualified people who could assist building certifiers to undertake inspections. However it must be highlighted that in recent years Building Codes Queensland has adopted a contrary stance and made attempts to limit the number of cadets (a recognised path for prospective certifiers) any one certifier can employ.”

- [260] The consumer *Neighbourhood Action Group - Sunnybank, Robertson and Macgregor* also favoured the introduction of the ‘inspector’ level building certifier.

⁵¹ Similar submissions were made by a building contractor responding to the Review survey

Support for status quo

Building certifiers should get out on site

- [261] Private certifier Gordon Heelan opposed the introduction of an ‘inspector’ level of private certifier. He argued that building certifiers should actually go out on site and inspect building work for themselves.

‘Inspectors’ will lead to poor quality outcomes

- [262] Private certifier Liz Woollard was also opposed to the suggested reform. She argued that the introduction of the fourth ‘inspector’ level building certifier would lead to poor quality outcomes because they would not have the same experience levels as existing building certifiers. Ms. Woollard argued in support of the current training practices of cadet certifiers inspecting building works under the supervision of building certifiers.

‘Inspectors’ will impact negatively upon cadet certifiers

- [263] Private certifier Morgan Bleek argued that the concept of the fourth level ‘inspector’ building certifier would impact negatively upon cadet certifiers. He argued that both options 1.4(a) and 1.4(b) were a “short term fix”.

Certification costs unrealistically low

- [264] In response to the review survey, a private certifier opposed the introduction of the fourth level ‘inspector’ building certifier. He argued that rather than introduce another level, we should first understand why more people are not being attracted to the profession. The certifier explained that certification costs were unrealistically low, impacted upon by:
- Local governments which are not operating on a level playing field with the private sector;
 - Poor business skills of private certifiers who lack proper understanding of the costs of operating a business.

Too many certifiers already

- [265] Another private certifier responding to the survey argued that:

“There are far too many certifiers now to make a living. It is already a race to the bottom of a cut-throat industry, where the mighty dollar is king.”

Support for other reforms

Fourth level 'Inspector' could lead to cutting of corners to compete

[266] Mr. Ain Kuru rejected the proposition that there is a critical shortage of certifiers. Rather than introducing a fourth level of 'inspector' Mr. Kuru argued that consideration could be given to allow cadet certifiers the ability to inspect minor work such as class 10 buildings. He also commented that its introduction is likely to reduce the standard of work because for the most part, the functions of a building certifier requires "*considerable experience and skill*". Mr. Kuru argued that rather than improving the quality of building work, an increase in the number of building certifiers through the introduction of an 'inspector level' may tempt some building certifiers to "cut corners" to compete for work.

Certifier must be able to rely on 'inspector'

[267] In very helpful written submissions, Claude McKelvey argued:

"What we highlight here is that simply bolstering numbers does not cover or fill all the voids current and future in the profession. Unless a certifier can under legislation accept and rely upon a inspection carried out by a 'inspector' class certifier (i.e. the inspector is responsible for errors or omissions in their work) it's hard to see a huge uptake or much value adding to the profession. We are not against the inclusion of a inspector level but we do not believe it is addressing the real concerns of certifiers."

The "real concerns" or challenges faced by building certifiers according to Mr. McKelvey are:

- The professionalism of building certification is under-valued by the industry;
- Ongoing political 'red tape reduction' campaigns;
- Inadequate remuneration for the responsibility involved;
- Indeterminate legal liability⁵²;
- The introduction of fourth level 'inspectors' will not increase the number of Level 1 or 2 certifiers where there is a skills shortage.⁵³

Reforms required to the accreditation process

[268] RICS provided detailed submissions on this issue. RICS acknowledged that there is a shortage of skilled certifiers at all

⁵² The Review received many submissions which raised the ongoing legal liability of certifiers as a deterrent for those considering entry into the profession

⁵³ Similar concerns were raised in the Review process by numerous other stakeholders including the HIA

levels in Queensland. It argued that this skill shortage is driven by the difficulties encountered by building certifiers who wished to upgrade to a more senior level. It called for reforms to be made to the accreditation process for those seeking a higher accreditation level, which is more focused on rigorous training and assessment rather than insisting on additional academic qualifications.

Consideration

- [269] As can be seen by the submissions provided in response to this question, the issue is hotly contested with many competing ideas and perceptions of whether there is in fact a need to introduce the fourth level of 'inspector'.
- [270] That said, those submitters in favour of the suggestion outnumbered those that weren't, by almost two to one. It is interesting to note that not one section of the industry maintained a universal view of how best to tackle this issue. For instance there were private certifiers in favour and there were those against the proposal, just as there were local government certifiers in favour and those against.
- [271] In order to properly address the need and desirability of introducing an extra level of certifier, there must be an examination of the rationale for the proposal. That is, what is the problem with the current system? What are we trying to achieve by changing it?

Is there a lack of building certifiers in Queensland?

- [272] As revealed by the submissions outlined above, there were submitters who complained that they were overworked (just about all complained that they were underpaid) and there were those that alleged that there were already too many building certifiers trying to "*feed from the same trough*".
- [273] This is perhaps unsurprising. In any endeavor in a free market economy, there will be those that will exceed all expectations and enjoy considerable measures of success whilst others will struggle to put bread on the table. This is known as the 'Pareto Principle'⁵⁴ (also known as the 80/20 Rule) which holds that 80% of outcomes can be attributed to 20% of the causes for a given event.
- [274] In any given region around the state, there were private certifiers who purportedly were doing very well, whilst in the same region there were those that were struggling for their very existence. This

⁵⁴ Named after the Italian economist Vilfredo Pareto who observed in 1906 that 80% of the land in Italy was owned by 20% of the population

is not to suggest that those who were purportedly doing well were any better at their craft than those who were not, but clearly those who were or who purported to be doing well seemed to be very positive about the future of the profession and the prospects for their business. On the other hand, unsurprisingly, the converse is true for those who by their own admission were struggling.

- [275] What was also telling was that the businesses that were purportedly thriving were not by any means the cheapest in price. During individual interviews, a number of private certifiers spoke about the fees they charged and whilst the vast majority thought they were worth more money the private certifiers who seemed most content with the success of their business had made a conscious decision not to join 'the race to the bottom'.
- [276] In the 12 months to January 2014, there were 108,877 building approvals in Queensland⁵⁵. Assuming that each of the 407 licensed building certifiers are presently working as certifiers (which is unlikely), this equates to each certifier approving an average of 267 applications each year. This equates to 5.5 applications per week.
- [277] Over the past ten years, the number of approvals performed each year has averaged 108,556⁵⁶. During that time, there has been an average of 387 building certifiers licensed in Queensland. Therefore, over the past ten years, building certifiers have been engaged to approve approximately 281 applications per year.
- [278] Naturally, there will be building certifiers who are doing more than 281 applications per year and some exceedingly so, and there will be those who are doing less. Based on the above statistics, the submissions made to the Review and the many discussions held with building certifiers across the State, the Review is satisfied that generally speaking the number of building certifiers is currently adequate, however there are greater efficiencies to be gained by allowing building certifiers to better leverage their time and skills by using fourth 'inspector' level building certifiers to conduct building inspections should they so choose.

Building certifier demographics

- [279] Table 5 below demonstrates the number of building certifiers presently licensed by the QBCC in groups of ages.

⁵⁵ Based on the number of approvals for individual residential dwelling units and number of jobs for non-residential building work valued at over \$50,000 during the months to January 2014. Source: Australian Bureau of Statistics, ABS 8731.0 – Building Approvals, Australia, March 2014

⁵⁶ Source: Australian Bureau of Statistics, 8731.0 Building Approvals, Australia, Table 14. Number of Dwelling Units Approved, By Sector, Original - Queensland

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8731.0Mar%202014?OpenDocument#Publications>

Table 5 – Age of Building Certifiers by Level

Age Group	BC1			BC2			BC3			Total	Percentage
	Standard	Endorsed	Total	Standard	Endorsed	Total	Standard	Endorsed	Total		
20 - 25		1	1		1	1	1	2	3	5	1.23%
26 - 30		7	7		2	2	1	9	10	19	4.67%
31 - 35		9	9	3	5	8	1	11	12	29	7.13%
36 - 40		23	23	4	13	17	1	8	9	49	12.04%
41 - 45	1	33	34	3	15	18	2	8	10	62	15.23%
46 - 50	2	28	30	2	18	20		2	2	52	12.78%
51 - 55	5	31	36	3	22	25	1	3	4	65	15.97%
56 - 60	2	35	37	5	24	29	1	1	2	68	16.71%
61 - 65	2	11	13	3	20	23	1	2	3	39	9.58%
66 - 70		4	4	2	5	7				11	2.70%
Unknown		3	3		5	5				8	1.97%
Total	12	185	197	25	130	155	9	46	55	407	100.00%

[280] What is clear on an examination of the figures contained in Table 5 is that approximately 30% of licensed building surveyors are within 10 years of the present retirement age of 65. On current figures, within 20 years almost 60% of the current building certifier workforce will have retired or be at the current age of retirement.

[281] What is also clear is that the number of younger people (under 35 years) entering the profession is very low (13.03%).

[282] On current trends, the building certification profession in Queensland is facing critical skill shortages over the next 20 years.

[283] Compounding this problem is the long lead-time it takes to become a qualified building certifier. Obtaining the requisite academic qualifications to become a level 1 building certifier is likely to take four years of full-time study depending upon the choice of course and delivery model⁵⁷. In addition, the applicant must demonstrate a minimum of 3 years of relevant experience in building surveying at a level relevant to this category of accreditation⁵⁸.

[284] Obtaining the requisite academic qualifications to become a level 2 building certifier is likely to take two years of full-time study depending upon the choice of course and delivery model⁵⁹. In addition, the applicant must demonstrate a minimum of 2 years of

⁵⁷ See Schedule 1 of the Australian Institute of Building Surveyors National Accreditation Scheme Rules, January 2010

https://aibs.com.au/images/stories/documents/national/accreditation/aibs_accreditation_schemeV7-20140701.pdf

⁵⁸ See clause 6.1.2 of the Australian Institute of Building Surveyors National Accreditation Scheme Rules, January 2010

⁵⁹ See Schedule 1 of the Australian Institute of Building Surveyors National Accreditation Scheme Rules, January 2010

https://aibs.com.au/images/stories/documents/national/accreditation/aibs_accreditation_schemeV7-20140701.pdf

relevant experience in building surveying at a level relevant to this category of accreditation⁶⁰.

- [285] Obtaining the requisite academic qualifications to become a level 3 building certifier is likely to take one year of full-time study depending upon the choice of course and delivery model⁶¹. In addition, the applicant must demonstrate a minimum of 12 months of relevant experience in building surveying at a level relevant to this category of accreditation⁶².
- [286] Whilst the Review accepts that many prospective building certifiers achieve their academic qualifications and experience requirements concurrently as a cadet certifier, the point remains, there are long lead times in the training of competent building certifiers. During the roadshows and individual interviews the Review was informed that some cadet certifiers still had not achieved their accreditation after 8 years of work and study. Compounding this problem, there are no locally based Recognised Training Organisations (RTOs) or universities based in Queensland that offer full-time studies in building surveying. Queensland based students must study by distance education. This is usually performed on a part-time basis whilst working as a cadet certifier. QBCC Senior Audit and Investigation Officer Wayne Blackman has advised the Review that this can often add an additional 2 years to the time it takes to attain a level 1 qualification.
- [287] What is clear from these challenges is that planning to avoid what would otherwise become inevitable skill shortages must start now. The introduction of a fourth 'inspector' level building certifier is just one measure in a suite of reforms discussed in this Report which seeks to address the approaching skill shortage.

Licensing provisions for building certifiers should be transferred to the QBCC Act

- [288] To ensure consistency between all QBCC licence holders, the licensing provisions currently contained within the *Building Act 1975*, should be transferred to the QBCC Act. This issue will be addressed further at section 1.4.2 below.

⁶⁰ See clause 6.2.2 of the Australian Institute of Building Surveyors National Accreditation Scheme Rules, January 2010

⁶¹ See Schedule 1 of the Australian Institute of Building Surveyors National Accreditation Scheme Rules, January 2010

https://aibs.com.au/images/stories/documents/national/accreditation/aibs_accreditation_schemeV7-20140701.pdf

⁶² See s.155(2)(b) of the *Building Act 1975* cf the 6 month period prescribed in clause 6.3.2 of the Australian Institute of Building Surveyors National Accreditation Scheme Rules, January 2010

Advantages of 'inspectors' outweigh the disadvantages

- [289] Careful consideration has been given to the reasons proffered against the introduction of the fourth level 'inspector'.
- [290] In the first instance all building certifiers should get out on site and inspect building work for which they have been engaged. However, if they so choose to engage a fourth level 'inspector', whether as an employee or subcontractor, that inspector can be the eyes and ears of the building certifier. The building certifier, if they choose to utilise the services of the inspector, will be able to better leverage their own time and skills by performing more financially lucrative work, namely building approvals.
- [291] The Review does not accept the submission that the introduction of inspectors will lead to poor quality outcomes if proper training and experience requirements are met. Equally, it will be in the building certifier's best interests to ensure that the inspector he or she employs or engages has adequate training in their proprietary systems and is otherwise satisfied that the inspector is competent.
- [292] The Review accepts that there is a possibility that the introduction of 'inspectors' could have some impact upon cadet certifiers but that impact is likely to be negligible because cadet certifiers are training to become either a level 1, 2 or 3 building certifier.
- [293] The Review accepts the submission that certification fees are unrealistically low and that there are a number of factors which promote the "*race to the bottom on fees*". However, the Review does not accept that the introduction of the fourth level 'inspector' building certifier will have a detrimental impact on fees. No evidence has been presented which would support that submission. The issue of unrealistic fees is considered later in this report where a number of recommendations are made to address it.
- [294] The Review accepts the submissions that it is preferable for the longevity of the profession and to encourage level 3 certifiers to up-skill, that an 'inspector' can only be engaged by a level 1 or 2 building certifier.
- [295] Adopting a number of the suggestions made by AIBS, the review is satisfied that for the long term benefit of the profession, Government should introduce an additional 'inspector' level of building certifiers with the following qualifications:
- To ensure that the 'inspector' possesses the appropriate skills, knowledge and experience for the work being inspected, there should be two categories of 'inspector'; 'inspector-restricted' and 'inspector-unrestricted'. These categories would align with

- the work able to be performed by a medium-rise builder and builder-open respectively;
- The 'inspector' must be licensed by the QBCC and be subject to the same disciplinary action by the QBCC as a building certifier;
 - The 'inspector' should be required to participate in the mandatory CPD program for building certifiers and will be bound by the Code of Conduct for building certifiers;
 - The 'inspector' should only be engaged by a private or local government building certifier (level 1 or 2). Such engagement could be by way of employment or subcontract arrangement;
 - The 'inspector' will be accountable for his or her actions. They must maintain appropriate professional indemnity insurance and will therefore have 'skin in the game';
 - The 'inspector' should be a natural person.

Question 1.4.1 Recommendations

[296]

15.	The provisions relating to the licensing and discipline of building certifiers contained in Chapter 6 of the <i>Building Act 1975</i> and any related provisions contained within the <i>Building Regulation 2006</i>, should be relocated to become proposed Part 11 of the <i>Queensland Building and Construction Commission Act 1991</i> and Schedule 2 of the <i>Queensland Building and Construction Commission Regulation 2003</i>.
16.	<p>That the Queensland Building and Construction Commission Act 1991 be amended to provide for the introduction of a fourth level certifier to be designated as an 'Inspector-restricted' to carry out inspections on behalf of a Level 1 or 2 building certifier in relation to structures not more than 3 storeys high or with a gross floor area not exceeding 2000m², but not including Type A construction on class 4 to 9 buildings, provided that the applicant:</p> <ul style="list-style-type: none"> (a) Is an individual; (b) In the two years prior to applying, has held for at least 5 years as a minimum, a Builder-medium rise licence class, pursuant to the <i>Queensland Building and Construction Commission Act 1991</i>; and (c) Has completed further tertiary or vocational studies approved by the QBCC; and (d) Holds professional indemnity insurance in the minimum sum of \$2,000,000.00, with such scheme to be approved by the QBCC; and (e) Is a person of good standing; and (f) Participates in the mandatory CPD program for

	<p>building certifiers; and</p> <p>(g) Is bound by the Code of Conduct for building certifiers.</p>
17.	<p>Further, that the <i>Queensland Building and Construction Commission Act 1991</i> be amended to provide for the introduction of a fourth level certifier to be designated as an 'Inspector-open' to carry out inspections on behalf of Level 1 or 2 building certifier in relation to all classes of buildings, provided that the applicant:</p> <p>(a) Is an individual; and</p> <p>(b) In the two years prior to applying, has held for at least 5 years as a minimum, a Builder-open licence class, pursuant to the <i>Queensland Building and Construction Commission Act 1991</i>; and</p> <p>(c) Has completed further tertiary or vocational studies approved by the QBCC; and</p> <p>(d) Holds professional indemnity insurance in the minimum sum of \$2,000,000.00, with such scheme to be approved by the QBCC; and</p> <p>(e) Is a person of good standing; and</p> <p>(f) Participates in the mandatory CPD program for building certifiers; and</p> <p>(g) Is bound by the Code of Conduct for building certifiers.</p>
18.	<p>An Inspector-restricted licence holder should be able to attain the licence category of Inspector-open via successful application for recognition of prior learning to a registered training organisation.</p>

Question 1.4.2: Do you think the Commission not accreditation bodies should be responsible for assessing qualification and experience requirements for certifiers?

Background

- [297] Currently the QBCC determines an applicant's suitability to obtain a building certifier's licence, although it is not involved in the accreditation of the applicant⁶³.
- [298] An "accreditation standards body" performs the accreditation of applicants wishing to be licensed as building certifiers. Similarly, a building certifier applying for a renewal of their licence must provide the QBCC with evidence that they continue to hold accreditation from an accreditation standards body⁶⁴.
- [299] Therefore, an accreditation standards body determines the qualifications and experience requirements for those wishing to obtain and maintain a building certifier's licence and it is the accreditation standards body that assesses the applicant against those requirements.
- [300] The current accreditation standards bodies are AIBS⁶⁵ and RICS⁶⁶.
- [301] The Discussion Paper poses the question as to whether the QBCC should be responsible for assessing the qualifications and experience requirements for building certifiers.
- [302] Some concerns have been raised that whilst the QBCC licences building certifiers it does not have control over the required pre-requisite qualifications and experience necessary to obtain a building certifier's licence. This is at odds with the current licensing regime of other building contractors who are licensed by the QBCC.

Feedback outcomes

- [303] Of the written submissions and completed surveys responding to this question, 43% of submitters supported the QBCC being made the responsible entity for assessing the qualification and experience requirements for building certifiers, whilst 33% were opposed.

⁶³ See s.155(1) of the *Building Act 1975*

⁶⁴ See s.167(3) of the *Building Act 1975*

⁶⁵ See s.184(1)(a) of the *Building Act 1975*

⁶⁶ See s.52A of the *Building Regulation 2006*

Approximately 8% of submitters had other suggestions on how to resolve the issue and 15% did not address the question.

Support for change

Current system: needless duplication of process and costs

- [304] Local government building compliance officer Anna Sissman considered that the current process of accreditation being performed by accreditation standards bodies and separate licensing managed by the QBCC was a needless duplication of process and costs. She also considered that the current process does not provide independent appeal entitlements to disaffected parties.

Administration by independent body

- [305] Logan City Council argued in favour of the proposal suggesting that the reform would provide integrity and promote faith in the licensing system because it would be administered independent of a 'professional body'.

Broad industry support

- [306] The Australian Institute of Architects, National Fire Industry Association and Cairns Regional Council to name a few supported the QBCC taking responsibility for assessing the qualification and experience requirements for certifiers.

Support for status quo

Increase in red tape

- [307] The HIA could see no benefit in changing the current accreditation process and considered any such mooted changes as an increase in red tape rather than a reduction. It argued that the current accreditation standards bodies provide sufficient competition.

Accreditation should be performed by experienced peers

- [308] One local government employee who wished to remain anonymous was also opposed to the proposed changes arguing that accreditation should be conducted by experienced peers who are the most competent to assess an applicant's knowledge and experience.

[309] Similarly, FPA Australia argued against the proposal. They submitted that government should be slow to interfere with an established accreditation scheme which seeks to improve the professionalism of its members⁶⁷.

QBCC accreditation will lead to ‘watering down’ of standards

[310] The AIBS strongly opposed the proposed reform. AIBS argued that:

- By placing the decision of who is and who is not appropriately qualified and experienced with the QBCC may result in a “*watering down*” of the skills of the profession;
- Government could pressure the QBCC to reduce the requirements for the various levels of licences of building certifiers;
- Reforms could be made to allow an appeal of a decision made by an accredited standards body to the QBCC “*via a review panel of industry peers, such as a tribunal of experts*”.

[311] Finally AIBS remarked that if the reforms were implemented, the AIBS’ income capacity would be seriously affected.

QBCC licensing system is not a proven success

[312] Private certifier Claude McKelvey again provided helpful and very detailed submissions on this issue. He argued strongly against the proposal. Mr. McKelvey argued that in his view the current licensing regime for building contractors was not a proven success and the proposal seeks to join certification licensing and accreditation with that system. He asked how the QBCC would determine the level of competency required to practice as a certifier and secondly how it would determine whether an applicant had attained that competency as the current accreditation standards bodies do now? As others submitters also argued, Mr. McKelvey queried whether it is appropriate for building certifiers to be assessed and licensed in the same manner as building contractors when building certification is more closely aligned with building professions such as engineering which also has a similar co-regulatory environment.

⁶⁷ Similar submissions were made by local government certifier Laurence Eves

Support for other reforms

Conditional support for QBCC accreditation in ‘special circumstances’ but could be seen as an ‘unacceptable concentration of power’

- [313] Private certifier John Mulderry gave conditional support to the proposed reform. He argued that in “*special circumstances*” the QBCC should be able to grant a licence to an applicant without accreditation from AIBS or RICS. However, he considered that providing the QBCC with the power to accredit and licence could be viewed as an “*unacceptable concentration of power*”.

Greater flexibility and competition required

- [314] Private certifier Neil Oliveri was in general agreement with the existing accreditation and licensing system. However, he argued that there should be greater flexibility and competition by allowing more accreditation standards bodies than just AIBS and RICS.

Certifiers should be able to attain accreditation ‘promotion’ by the recognition of prior learning

- [315] RICS argued that the reforms would lead to an increase in red tape for the QBCC. However, they made the following suggestions for improving the current accreditation scheme:
- The responsibility of the assessment of qualifications and experience accreditation of building certifiers remains with RICS and AIBS;
 - Certifiers should be able to progress through the various certification levels with increased experience and training;
 - The QBCC provide a third accreditation alternative to RICS and AIBS by the recognition of prior learning assessment process.

Consideration

Red tape reduction

- [316] The Department of Queensland Treasury and Trade is seeking to cut red tape by 20% by 2018 and drive regulatory reform across the Queensland Government⁶⁸. With that objective in mind, a number of submitters sought to argue that red tape would be increased if the QBCC assumed responsibility for the qualification and experience requirements of certifiers as opposed to that being

⁶⁸ See <http://www.treasury.qld.gov.au/office/services/regulatory-reform/reducing-the-regulatory-burden.shtml>

provided by the current accreditation standards bodies. It is almost as though some submitters expect with the mere mention of the term 'red tape' that government will run in the opposite direction.

- [317] The Review does not accept the submission that the proposed reform will lead to greater red tape. In fact, the opposite is true. Currently, the QBCC administers the licensing of building certifiers, whilst the accreditation standards bodies determine qualification and experience requirements. It makes little sense to have these functions required to be performed by two separate bodies with the resultant costs and delays experienced by a fragmented two-step approach.

Alternate choice rejected

- [318] Consideration has been given to the option of enabling applicants and building certifiers a choice of seeking accreditation from either the accreditation standards bodies or the QBCC. If uniform requirements were established between the accreditation standards bodies and the QBCC, then this would provide a greater degree of certainty to stakeholders. However, whilst offering this choice would appease the accreditation standards bodies, the Review is not convinced that it provides the requisite degree of transparency and appropriate review entitlements.

Transparency and review entitlements

- [319] For instance if a decision was made by AIBS or RICS to refuse an application for accreditation as a Level 1 certifier, the unsuccessful applicant could not review that decision to the QBCC because it was not the decision of the QBCC in the first instance. Whilst some form of peer review tribunal or panel could be established to review the decision, governments of all persuasions have in recent years trended away from the establishment and maintenance of discrete review panels and tribunals and are directed more toward administrative reviews being heard by the one body, namely QCAT⁶⁹.
- [320] If accreditation decisions are made by the QBCC, then unsuccessful applicants would have a right of review to the QBCC Internal Review Unit in the first instance and then if they remain dissatisfied with the outcome, a further review could then be made to QCAT. Amendments would be required to s.86(1) of the *Queensland Building and Construction Commission Act 1991*. Similar

⁶⁹ QCAT began operations on 1 December 2009, amalgamating 18 tribunals and 23 jurisdictions into one – see QCAT Annual Report 2012/13, 14
http://www.qcat.qld.gov.au/_data/assets/pdf_file/0013/211252/QCAT_Annual_Report_2012-13.pdf

opportunities for independent review are not available from the current accreditation processes conducted by AIBS⁷⁰ or RICS⁷¹.

QBCC accreditation will be the death knell of AIBS

- [321] If all of the recommendations provided in this report are adopted, the Review does not accept that the removal of accreditation will result in the financial non-viability of AIBS. The Review notes that similar suggestions have not been made about RICS, although RICS appears to enjoy a much broader income stream than does AIBS.

Watering down of standards

- [322] The QBCC should consult with the accreditation standards bodies to establish agreed requirements for qualifications and experience for the various levels of building certifier licences. This consultation should be on-going and be the subject of at least bi-annual review to ensure that community and industry expectations are reflected in the requirements.

Functional licensing regime

- [323] As a licensed builder of some twenty years and counsel who has practiced in the construction law field for the past 14 years, the Review considers that generally speaking the licensing regime in Queensland works very well. Whilst no system is perfect and can always be improved, the licensing regime established under the now disbanded Queensland Building Services Authority and now administered by the QBCC is a shining example of occupational regulation. Similar views were expressed by Collins QC in his 2012 review into insolvency in the NSW construction sector⁷² when he said at p.4 (footnotes omitted):

“At the forefront of the Inquiry’s response to the Government’s Terms of Reference must be placed the recommendation that the Queensland model is necessary to be implemented. It is rare to find unanimity upon any issue in a chattering society such as ours, however all those who gave evidence to the Inquiry from all sections of the industry with the exception of the Housing Industry Association, agreed that it was an essential part of any

⁷⁰ See clause 11 of the Australian Institute of Building Surveyors National Accreditation Scheme, January 2010

⁷¹ See Section One of the RICS Accreditation Standards Body – QLD Appeal Process Guidance Notes 23 March 2011
http://www.rics.org/Global/Downloads/RICS_Accreditation_Standards_Body_Queensland_Appeal_process_23_March_2011.pdf

⁷² Final Report, Independent Inquiry into Construction Industry Insolvency in NSW, Bruce Collins QC, November 2012
<https://www.finance.nsw.gov.au/sites/default/files/pdfs/IICII-final-report.pdf>

reform package to bring in a licensing model and regulatory structure along the Queensland lines.

The Queensland model presents the only solution to the problem of preventing insolvency in the first place. The construction trust is important because it operates in a remedial manner after insolvency has begun to cause its problems, yet the best defence to the ills, ailments and undesirable consequences which gave rise to the establishment of this Inquiry, must be the Queensland model. The Inquiry cannot place too much emphasis upon that vital conclusion.

That recommendation is placed at the forefront of the Inquiry's work because it aligns almost perfectly with the causes of insolvency. The most effective way to ensure a healthy industry is to ensure the healthy condition of those who aspire to participate in the industry. That is what is done in Queensland and it is there that it has had its effect upon reducing the number of disastrous insolvencies in the building and construction industry.

The Queensland approach addresses the proven causes of insolvency in the industry, low or non-existent barriers to entry, lack of insulation from the vicissitudes of the industry and the economic cycle, poor financial disciplines, lack of business sophistication and poor payment practices, by the establishment of a compulsory financial backing requirement which places each licensee in an appropriate place in the licensing ladder to execute projects it has the appropriate financial backing to tackle."

QBCC accreditation brings certification into line with all other licensing

- [324] The Review does not accept the proposition that QBCC accreditation would amount to an '*unacceptable concentration of power*'. On the contrary, it would bring the accreditation of certifiers into line with the accreditation regime of all trade contractors licensed by the QBCC. There are obvious advantages both procedurally and economically from having uniform accreditation, licensing and disciplinary procedures for licensees who fall within the QBCC's jurisdiction. Accreditation of applicants by the QBCC which relies upon '*special circumstances*' is likely to be unworkable and insufficiently transparent.

Flexible, alternative pathways to licensing

- [325] A QBCC accreditation scheme would provide an alternative flexible competency assessment through recognition of prior learning.
- [326] Other benefits of QBCC accreditation include:
- Aligns with other licensing regimes for all licensees;
 - Red tape reduction;

- Cost and time savings through a one-step accreditation and licensing process;
- Improves transparency in the decision making process; and
- Provides independent review entitlements.

Question 1.4.2 Recommendations:

[327]

19.	<p>In line with the other licensees it regulates, the QBCC ought to be responsible for setting the qualifications and experience requirements for certifiers.</p> <p>The QBCC should regularly consult with industry and the current accreditation standards bodies, the Australian Institute of Building Surveyors and the Royal Institution of Chartered Surveyors to determine the appropriate qualifications and experience requirements for building certifiers.</p>
20.	<p>Applications for the review of decisions made by the QBCC in relation to the accreditation and licensing of building certifiers may be made to the QBCC Internal Review Unit and ultimately to QCAT. Amendments would therefore be required to s.86(1) of the <i>Queensland Building and Construction Commission Act 1991</i> to facilitate that review.</p>

Question 1.5.1: Which is your preferred option in relation to the Code of Conduct?

1.5.1(a): Transfer the Code of Conduct provisions in legislation; or
--

1.5.1(b): Retain and review the Code of Conduct?
--

Question 1.5.2: If you support retaining the Code of Conduct, what format would you prefer:
--

1.5.2(a): A stand alone document, given effect by regulation; or
--

1.5.2(b): Included as a schedule in a regulation?

Background

[328] The Code of Conduct sets out the standards of conduct and professionalism expected from building certifiers when performing building certifying functions in Queensland. Aside from this, its purpose is also to provide consumer, regulatory, employing and professional bodies, with a basis for making decisions regarding standards of conduct and professionalism expected from building certifiers.

[329] The Code of Conduct is established under s.129 of the *Building Act 1975*.

[330] Any amendments made to the Code of Conduct must be made by way of regulation⁷³.

[331] A building certifier must in performing building certifying functions, always act in the public interest⁷⁴. A building certifier does not act in the public interest when he or she among other things, contravenes the Code of Conduct⁷⁵.

[332] The Code of Conduct establishes 10 requirements which governs the standards of conduct and professionalism of building certifiers:

A building certifier must:

1. *Perform building certifying functions in the public interest.*
2. *Maintain satisfactory levels of competence.*
3. *Comply with legislative requirements.*
4. *Not perform building certifying functions where there is the potential for a conflict of interest.*
5. *Not perform building certifying functions beyond their level of competence or outside their area of expertise.*

⁷³ s.129(3) of the *Building Act 1975*

⁷⁴ See ss.127 and 136 of the *Building Act 1975*

⁷⁵ See ss.127(2)(e) and 136(2)(e) of the *Building Act 1975*

6. *Maintain confidentiality.*
7. *Abide by moral and ethical standards expected by the community.*
8. *Take all reasonable steps to obtain all relevant facts when performing building certifying functions.*
9. *Clearly document reasons for building certifying decisions.*
10. *Ensure inspections are carried out to ensure building work complies with the Building Act 1975 and the development permit.*

[333] A building certifier who is found to have contravened the Code of Conduct may be the subject of disciplinary proceedings for unsatisfactory conduct or professional misconduct⁷⁶.

[334] The Discussion Paper poses the question as to whether the provisions contained within the Code of Conduct ought to be inserted into the Building legislation, or whether it should be retained and reviewed.

Feedback outcomes

[335] Of the written submissions and completed surveys responding to this question, 26% of submitters supported the removal of the stand-alone Code of Conduct and enshrining those provisions into the Building legislation, whilst 53% preferred that the Code of Conduct be retained and reviewed to ensure that it is meeting industry and consumer expectations. Approximately 7% of submitters had other suggestions on how to resolve the question and 14% did not address the question.

[336] Of those submitters who supported retaining and reviewing the Code of Conduct, 35% considered that the Code of Conduct should be retained as a “stand alone” document, whilst 30% considered it should be placed into the Regulations. Approximately 5% of submitters had other suggestions and 30% did not address the question.

Support for enshrining the Code of Conduct into legislation

[337] There was little support for inserting the Code of Conduct into the *Building Act 1975*. What support was offered was generally without foundation.

Support for retaining and reviewing the Code of Conduct

[338] As demonstrated in the feedback outcomes, there was significant support for retaining and reviewing the Code of Conduct as a stand-alone document with an emphasis on clarifying specific terms such

⁷⁶ See ss.133(e) and Schedule 2 of the *Building Act 1975*

as “unsatisfactory conduct”, “professional misconduct” and “conflict of interest” to provide better industry and community awareness and understanding.

Clarifying the Code of Conduct is a step in leveling the ‘liability playing field’

- [339] Private certifier Neil Oliveri argued that retaining and reviewing the Code of Conduct improved public understanding of the role of a private certifier. He also considered that by outlining in the Code of Conduct what is not the role of a private certifier would ‘level the liability playing field’.

Consideration

- [340] There is considerable merit in retaining and reviewing the Code of Conduct as a stand-alone document given effect by regulation. Enshrining the Code of Conduct into the *Building Act 1975* would result in unnecessary and undesirable inflexibility.
- [341] Whilst it would be acceptable for the Code of Conduct to be included as a schedule to the Regulation, a stand alone document given effect by regulation is likely to have greater accessibility to both the industry and the public. It is important that the industry and especially the public are able to locate the Code of Conduct easily from the QBCC website. Including the Code of Conduct as a schedule to the Regulation runs the risk of the Code of Conduct being lost in the Regulation.
- [342] The Code of Conduct has not been the subject of review since it was amended 11 years ago. If Government accepts the Recommendations in this Report, there will be a necessity to review the Code of Conduct in light of these reforms.
- [343] It is appropriate that a review of the Code of Conduct re-examine the 10 requirements which govern the standards of conduct and professionalism of building certifiers. It is also appropriate that the Code of Conduct clearly and succinctly identifies the responsibilities of building certifiers. The review should also ensure that the tension between the terms “*conflict of interest*” in the *Building Act 1975* and “*potential conflict of interest*” in the Code of Conduct is removed from the Code of Conduct as referred to in paragraphs [107] – [111] above.
- [344] The Code of Conduct should also be reviewed in light of the Recommendations contained in the Transport, Housing and Local Government Committee Report No.14 into the Inquiry into the

Operation and Performance of the Queensland Building Services Authority 2012⁷⁷.

- [345] It is beyond the remit of this Review to re-draft the Code of Conduct. That should only be done once Government has responded to this Report and after appropriate industry consultation has been undertaken.

Question 1.5.1 and 1.5.2: Recommendations:

[346]

21.	Retain the Code of Conduct in a stand-alone document, given effect by regulation.
22.	The Code of Conduct should be reviewed to properly reflect the accepted recommendations of this Review and the recommendations contained in the Transport, Housing and Local Government Committee Report No.14 into the Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012.

⁷⁷ <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2012/5412T1818.pdf>

Question 1.6.1: Do you support the creation of a new guideline clarifying when a certifier may provide advice during the design stage of a building?

Background

- [347] The issue as to whether or not a certifier can or should be able to give design advice in the design or construction phase of a building generated one of the strongest reactions from stakeholders during the Review. It is apparent from the feedback provided during the Review that building certifiers and the industry more broadly are seeking clarification on this important issue.
- [348] Many building certifiers and building contractors argued during the course of the Review that a building certifier should be able to assist the builder, the owner and the design team both during the design and construction phases of a building project with what many of them considered 'regulatory advice'.
- [349] It is this ambiguous distinction between what is 'design' and 'design advice' and what is 'regulatory advice' which seems to be causing uncertainty.

Feedback outcomes

- [350] Of the written submissions and completed surveys responding to this question, 67% of submitters supported the establishment of a guideline clarifying when a certifier may provide advice during the design stage of a building, whilst 11% were opposed. Approximately 9% of submitters had other suggestions on how to resolve the question and 13% did not address the question.

Support for the guideline

Early intervention

- [351] The Australian Institute of Architects in its written submissions argued strongly in favour of allowing building certifiers to provide advice during the design stage of a building. It argued:

" ... this is one of the main advantages of having a Private Certification system. This enables decisions relating to the BCA matters and interpretations to be made early in the design process with some certainty thereby reducing potentially expensive delays."

Guideline should deal with the provision of advice in the design or construction phase and should differentiate between building certifiers and building surveyors

- [352] Similarly, AIBS strongly supported the creation of a clear guideline which would clarify the circumstances in which a building certifier, whether employed by local government or a private certifier, when engaged to perform certifying functions may provide advice in the design or construction phase of a building. Importantly, the AIBS sought clarification in the guideline between the obligations of a building certifier performing certifying functions and the work performed by a *building surveyor* acting as a consultant.

Alternative solutions should not require two certifiers

- [353] Private certifier Claude McKelvey also called for clarification on this issue. He argued that in his experience, advice on designs and more specifically advice in relation to non-compliance with code requirements was an important service and one that does not constitute “design”. He argued:

“... the information provided informs the designer on what the code requires of a particular aspect to achieve compliance and where there is a non-compliance the reason why that aspect has not met those code requirements. This provides project specific advice, as opposed to the designer having to wade through the entire building code. The designers can then absorb that advice and attempt to amend their design to meet compliance requirements. The certifier is not directing the design of the building.

When it comes to alternative solutions there are competing issues that demand that the assessing certifier be involved, not least the liability issues. At the end of the day the person taking or inheriting the responsibility for alternative solutions is the building certifier. ... The suggestion that a second certifier be involved to provide advice during the alternative solution development and then it is passed onto another certifier for assessing and approval is an absurdity. This would create two streams of the profession, those that only give advice and avoid possible liability issues, and those that issue approvals and inherit the liability, where would that sit with PI insurance companies?

Any documented guidelines relating to the provision of advice by certifiers at design stage must include enough scope to cover the above.”

Certifiers are part of the design ‘team’

- [354] Early in the Review process, during an individual interview, a commercial builder explained that he regarded private certifiers whom he contracted with as being on his ‘design team’.

- [355] As it turns out, this line of thinking was common amongst stakeholders. For example, in his written submissions, private certifier Clayton Baker said:

"I see great benefit to the architectural industry when Certifiers provide regulatory advice at the preliminary design stage. Quite often the Certifier is brought on board as part of the professional team working the proposal up to construction issue documentation. That is Certifiers often have regulatory input early on in commercial projects to ensure the proposal complies with the BCA. This is beneficial to the project as it significantly reduces the chance of the design progressing to the final stage (i.e. Tender) with a compliance issue. I am not in support of restricting the advice Certifiers are permitted to give further, however clarifying what advice we can give with legal examples would be beneficial."

Certifiers act more as consultants than independent statutory approval bodies

- [356] FPA Australia in its written submissions argued that since de-regulation of the building certification role, building designers' knowledge and skills in relation to regulatory requirements has diminished. FPA Australia suggested that this reduction in skills has been compounded by the introduction of alternative solution options which require greater intensive design skills to satisfy performance requirements. It suggests that the expert knowledge of the building certifier is *"an increasingly valuable commodity to the design team who now expect the building certifier to act more as a consultant than independent statutory approval body"*.
- [357] FPA Australia also submitted that this then creates a *"dilemma"* for building certifiers who provide design advice like other members of the design team and who then approve that design. It submitted that this close interaction between the building certifier and the design team is like *"Caesar judging Caesar"*. FPA Australia submitted that the *"separation of roles between independent statutory decision maker and consultant is critical"*.

One of the greatest barriers to an efficient system

- [358] Builder and building designer Glen Place argued that the current prohibition on building certifiers being involved in design is *"one of the greatest barriers to an efficient system"*⁷⁸. In his written submissions he said:

"For a number of years I have encouraged a more integrated approach to the building design process. I want to improve the efficiency of the entire industry by adopting a 'get it right the first time' approach. This involves

⁷⁸ Similar submissions were made by building certifier Neil Oliveri

getting the whole design team together early in the process. Each team member is engaged for a purpose. That purpose is to bring expert advice to the table.

The suggestion that a building designer may engage a particular building certifier to somehow avoid compliance with any legislative provision has no credibility.

Building designers and building certifiers are professionals who have responsibilities to their clients, to the community and to their professions.

The benefits of engaging a building certifier at design stage far outweigh the negligible potential for corrupt collusion. Input by a building certifier has a very real potential to prevent re-work. Re-work is not only inefficient but creates a situation where error can occur because a change in one part of the documentation can affect a wide range of documents prepared by a number of practitioners.

It is difficult to envisage a situation where the designer or certifier would gain advantage by being less than professional in their joint responsibilities. I do not regard the provision of technical advice at the design stage, as a “conflict of interest” or as creating a potential for bias.

I recommend that building certifiers be encouraged to become involved earlier in the process as part of the design team.”⁷⁹

- [359] The Review notes however that Mr. Place conceded that alternative solutions should not be prepared by the building certifier. It appears that was a ‘bridge too far’.

Building designers seek design assistance from certifiers

- [360] Another building designer Joanne Galea submitted that she “welcome[d] the inclusion of the building certifier as a member of the design team”. In her written submissions she said that she encourages her clients to engage a building certifier during the design stage with the objective of reducing repeat work for her and reducing costs to her clients. Like Glen Place, Joanne Galea stopped short of allowing certifiers to design and then subsequently approve their own alternative solutions⁸⁰.

Why are certifiers being singled out?

- [361] The HIA queried why building certifiers are being treated differently to other industry professionals when it comes to the

⁷⁹ Identical submissions were made by the Building Designers Association of Queensland (BDAQ)

⁸⁰ Similar submissions prohibiting the approval of alternative solutions designed by the building certifier were raised by local government certifier Gary Shumm and the Scenic Rim Council

ability to assess designs on which they have provided advice. HIA rejected the assertion that a building certifier in providing design advice should somehow compromise his or her ability to then assess a building development application. It argued that the same argument could equally be applied to a local government development assessment officer. Equally, HIA argued that engineers provide design advice and provide advice as to whether construction has been completed in accordance with that design.

[362] HIA further submitted:

“Surely we want the most qualified people giving advice and the certification role now extends beyond just that of a regulator. The government needs to factor into its thinking that as more and more Councils withdraw from providing in house building certification services and advice about building related matters and instead direct enquiries about building matters towards local Private Certification businesses, Private Certifiers are being forced towards acting more as consultants.”

Distinction between providing advice and providing the design

[363] Private certifier Ross Rippingale agreed that a building certifier should be able to provide advice during the design stage, but suggested that a distinction should be drawn between the provision of advice and actually providing the design.

Support for status quo

[364] The QFES argued in support of the current legislative regime. It argued that:

“... it is entirely appropriate for a private certifier to provide regulatory advice during the design stage of a project. However, this must not extend to providing design advice, as this is not the role of the private certifier i.e. the private certifier is a wholly independent assessor of compliance – regulator not designer.

...

It has previously been suggested that a guideline could be developed to help private certifiers avoid potential conflicts of interest, including (for example) what constitutes design work, as opposed to giving regulatory advice. QFES supports this proposal and would be pleased to provide further advice to assist with the development of any such guideline.”

Support for other reforms

No need for a guideline if conflict of interest is clearly defined

- [365] One private certifier responding to the survey strongly supported the proposal that building certifiers should be able to give advice during the design stage because giving advice was not “designing”. The certifier argued:

“Those professions that do the actual design work seek advice from building certifiers on a daily basis to ensure compliance with the building assessment provisions. This allows for ‘red tape reduction’ as the designers are given advice along the way.”

However, the submitter suggested that a guideline would not be required if the term ‘conflict of interest’ was clearly defined.

Consideration

The legislation

- [366] Section 128(1) of the *Building Act 1975* prohibits a local government certifier from performing a building certifying function, if in performing the function, the certifier has a conflict of interest⁸¹.

- [367] Subsections (2) and (3) provide:

(2) For subsection (1), the occasions when a building certifier has a conflict of interest include, but are not limited to, when the certifier—

*(a) is to carry out the **building work** the subject of the building certifying function; or*

(b) is engaged by the owner of the building or the builder to perform a function other than—

(i) a building certifying function; or

(ii) to manage a development application; or

(iii) give regulatory advice about any matter; or

(c) has a direct or indirect pecuniary interest in the building.

(3) In this section—

***builder** means the person who will be carrying out the building work the subject of the building certifying function.*

***building work** includes—*

*(a) the **preparation of the design of all or part of the***

⁸¹ Identical provisions are contained in s.137 of the *Building Act 1975* for private certifiers

building; or (b) carrying out all or part of building work.

owner means the owner of the building.

the building means the building or structure the subject of building assessment work to be carried out under the building certifying functions.

[Emphasis added]

- [368] A plain reading of ss.128 and 137 of the *Building Act 1975*, suggest that if a local government building certifier, or a private certifier are involved in the *preparation of the design of all or part* of the building which they are performing a certifying function, they have a conflict of interest. This would be regarded as a breach of the Code of Conduct and render the certifier liable to disciplinary action for unsatisfactory conduct or professional misconduct⁸².
- [369] However, under the *Building Act 1975* a building certifier would not have a conflict of interest if they gave “*regulatory advice about any matter*”.
- [370] What is the distinction between “*regulatory advice*” and “*the preparation of the design*” of all or part of a building? Neither term is defined in the *Building Act 1975*. When does ‘design advice’ become “*the preparation of the design of all or part of a building*”?

Judicial or quasi-judicial authority

- [371] There is a dearth of judicial or quasi-judicial consideration of ss. 128 and 137 of the *Building Act 1975*.
- [372] The only decision the Review has been able to locate which considered a breach of ss. 128 or 137 of the *Building Act 1975* was the recent decision in *Queensland Building and Construction Commission v Weber* [2014] QCAT 448 (9 September 2014) where Member Browne held that the private certifier did breach s.137 by formulating an alternative solution in relation to the waterproofing of a bathroom floor.
- [373] In *Weber*, the Tribunal accepted that the private certifier issued and signed the performance assessment document that included offering advice as to whether the bathroom met or was equivalent to the deemed-to-satisfy performance requirement provisions of the Building Code of Australia. The Tribunal accepted that this resulted in the private certifier making recommendations as to the future maintenance of the floor as stated in the performance assessment document. The private certifier was found, by his conduct to have both assessed and formulated the alternative

⁸² See Schedule 2 of the *Building Act 1975*

solution by the making of enquiries, conducting research (into the sealing product), committing certain requirements to writing in the performance assessment document as to the application of the sealer and the display of a notice in the meter box and kitchen cupboard.

[374] The Tribunal accepted that the private certifier formulated and assessed the alternative solution in breach of s.137 of the *Building Act 1975* and was therefore found to have performed his certifying function whilst having a conflict of interest.

[375] In so doing, the Tribunal was satisfied that the private certifier breached the Code of Conduct by:

- Failing to perform building certifying functions in the public interest;
- Failing to comply with legislative requirements;
- Performing building certifying functions where there was the *potential* for a conflict of interest;
- Failing to take all reasonable steps to obtain all relevant facts when performing building certifying functions; and
- Failing to clearly document reasons for building certifying decisions.

[376] Being so satisfied, the Tribunal found that the private certifier's conduct amounted to professional misconduct.

[377] The case of *Weber* is perhaps a clear example of where a building certifier breaches s.137(2) of the *Building Act 1975* by the formulation and assessment of an alternative solution. However whilst illustrative, it is of little assistance in circumstances where a private certifier simply provides design advice without going so far as actually providing the actual design of the building or part of the building. This once again raises the question whether there is any distinction between 'design advice' and the "*preparation* of the design of all or part of the building".

Building certifiers are currently providing design advice

[378] As can be seen from the submissions provided to the Review and the responses to the survey, there is no doubt that building certifiers are already providing 'design advice' to designers and builders. It is clear from the submissions that this advice is not restricted to 'deemed to satisfy' performance requirement provisions of the NCC. Based on the content of these submissions, it is highly likely and in fact has been proven in *Weber* that some building certifiers are involved in the formulation and assessment

of alternative solutions that comply with the performance requirements of either the NCC or the QDC⁸³.

Create a new guideline

- [379] There is a need to clarify when a building certifier may provide advice during the design stage of a building, just as there is a need to clarify when a building certifier may provide advice during construction. In that regard, Question 1.6.1 of the Discussion Paper is incomplete. It is just as important for a building certifier to clarify his or her legal position with respect to the giving of advice whilst the works are under construction as it is during the design stage.
- [380] The vast majority of submitters support the creation of a new guideline clarifying this issue and with good reason.

Should certifiers be providing design advice?

- [381] When this question was first considered, the Review held a more traditional view similar to that proffered by QFES. Namely, building certifiers are acting in a statutory decision making role and should not place themselves or be placed in a position where they may be in a conflict of interest. The traditional argument of course is a simple one. If a building certifier is involved in the formulation of the design of a building or part of a building, they should not be involved in its assessment or inspection anymore than a building certifier should not be engaged if they are actually carrying out the building work. The issue revolves around the classic question, *"who would then check the checker?"*
- [382] It is likely that this traditional viewpoint emanates from the early role of the council building inspector. However, the building industry in Queensland has well and truly moved on from that traditional model. As has been submitted by the HIA, private certification has been a significant micro-economic reform and has resulted in considerable cost savings and timesavings to both the industry and consumers. Yet the underlying rationale for the traditional council building inspector model still remains entrenched in the psyche of regulators and to a lesser extent the industry. When a building contractor in an individual interview described "his" building certifier as one of "his" consultants, the Review was quite frankly aghast that the ethos behind the 'traditional model' of building control had been plundered to such an extent that building contractors had lost all sight of the required

⁸³ See s.14(3) of the *Building Act 1975*

independence of building certifiers, such that they now considered them to be “one of the team”.

- [383] Like it or not, based on the submissions to the Review, that perception would appear to be held rather widely. Whilst this does create concerns regarding the independence of the building certifier, what should not be lost is that there are significant economic and timing benefits to be achieved by early intervention with the design team of a project. That does not mean that the building certifier should be “part of the design team” but the Review now accepts that there are greater benefits by the building certifier being engaged with that process from the beginning of the project than otherwise.

The ‘overriding duty’ of the building certifier is to act in the public interest

- [384] To once again draw the legal analogy, a lawyer ought never be the mere mouthpiece of his or her client, but must ensure that his or her overriding duty to the court to act with independence in the interests of the administration of justice is observed⁸⁴. In *Attorney General (NSW) v Spautz* [2001] NSWSC 66, O’Keefe J said at [68]:

“Barristers must exercise independent judgment in relation to matters in which they appear. They are required to do so by the rules governing the conduct of barristers in New South Wales. Barristers are not mere mouthpieces for their clients. They owe a duty to the court which transcends their duty to their clients. It is not a breach of duty which barristers owe to their clients to exercise independent forensic judgment even contrary to the wishes of their clients.”

- [385] Similarly with building certifiers, whilst they should be able to provide design advice, their overriding duty is to ensure the health and safety of the public⁸⁵. A private certifier should never act in a manner which would put the interests of the person who engaged him or her or the interests of the project above those of the public. If a building certifier does so, they ought to feel the full weight of the law upon them. Building certifiers must retain an appropriate degree of independence and impartiality that ensures that they are performing their certifying functions in the public interest. What has been demonstrated to the Review, particularly from the submissions received during the roadshow and individual interviews, is that apart from the reliance of the general public on building certifiers, reputable building contractors also rely upon that independence as a check and balance against short-term monetary gain.

⁸⁴ Rule 25 of the Bar Association of Queensland Barristers’ Conduct Rules, 23 December 2011; Rule 3 Australian Solicitors Conduct Rules, 1 June 2012

⁸⁵ See ss.127(1) and 136(1) of the *Building Act 1975*

- [386] Sections 127(1) and 136(1) of the *Building Act 1975* together with the Code of Conduct should be amended to reflect a greater emphasis on the public interest being the “overriding duty” of the building certifier which prevails to the extent of inconsistency with any other duty.

Overriding duty is as much an ethical issue as it is a legal one

- [387] The overriding duty of a building certifier to always act in the public interest is as much an ethical obligation as it is a legal one. All industry bodies particularly AIBS, RICS, Australian Institute of Building (AIB), HIA and MBA have a vitally important part to play in the development of these ethical obligations. A number of submitters during the roadshows and individual consultations expressed concerns about the lack of understanding of the overriding duty to the public interest, particularly amongst building certifiers who may not have worked previously as a local government building inspector.

- [388] In an address to the Queensland Bar Association on 3 May 1992, Sir Gerard Brennan AC, who was then a Justice of the High Court of Australia said:

“The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the barrister knows he or she should do: ethics are what the barrister does. They are not so much learnt as lived. Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skillful evasion. There is no really effective forum for their enforcement save individual acceptance and peer expectation.

However, among those who see themselves as members of a profession, peer expectation is sufficient to maintain the profession’s ethical code. Ethics give practical expression to the purpose for which a profession exists, so a member who repudiates the ethical code in effect repudiates members of the profession. It follows that if we are to gain an understanding of the ethics of the Bar, we must first ask ourselves whether the Bar is truly a profession and as certain the purpose for which it exists. Only then can we see whether and how the ethics of the Bar express that purpose.”

- [389] It is noted that the AIBS qualification benchmarks and competencies include the “[demonstration of] thorough understanding of the professional and ethical responsibilities and practices of [a] building surveyor/certifier”⁸⁶.

⁸⁶ Australian Institute of Building Surveyors National Accreditation Scheme Rules, January 2010, page 30

- [390] The ethical obligations of building certifiers should be a significant element of the teaching syllabus and the subject of on-going CPD requirements. The overriding duty to the public interest should be indelibly ingrained into the psyche of building certifiers so that it becomes the ‘cultural norm’, such that any departure from it must be viewed as an affront to the professionalism of all building certifiers.
- [391] However, it is not sufficient to simply rely upon the ethical obligations of building certifiers. When a building certifier’s duties conflict and they will conflict, the regulatory and disciplinary regime must be sufficiently robust enough to ensure that a building certifier will be more concerned about the licensing consequences of inappropriate choices than he or she would be concerned about losing one particular client. In addition to these licensing consequences, private certifiers are sure to feel cost pressures to comply with their obligations under the Code of Conduct from their professional indemnity insurers.
- [392] The issues of disciplinary procedures and professional indemnity insurance are further considered below.

Should a building certifier be able to provide the formulation of alternative solutions?

- [393] Whilst there is an argument for this proposition, the Review considers that for now at least, a building certifier should be restricted to providing regulatory advice but the advice should not extend to the formulation of alternative solutions. That is as some submitters have put it, a “step too far” for now.

The law is ambiguous

- [394] Sections 128(3) and 137(3) of the *Building Act 1975* are in the Reviews, view ambiguous, particularly in relation to the definition of the term “building work” where the provisions state:

“building work includes—

(a) the preparation of the design of all or part of the building;”

- [395] What does “*the preparation of the design*” mean? Does it mean that building certifiers will only be in a conflict of interest if they actually *prepare* the design or does it mean that they will be in a conflict of interest if they are simply involved in providing advice which is preparatory to the design?

[396] The term “*preparation of the design* of all or part of the building” is not defined in the *Building Act 1975*. The ordinary meaning of the word “preparation” is defined as:

“*preparing, being prepared; thing done to make ready; to get ready*⁸⁷”

[397] Used in its everyday language, the word “preparation” can be used interchangeably with the “drafting” of a contract or the “drafting” of an affidavit.

[398] The “*preparation of the design*” means the actual performance of designing the building or part of the building as opposed to the provision of advice that may constitute one of the factors that make up the design. What is clear however is that the position needs to be clarified by either amending the legislation or creating a guideline.

What should the position be in respect to building surveyors?

[399] As was submitted by AIBS in respect to Question 1.6.2, all building certifiers are building surveyors, but not all building surveyors are building certifiers. A building certifier is a building surveyor performing the statutory certification function set out in the *Building Act 1975*. This distinction should be expressly drawn in the *Building Act 1975*.

[400] Some building surveyors choose not to practice as a building certifier. They choose to act in the capacity as a consultant rather than a statutory decision maker. Some do both, although not concurrently in respect to the same building.

[401] Should the Government adopt the recommendation to create a guideline, the guideline should expressly clarify that a *building surveyor* who is **not** engaged as a building certifier in respect to the relevant building, may provide regulatory advice, design advice and advice in relation to the formulation of alternative solutions and may even formulate those alternative solutions provided he or she is competent to do so.

[402] However, a building surveyor ought not be permitted to provide such advice or services in relation to a building in circumstances where he or she is employed by the building certifier or his or her employer, responsible for performing the certification functions for the same building. For these purposes, it does not matter whether the building surveyor is employed under a contract of service or engaged under a contract for service.

⁸⁷ Australian Concise Oxford Dictionary, Seventh Edition, Oxford University Press, Melbourne 1987

Question 1.6.1: Recommendations

[403]

23.	Sections 127(1) and 136(1) of the <i>Building Act 1975</i> together with the Code of Conduct for building certifiers should be amended to reflect a greater emphasis on the public interest being the 'overriding duty' of the building certifier which prevails to the extent of inconsistency with any other duty.
24.	<p>Pursuant to s.258 of the <i>Building Act 1975</i>, the chief executive should develop a clear guideline which clarifies:</p> <p>(a) The circumstances in which a building certifier when engaged to perform certifying functions may provide regulatory and design advice in the design or construction phase of a building under their jurisdiction. This regulatory and design advice ought not involve the actual design or formulation of alternative solutions;</p> <p>(b) That building surveyors who are acting as consultants but NOT engaged as building certifiers may provide any services including the actual design and formulation of alternative solutions in the design or construction phase of a building for which they are competent. However, it ought to be considered a conflict of interest for the building certifier and the building surveyor where a building surveyor provides those services in circumstances where:</p> <p>(i) The building surveyor is employed by the building certifier responsible for performing certification work for the same building; or</p> <p>(ii) The building surveyor is employed by the same entity which employs the building certifier responsible for performing certification work for the same building.</p> <p>For the purposes of this recommendation a person is regarded as employed regardless of whether the person is engaged under a contract of service (as an employee) or a contract for service (as a subcontractor).</p> <p>(c) To remove doubt, a building surveyor who has provided building consultancy services in respect to a building should be entitled to be engaged as the building certifier for a building development application for the building, provided that he or she has not provided the actual design or formulation of an alternative solution as part of the building development application.</p>

25	In addition to Recommendation 24, ss.128 and 137 of the <i>Building Act 1975</i> should be amended to clarify the functions of building certifiers and building surveyors.
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Question 1.6.2: Do you think that building certifiers providing advice outside of the building approval process should be subject to disciplinary action for providing incorrect or misleading advice?

Background

- [404] The Discussion Paper raises the prospect of allowing building certifiers the ability to work outside of their traditional role of the building development approval process. This is particularly relevant when a building surveyor is called upon to provide expert advice in respect to the assessment of an existing building which for example may be the subject of an intended purchase. The Discussion Paper queries, if this is permitted, whether the building certifier should be subject to disciplinary action for providing incorrect or misleading advice.
- [405] This question is closely related to Question 1.6.1. Therefore the examination of the submissions which deal with it need only be relatively brief.

Feedback outcomes

- [406] Of the written submissions and completed surveys responding to this question, 49% of submitters supported building certifiers providing advice outside the building approval processes being subject to disciplinary action for providing incorrect or misleading advice, whilst 21% were opposed. Approximately 14% of submitters had other suggestions on how to resolve the question and 16% did not address the question.
- [407] The question posed in the survey (as extracted above) is slightly different to that posed in the Discussion Paper and therefore may have skewed some of the survey results if submitters did not read the Discussion Paper but simply responded to the questions posed in the survey.

Support for change

- [408] Private certifier Neil Oliveri following on from his submissions in response to the previous question said:

"I believe that [this] option is the best solution for this topic and offers the ability to provide an initial advice service to clients at an early stage whilst still achieving community expectation that there is no conflict of interest. It is in my opinion that early design advice and conflict of interest are not

mutually exclusive; to the contrary, providing solutions and advice up front is more likely to result in Deemed to Satisfy (DtS) outcomes and a general atmosphere to create compliance than a review of a substantially progressed and planning approved development – essentially one ‘set in stone’.

Avoiding conflict of interest also extends to other building industry professions such as engineers and architects. After many decades of operation it has been accepted and in fact highly regarded that professionals within these industries provide upfront advice regarding projects as part of their service. Up front certification advice is what the industry needs for greater transparency on building code related matters and to ensure our industry is as efficient as it can be in issuing development permits for building work.”

[409] QFES supported the introduction of QBCC disciplinary proceedings for building certifiers and surveyors that provide advice outside of the building approvals process otherwise such work would be unregulated which it considered unacceptable.

[410] Private certifier Ross Rippingdale strongly advocated for this reform. He argued that:

“... it is the most ridiculous situation to suggest that a Building Surveyor/ Building Certifier can only consider, inspect or report on a buildings (sic) from design to the issue of the Certificate of Classification and not have the expertise and professional (sic) to make comment or assessment on existing buildings.”

Support for status quo

[411] In the survey responses, several private certifiers objected to being singled out for disciplinary proceedings comparing themselves to architects and engineers who they [incorrectly] considered were not subject to disciplinary proceedings for incorrect or misleading advice.

[412] A building designer in a survey response also objected to the introduction of disciplinary proceedings against building surveyors performing work outside of the building development approval process. The building designer argued that the work of designers and building certifiers was being unfairly scrutinised by zealous “forensic checks by prosecuting barristers”.

Support for other reforms

[413] As referred to in paragraph [399] above, the AIBS argued that the question in the Discussion Paper was not correctly phrased. It argued that:

- *“It is important to ascertain the distinction between the term “Building certifier” and “Building Surveyor” as a definition in the legislation;*
- *In addition it is important to improve on current legislation and add and define the term “Building Surveying Function” in the legislation.*
- *Building Surveyor and Building Surveying Function should be a defined term that is located both in the Building Act and the QBCC Act / Regulation;*
- *Building Surveyors should be allowed to provide consultancy advice about the Building Act, the BCA and Australian Standards as they are experts in this legislation and they should not be required to hold a separate license such as a “Fire Safety Professional” that exists in the current QBCC legislation;*
- *Building Surveyors when not engaged as Building Certifiers are not carrying out a certification function therefore should NOT be referred to as certifiers at all and secondly should not be the subject of certification review.”*

Consideration

[414] As discussed above in paragraphs [399] – [402] and in Recommendation 24(b), there is a distinction between a building certifier and a building surveyor. That distinction should be clarified in the *Building Act 1975* and in the *Queensland Building and Construction Commission Act 1991* by defining a building surveyor and his or her functions⁸⁸.

[415] Building surveyors should be permitted to provide consultancy services in respect to regulatory advice, design advice and even the actual design and formulation of alternative solutions provided they are competent to do so. The only qualification in this regard, is that provided in Recommendation 24(c), namely that:

“A building surveyor who has provided building consultancy services in respect to a building should be entitled to be engaged as the building certifier for a building development application for the building, provided that he or she has not provided the actual design or formulation of an alternative solution as part of the building development application.”

[416] When a building surveyor who is providing a building surveying function in relation to a building, but who is not engaged as a building certifier for the building, is not carrying out a certifying function in respect to the building and should not therefore be

⁸⁸ Note: The definition of “surveyor” in s.6 of Schedule 1AA of the *Queensland Building and Construction Commission Regulation 2003* should be amended to remove any confusion between a licensed building surveyor and licensed cadastral surveyor

required to comply with the Code of Conduct for building certifiers. In the premises, a building surveyor ought not be the subject of complaints, investigations and disciplinary proceedings relating to building certifiers currently under Chapter 6 Part 4 of the *Building Act 1975*.

- [417] However, building surveyors ought to be licensed by the QBCC and should fall within the usual disciplinary process of licensees governed by the *Queensland Building and Construction Commission Act 1991*. However, given the similarity in the two roles, building surveyors who are licensed building certifiers ought not have to pay for an additional QBCC licence.

Question 1.6.2 Recommendations

[418]

26.	The following terms should be defined in the <i>Building Act 1975</i> and the <i>Queensland Building and Construction Commission Act 1991</i>: (a) Building surveyor; and (b) Building surveying function [See Recommendations 24(b) and (c)]
27.	A building surveyor who is providing a building surveying function in relation to a building but who is not engaged as a building certifier for the building, ought not be considered as carrying out a certifying function in respect to the building. In addition, building surveyors ought not be required to comply with the Code of Conduct for building certifiers. Therefore building surveyors ought not be the subject of complaints, investigations and disciplinary proceedings relating to building certifiers currently under Chapter 6, Part 4 of the <i>Building Act 1975</i>.
28.	Building surveyors ought to be licensed by the QBCC and should fall within the usual disciplinary process of licensees governed by the <i>Queensland Building and Construction Commission Act 1991</i>. Note however: (a) Building surveyors who are also licensed as building certifiers, ought not have to pay an additional licence fee; (b) The definition of “surveyor” in s.6 of Schedule 1AA of the <i>Queensland Building and Construction Commission Regulation 2003</i> should be amended to remove any confusion between a licensed building surveyor and licensed cadastral surveyor.

Question 1.7.1: Which is your preferred option for improvements to the disciplinary framework?
Option 1.7(a) – Remove the distinction between “unsatisfactory conduct” and “professional misconduct”;
Option 1.7(b) – Retain and review current “unsatisfactory conduct” and “professional misconduct” provisions;
Other

Background

[419] Chapter 6 Part 4 of the *Building Act 1975* deals with complaints, investigations and disciplinary proceedings relating to building certifiers.

[420] After investigating a complaint or conducting an audit, the QBCC must decide whether or not the building certifier has engaged in unsatisfactory conduct or professional misconduct⁸⁹.

[421] If the QBCC decides the building certifier has engaged in unsatisfactory conduct, the QBCC has a number of options open to it to deal with that conduct ranging from⁹⁰:

- Reprimanding the building certifier;
- Imposing conditions on the building certifier’s licence;
- Directing the building certifier to complete an educational course;
- Directing the building certifier to report to the QBCC;
- Require the building certifier to take all necessary steps to ensure that the certification of building work *inter alia* complies with the *Building Act 1975*;
- Directing the building certifier to take enforcement action;
- If satisfied the building certifier is generally competent and diligent, take no further action.

[422] If the QBCC decides that the building certifier has engaged in professional misconduct, the QBCC must apply to the tribunal to start disciplinary proceedings against the building certifier⁹¹.

[423] If the QBCC decides that the building certifier has engaged in unsatisfactory conduct or professional misconduct, the building certifier may review that decision to QCAT⁹². The QBCC cannot amend, cancel or suspend a building certifier’s licence if it considers

⁸⁹ See s.204(1) of the *Building Act 1975*

⁹⁰ See s.204(4) of the *Building Act 1975*

⁹¹ See s.204(6) of the *Building Act 1975*

⁹² See s.205 of the *Building Act 1975*

the building certifier is not a suitable person to hold a licence because of unsatisfactory conduct or professional misconduct⁹³.

- [424] A local government may also start disciplinary proceedings in QCAT against a building certifier but before doing so, must issue the building certifier with a show cause notice⁹⁴.
- [425] On an application by QBCC or a local government, QCAT may conduct a disciplinary proceeding to decide whether proper grounds exist for taking disciplinary action against a building certifier⁹⁵.
- [426] Proper grounds exist for taking disciplinary action if the building certifier has behaved in a way that constitutes professional misconduct⁹⁶. This does not prevent QCAT from making a decision that the conduct whilst not amounting to professional misconduct, does amount to unsatisfactory conduct⁹⁷.
- [427] There have been concerns raised during the Review that the current disciplinary regime too readily enables a finding by the QBCC that a building certifier has engaged in unsatisfactory conduct for minor administrative errors and at the other end of the spectrum that it is too difficult to secure a finding from QCAT that a building certifier has engaged in professional misconduct. There have also been concerns raised that there is broad misunderstanding about the distinction between the two terms.
- [428] The Discussion Paper raises the prospect of once again having a single term which deals with conduct which is currently defined as unsatisfactory conduct and professional misconduct.

Feedback outcomes

- [429] Of the written submissions and completed surveys responding to this question, 28% of submitters supported the removal of the distinction between “unsatisfactory conduct” and “professional misconduct”, whilst 50% wanted to retain and review the current provisions. Approximately 9% of submitters had other suggestions on how to resolve the question and 13% did not address the question.

⁹³ See s.171(3) of the *Building Act 1975*

⁹⁴ See s.207(2)(b) of the *Building Act 1975*

⁹⁵ See s.208(1) of the *Building Act 1975*

⁹⁶ See s.208(2) of the *Building Act 1975*

⁹⁷ See s.20 of the *Queensland Civil and Administrative Tribunal Act 2009*; *Mr. Troy Christopher Richardson t/a Troy Richardson's Building Approvals & Inspections v Queensland Building Services Authority* [2013] QCAT 113 per Member Paratz at [13]-[14]; *Drake v Minister for Education* (1979) FLR 577; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286

Submissions in support of removing the distinction

- [430] The Australian Institute of Architects suggested that the distinction between unsatisfactory conduct and professional misconduct should be removed but provided no reasons or justification in support. Much of the support for removing the distinction came from responses to the surveys many of which did not provide supporting submissions.

Submissions in support of retaining and reviewing the provisions

Maintain the distinction

- [431] The overall view of a significant majority of submitters was that there needs to be a distinction drawn between the less serious and more serious cases of ‘misconduct’. Many submitters also considered that there should be a legislative recognition of minor administrative breaches by building certifiers that ought not be considered as unsatisfactory conduct⁹⁸.

Minor administrative errors

- [432] Private Certifier Claude McKelvey expressed “*very serious reservations*” with the creation of the one term “misconduct” as mooted in the Discussion Paper. Mr. McKelvey argued that every error made by a building certifier could then be regarded as “misconduct” which would inevitably have drastic consequences on a building certifier’s business, no matter how small the infraction. He also suggested that a finding of unsatisfactory conduct for minor administrative errors is an “*inappropriate black mark placed on a certifier*”.

Clarify the terms

- [433] AIBS argued that the terms should be retained but clarified in both the legislation and in the Code of Conduct so that stakeholders, the legal profession and QCAT are clear as to their meaning and scope.

⁹⁸ See for example the submissions of local government building compliance officer Anna Sissman, builder and building designer Glen Place, private certifier Neil Oliveri and QBCC Senior audit and investigation officer Philip Godfrey

Submissions in support of other reforms

QBCC should not be sole prosecutor, judge and jury

- [434] HIA argued that the QBCC must be more active in auditing, identifying and investigating instances of sub-standard work undertaken by building certifiers, rather than focusing on administrative errors. In addition, HIA opposed any legislative amendments which would enable the QBCC to become “sole prosecutor, judge and jury”, particularly in matters involving alleged professional misconduct. HIA did not support the proposal of joining the two forms of misconduct into one, arguing that the ability to differentiate between serious matters and administrative errors must be maintained.

Protracted disciplinary process

- [435] QFES argued that the current complaint and disciplinary process was less than effective. It argued that the QBCC disciplinary process was inordinately protracted and often resulted in a finding of unsatisfactory conduct despite the complaint being of a nature that impacted upon fire and life safety issues requiring quick resolution to ensure public safety. QFES called for the current disciplinary system to be “*significantly strengthened and adequately resourced*” to ensure that the community is provided with an adequate level of fire safety in buildings.
- [436] QBCC Senior audit and investigation officer Philip Godfrey suggested that a time limit of 5 years should be placed on a person’s ability to make a complaint against a building certifier, unless it was a matter which affected the health and safety of the occupants of the building.

Consideration

Legislative provisions

- [437] The object of disciplinary proceedings is the protection of the public and the maintenance of proper professional standards. Disciplinary proceedings are not designed to punish the person who is disciplined⁹⁹.
- [438] The term “unsatisfactory conduct” is defined in Schedule 2 of the *Building Act 1975* as:

⁹⁹ *Wentworth v New South Wales bar Association* (1992) 176 CLR 239 at 251; *Smith v New South Wales Bar Association* (1992) 176 256 at 270

unsatisfactory conduct, for a building certifier or former building certifier, includes the following—

- (a) *conduct that shows incompetence, or a lack of adequate knowledge, skill, judgment, integrity, diligence or care in performing building or private certifying functions;*
- (b) *conduct that is contrary to a function under this Act or another Act regulating building certifiers (including private certifiers for building work), including, for example—*
 - (i) *disregarding relevant and appropriate matters; and*
 - (ii) *acting outside the scope of the building certifier's powers; and*
 - (iii) *acting beyond the scope of the building certifier's competence; and*
 - (iv) *contravening the code of conduct;*
- (c) *conduct that is of a lesser standard than the standard that might reasonably be expected of the building certifier by the public or the building certifier's professional peers.*

[439] The term “professional misconduct” is defined in Schedule 2 of the *Building Act 1975* as:

professional misconduct, for a building certifier or former building certifier, includes the following—

- (a) *conduct that—*
 - (i) *shows incompetence, or a lack of adequate knowledge, skill, judgment, integrity, diligence or care in performing building certifying functions; and*
 - (ii) *compromises the health or safety of a person or the amenity of a person's property or significantly conflicts with a local planning scheme; and*
Example of significantly conflicts with a local planning scheme—
The approved building work compromises the outcomes sought by the planning scheme.
 - (iii) *is contrary to a function under this Act or another Act regulating building certifiers (including private certifiers for building work), including, for example—*
 - (a) *disregarding relevant and appropriate matters; and*
 - (b) *acting outside the scope of the building certifier's powers; and*
 - (c) *acting beyond the scope of the building certifier's competence; and*
 - (d) *contravening the code of conduct; and*
 - (e) *falsely claiming the building certifier has the qualifications, necessary experience or licence to be engaged as a building certifier;*

- (b) *seeking, accepting or agreeing to accept a benefit, whether for the benefit of the building certifier or another person, as a reward or inducement to act in contravention of—*
 - (i) *this Act; or*
 - (ii) *another Act regulating building certifiers, including private certifiers for building work;*
- (c) *failing to comply with an order of the QBCC or the tribunal;*
- (d) *fraudulent or dishonest behaviour in performing building certifying functions;*
- (e) *other improper or unethical conduct;*
- (f) *repeated unsatisfactory conduct.*

[440] The dual disciplinary descriptions of unsatisfactory conduct and professional misconduct were originally inserted into the *Building Act 1975* in 2002¹⁰⁰. Prior to 1 July 2002, there was only one all encompassing term, namely “professional misconduct” which was defined in s.3 of the *Building Act 1975* as:

“professional misconduct” includes conduct (whether by act or omission) when a building certifier—

- (a) *seeks, accepts or agrees to accept a benefit, whether for the benefit of the building certifier or another person, as a reward or inducement to act other than—*
 - (i) *under this Act; or*
 - (ii) *under another Act regulating building certifiers, including private certifiers for building work; or*
- (b) *acts in a way contrary to a duty—*
 - (i) *under this Act; or*
 - (ii) *stated in another Act for building certifiers, including private certifiers for building work; or*
- (c) *falsely claims the building certifier has the qualifications, necessary experience or accreditation to be engaged as a building certifier; or*
- (d) *acts outside the scope of the building certifier’s powers; or*
- (e) *acts beyond the scope of the building certifier’s competence; or*
- (f) *contravenes a code of conduct published by an accrediting body; or*
- (g) *acts negligently or incompetently in relation to the certifier’s practice.*

[441] As can be observed by comparing the old definition of ‘professional misconduct’ with the new definition, a finding of professional misconduct against building certifiers prior to the amendments in 2002 would not have been altogether difficult. For instance, a failure to lodge a Notice of Engagement by a private certifier within

¹⁰⁰ See s.161(2) of the *Plumbing and Drainage Act 2002*

5 business days after the engagement is a breach of s.143 of the *Building Act 1975* and is therefore a failure to act in a way that is contrary to the Act. This failure would have constituted professional misconduct prior to 1 July 2002, which is clearly an unacceptable outcome for what may constitute a minor administrative error.

Removal of disciplinary provisions from the Building Act 1975

- [442] The contents of the *Building Act 1975* should be restricted to the legislation required to assess building development applications and to complete building work. Provided Recommendations 15 and 36 are accepted, the disciplinary provisions for building certifiers will as part of the transfer of Chapter 6 of the *Building Act 1975* be inserted into the *Queensland Building and Construction Commission Act 1991*. This will provide a degree of consistency with the disciplinary regime of all QBCC licensees.

Building certifiers are not building contractors

- [443] As has been discussed above, building certifiers perform a very important statutory function, one that until 1998 was the exclusive purview of local government. It is this statutory function that sets them apart from a carpenter, bricklayer or builder. As has been discussed in detail above, the building certifier's overriding statutory duty is to act in the public interest by ensuring the health and safety of the community. Curiously, no other trade or profession in the building industry that is regulated by the QBCC has this same statutory obligation, not even the builder itself.
- [444] To reflect the significance of their statutory function and the importance of their overriding duty to the public interest, whilst the disciplinary provisions should be brought within the *Queensland Building and Construction Commission Act 1991*, it is appropriate that in addition to the provisions pertaining to licensees, the disciplinary provisions currently contained within the *Building Act 1975* be transferred to the *Queensland Building and Construction Commission Act 1991*, within a new proposed Part 11.

Retain the distinction

- [445] There is considerable merit in retaining the distinction between unsatisfactory conduct and professional misconduct. The Review accepts the submissions which argued the importance of retaining a distinction between the less serious 'charge' of unsatisfactory conduct and the more serious professional misconduct. Without that distinction, the public and the industry at large will have no

appreciation of the seriousness of the conduct of the building certifier that has been found wanting. This could have unintended consequences for building certifiers whose businesses may unnecessarily suffer as a result of minor infractions. Equally, the public may not be appropriately appraised of the seriousness of misconduct by a building certifier if the one unifying term was reintroduced.

QBCC currently has no discretion

- [446] The Review received submissions from numerous private certifiers who had been audited and as a result of not filling out a form correctly, or not dating a form, or not providing a copy of a form to a local government within the prescribed timeframe, a finding of unsatisfactory conduct had been made by the QBCC. The *Building Act 1975* does not provide the QBCC with any discretion not to make that finding if the decision maker is satisfied that the conduct of the building certifier falls within the definition of unsatisfactory conduct stated in Schedule 2 of the *Building Act 1975*. The discretion afforded to the QBCC if it finds a building certifier has engaged in unsatisfactory conduct is in respect to penalty¹⁰¹. The QBCC should be able to deal with clerical errors without having to make a finding of unsatisfactory conduct.

Minor administrative error

- [447] A third category of conduct should be introduced where a simple clerical mistake or other administrative error has been made. The description of this third category should be easily differentiated from unsatisfactory conduct or professional misconduct and should illustrate the minor nature of the “offence”. The Review suggests that third category be classified as “minor administrative error”.
- [448] The QBCC ought to have a discretion to be able to issue a building certifier with an Improvement Notice for minor administrative errors or for a first offence (provided the conduct does not amount to professional misconduct) without such to be listed on the building certifier’s public record. A minor administrative error or a first offence may involve multiple administrative errors or first offences or both.

Greater emphasis on performance auditing rather than administrative auditing

- [449] The Review agrees with the submissions of the HIA that there needs to be a greater emphasis within the QBCC on the auditing of

¹⁰¹ See s.204(4) of the *Building Act 1975*

building certifiers' assessment and inspection work, rather than relying upon examinations of the 'low hanging fruit' of their administrative labours. To be able to provide this greater degree of review of the work performed by building certifiers, the QBCC Certification Section should be appropriately funded to carry out this work and to ensure that it is able to attract and retain sufficiently experienced personnel to execute it.

Do the definitions of unsatisfactory conduct and professional misconduct in the Building Act 1975 require amendment?

[450] To answer this question, it is worthwhile considering a number of recent decisions of QCAT which have considered the provisions.

[451] The definition of 'unsatisfactory conduct' was considered by Member Paratz in *Kay v Queensland Building and Construction Commission* [2014] QCAT 421 at [13]-[36] where he was satisfied that in respect to paragraph (a) of the definition, the word "or" is implied into each of the words which are separated by commas, so that is to be read in each application as "*conduct that shows incompetence or a lack of adequate knowledge, or a lack of adequate skill, or a lack of adequate judgment, or a lack of adequate integrity, or a lack of adequate diligence, or a lack of adequate care in performing building or private certifying functions*". As Member Paratz said:

"It is therefore not necessary to show that all the words expressed in (a) are demonstrated. Specifically I do not consider that the words "incompetence", "knowledge", "skill", and "integrity" are necessary elements."

[452] In *Mr. Troy Christopher Richardson t/a Troy Richardson's Building Approvals & Inspections v Queensland Building Services Authority* [2013] QCAT 113 Member Paratz said at [12]:

"The expressions 'unsatisfactory conduct' and 'professional misconduct' are defined in Schedule 2 of the Act [the Building Act 1975]. The elements are very similar, but professional misconduct requires all of the elements and an element of safety, whereas unsatisfactory misconduct (sic) only requires some of the elements." [Emphasis added]

[453] With respect, the above extract of Member Paratz' decision is not a completely accurate representation of the definitions in Schedule 2. Whilst there is an overlap in the definitions, and whilst only one of the elements is required for a finding of unsatisfactory conduct, not *all* of the elements set out in the definition of professional misconduct must be made out. In the first instance the definition of 'professional misconduct' is an inclusive one, not exhaustive. Secondly, whilst at least one of the elements in subparagraphs (a)(i), and (ii) and (iii) must be present for such a finding, any of the

elements contained in subparagraphs (b) –(f) on their own are sufficient to satisfy the definition.

[454] To illustrate this point further, subparagraph (a)(i), (ii) and (iii) of the definition ‘professional misconduct’ are conjunctive. If a building certifier wrongfully accepted a benefit, for example by accepting a bribe from a building contractor to assess a building as a particular class which would result in lower building costs, then *prima facie*, that of itself would constitute professional misconduct. Similarly, if a building certifier failed to comply with an order of QCAT, that would constitute professional misconduct. However, in respect to the inspection of a house frame, to constitute professional misconduct, the inspection would have to have been performed incompetently, or with a lack of adequate knowledge, or a lack of adequate skill, or a lack of adequate judgment, or a lack of adequate integrity or a lack of adequate diligence or a lack of adequate care in performing building certifying functions AND, the conduct would have to compromise the health or safety of a person or the amenity of a person’s property or if the conduct significantly conflicts with a local planning scheme; AND is contrary to a function under the *Building Act*, then the building certifier will have engaged in professional misconduct.

[455] In *Schwede v QBSA and Kennedy* [2009] QCCTB 157, Member Bradley said at [63]-[69]:

“The distinction between unsatisfactory conduct and professional misconduct is apparent from the definitions in the Building Act and also from the consequences flowing from the different findings in the scheme of the Act.

Some parts of the definitions of professional misconduct and unsatisfactory conduct appear to overlap: paragraph (a)(i) of professional misconduct definition and paragraph (a) of the unsatisfactory conduct definition are the same; as are paragraphs (a)(iii) (except for (E)) and paragraph (b) of the respective definitions. From these ‘overlaps’ it is clear that the Parliament did not intend that every instance of conduct showing ‘incompetence’ or ‘lack of care’ would be professional misconduct or that every contravention of the Act or the Code of Conduct would be. If that were the case, the legislature would have removed those parts of the definition of unsatisfactory conduct. In the areas of overlap, whether conduct is merely unsatisfactory or amounts to professional misconduct will depend upon the nature and degree of the conduct itself.

When professional misconduct is found, the Building Act requires the BSA to commence disciplinary proceedings in the Tribunal against the private certifier. No such requirement attends a finding of unsatisfactory conduct. Plainly, professional misconduct is a very serious matter: it is conduct that shows serious incompetence, lack of knowledge, judgement, integrity, diligence or care; it is conduct that compromises the safety of persons using buildings, the amenity of a property or significantly conflicts with the local

planning laws; it is unlawful conduct – in the sense of conduct contrary to the Acts regulating the functions of private certifiers; it is corruption in the sense of seeking or taking benefits in return for breaching the regulating Act or seeking to corrupt other private certifiers in the same way; it is defiance of the orders of the tribunal or the BSA; it is fraud, dishonesty, unethical and improper conduct. Repeated unsatisfactory conduct is a type of professional misconduct that appears at the end and in the context of the balance of the definition.

The definition of each of the terms is ‘inclusive’; neither provides an exhaustive meaning for the term. The use of the term ‘professional misconduct’ brings with it a good deal of established common law meaning.

...

In the context of the Building Act, I am satisfied that professional misconduct is misconduct of a nature and seriousness that a private certifier in good standing would regard as disgraceful or dishonourable and which warrants severe disciplinary action. Although each case must be assessed on its merits, it is likely that in disciplinary proceedings a person found to have committed professional misconduct would face a fine or the suspension or loss of his or her licence as a private certifier or other penalties more severe than those that apply to unsatisfactory conduct, found in section 204(4) of the Building Act.”

[456] Submissions were also made by Wayne Blackman who is a Senior audit and investigation officer of the QBCC. He suggested a number of minor amendments be made to clarify the definitions of ‘unsatisfactory conduct’ and ‘professional misconduct’. In particular, he suggested that some clarification ought to be made regarding what is meant by the term ‘repeated unsatisfactory conduct’ which is contained in paragraph (f) of the definition of ‘professional misconduct’ in Schedule 2 of the *Building Act 1975*.

[457] This term was considered by Member Lohrisch in *Chandra v Queensland Building Services Authority* [2008] QCCTB 232. At paragraphs [51]-[54] he said:

“51. The Macquarie Concise Dictionary (Third Edition) meaning of the word ‘repeated’ is ‘done, made or said again and again’. In the context of these proceedings, that suggests to me ‘unsatisfactory conduct’ that is not just one repeat, but more than one repeat.

52. Further, there appears to me to be two respects in which there could be ‘repeated unsatisfactory conduct’ in terms of the definition of ‘professional misconduct’, namely –

(i) in respect of the same job, more than two instances where the certifier had been guilty of ‘unsatisfactory conduct’; and

(ii) in different jobs, more than two instances of unprofessional conduct.

53. The gravity of such conduct, in either instance, must depend on the

nature of the offending conduct, its frequency and/or the circumstances in which, the offending conduct was committed. However, the definition of 'professional misconduct', when it refers to 'repeated unprofessional conduct', does not differentiate between levels of seriousness of the resultant professional misconduct. Simply, those are matters of mitigation and penalty.

54. In this instance (including my findings) there are four instances of unsatisfactory conduct. In accordance of the definition of 'professional misconduct' then that, in my view, amounts to 'repeated unsatisfactory conduct', and accordingly, is professional misconduct."

[458] Whilst reasonable minds may at times differ about the difference between the two definitions, there is now a reasonably well-established body of law which has considered whether conduct of a building certifier amounts to 'unsatisfactory conduct' or 'professional misconduct'. The Review does not consider any aspects of either definition sufficiently obscure or ambiguous that warrant statutory intervention which may have the unintended consequence of complicating terms which appear to me to be reasonably well understood.

[459] No part of either definition requires amendment.

QBCC: Investigator, judge and jury

[460] The Review does not accept the submissions of the HIA that it is inappropriate for the QBCC to investigate and make decisions as to whether a building certifier has made minor administrative errors or has engaged in unsatisfactory conduct or professional misconduct. This type of regulatory regime reflects the same process undertaken by the QBCC for all other licensees and importantly affords appropriate procedural fairness to all parties.

[461] However, the Review considers that it is advisable that the person who has undertaken the investigation of an alleged breach of the building legislation or Code of Conduct is not the same person within QBCC who determines whether the complaint has been made out. Nor is it appropriate that the same person decide the appropriate penalty. Decisions in respect to whether a building certifier has engaged in conduct amounting to unsatisfactory conduct or professional misconduct ought to be made independently of the person conducting the investigation. This task could be performed by the Manager of the Certification Unit, or his or immediate superior. In circumstances where a QBCC investigator considered that a breach by a building certifier amounted to a minor administrative error or in circumstances where it was a first offence and where the QBCC investigator intended to caution the building certifier, the matter should not

need to be referred to the Certification Manager for decision and penalty.

- [462] If a complainant or building certifier is aggrieved by the decision made by the QBCC, they will have review entitlements to the Internal Review Unit of the QBCC and ultimately if they remain dissatisfied to QCAT.
- [463] Subject to any administrative review entitlements, the QBCC ought to have the sole responsibility for investigating and deciding whether a building certifier has made a minor administrative error or engaged in unsatisfactory conduct or professional misconduct¹⁰². This would require an amendment to s.206 of the *Building Act 1975*. It is envisaged that complaints made by local governments against a building certifier could be made to the QBCC without having to issue a show cause notice.
- [464] If the QBCC decides that reasonable grounds exist for deciding that the building certifier may have engaged in conduct that amounts to professional misconduct, the QBCC should be required to issue the building certifier with a show cause notice allowing the building certifier 21 days to respond.
- [465] If after considering the show cause notice the QBCC may be satisfied that the building certifier has engaged in professional misconduct or the lesser 'charge' of unprofessional conduct. In either case, the QBCC should be able to discipline the building certifier in accordance with the current provisions contained in s.211 of the *Building Act 1975*. These powers are currently exercised by QCAT and they include:
- (a) Reprimanding the building certifier; or
 - (b) Imposing conditions it considers appropriate on the building certifier's licence; or
 - (c) Directing the building certifier to complete the educational courses stated in the order; or
 - (d) Directing the building certifier to report on his or her practice as a building certifier at the times, in the way and to the persons stated in the order; or
 - (e) Suspending the building certifier's licence for the term the tribunal considers appropriate; or
 - (f) Cancelling the building certifier's licence; or
 - (g) Disqualifying, indefinitely or for a stated period, the building certifier from obtaining a licence as a building certifier from QBCC.

¹⁰² Similar provisions apply in s.49 of the *Queensland Building and Construction Commission Act 1991* in respect to the discipline of other licensees

- [466] These powers are also consistent with the powers of the New South Wales Builders Practitioners Board¹⁰³.
- [467] The Review does not consider it necessary for the QBCC to be required to issue a building certifier with a show cause notice if the QBCC considers that the building certifier has engaged in conduct which amounts to a minor administrative error or unsatisfactory conduct.
- [468] There may be some instances where the QBCC can immediately suspend a building certifier's licence without the opportunity to provide representations, if the QBCC believes on reasonable grounds there is a real likelihood that serious financial loss or other serious harm will happen to other licensees, their employees or consumers¹⁰⁴.

Frivolous or vexatious complaint

- [469] The QBCC should have the legislative power to dismiss a complaint made against a building certifier on the basis that it is frivolous, vexatious or lacking sufficient evidence to support the complaint.
- [470] If dissatisfied with the decision, the complainant should be able to seek a review of the QBCC's decision from the Internal Review Unit and if the complainant remains dissatisfied after that process, the complainant should be able to review the decision in QCAT.
- [471] The Review does not consider it desirable to restrict the time that a complaint may be made about a building certifier for complaints which impact upon the health and safety of building occupants, otherwise, the ability to make a complaint to the QBCC should be barred six years after a final inspection certificate or certificate of classification is issued¹⁰⁵, or if a certificate is not issued, 6 years after the building is occupied or could reasonably have been occupied.

Administrative Review

- [472] All decisions made by the QBCC regarding the discipline of building certifiers should be able to be reviewed by the Internal Review Unit of the QBCC, prior to an application for a review of the decision to QCAT. This will require amendments to s.86(1) of the *Queensland Building and Construction Commission Act 1991*.

¹⁰³ See s.31(4) of the *Building Professionals Act 2005* (NSW)

¹⁰⁴ See s.49A of the *Queensland Building and Construction Commission Act 1991*

¹⁰⁵ Compare Recommendation 109 in relation to civil liability limitations

Question 1.7.1: Recommendations

[473]

29.	The distinction between “unsatisfactory conduct” and “professional misconduct” ought to be retained.
30.	A third category of building certifier misconduct should be established for minor administrative errors.
31.	<p>The QBCC ought to have a discretion to be able to issue a building certifier with an Improvement Notice for minor administrative errors or for a first offence (provided it is not conduct which amounts to professional misconduct) without such to be listed on the building certifier’s public record.</p> <p>Note: for the purposes of this recommendation a minor administrative error or a first offence may involve multiple administrative errors or first offences or both.</p>
32.	The QBCC should place a greater emphasis on the auditing of building certifiers’ assessment and inspection work, rather than relying upon administrative or “desk-top” audits. The QBCC Certification Unit should be appropriately funded to carry out this work and to ensure that it is able to attract and retain sufficiently experienced personnel.
33.	<p>Subject to any administrative review entitlements, the QBCC ought to have the sole responsibility for investigating and determining whether a building certifier has made a minor administrative error or engaged in unsatisfactory conduct or professional misconduct and for determining the appropriate penalty as detailed in s.211 of the <i>Building Act 1975</i>.</p> <p>However there should be a distinction between the person who investigates a complaint against a building certifier and the person who determines whether the complaint is made out and what the appropriate penalty should be. These tasks should be performed by a more experienced person within QBCC, ideally the Certification Manager or his or her superior.</p>
34.	<p>The QBCC should have the legislative power to dismiss a complaint made against a building certifier on the basis that it is frivolous, vexatious or lacking sufficient evidence to support the complaint.</p> <p>If dissatisfied with the decision, the complainant should be</p>

	<p>able to seek a review of the QBCC's decision from the Internal Review Unit and if the complainant remains dissatisfied after that process, the complainant should be able to review the decision in QCAT.</p> <p>Unless a complaint about the conduct of a building certifier in performing the building certifying function relates to the health and safety of building occupants, the ability to make a complaint to the QBCC should be barred six years after a final inspection certificate or certificate of classification is issued, or if a certificate is not issued, six years after the building is occupied or could reasonably have been occupied.</p>
35.	<p>Decisions made by the QBCC in relation to the disciplining of building certifiers may be reviewed by the Internal Review Unit of the QBCC, prior to an application for a review of the decision to QCAT. Amendments would therefore be required to s.86(1) of the <i>Queensland Building and Construction Commission Act 1991</i> to facilitate that review.</p>
36.	<p>To the extent that they are relevant to building certifiers and the building certifying function, building certifiers should be bound by the provisions contained in the following parts of the <i>Queensland Building and Construction Commission Act 1991</i>:</p> <ul style="list-style-type: none"> - Part 3 - Licensing - Part 3A - Excluded and permitted individuals and excluded companies - Part 3B - Permanently excluded individuals - Part 3C - Convicted company officers - Part 3D - Banned individuals - Part 3E - Disqualified individuals (Subject to Recommendation 37) - Part 6 - Rectification of building work - Part 7 - Jurisdiction of the tribunal - Part 8 - Registers - Part 9 - Inspectors - Part 10 - Miscellaneous - Part 11 - Proposed specific provisions in relation to the licensing and discipline of building certifiers - Part 12 - Proposed specific provisions in relation to the licensing and discipline of pool safety inspectors.

Question 1.8.1: Do you think a demerit point system for building certifiers should be introduced?

Background

- [474] Section 5 of the *State Penalties Enforcement Regulation 2014* enables the QBCC to issue building certifiers with penalty infringement notices (PINs) otherwise known as “on the spot fines” for certain administrative offences¹⁰⁶ committed against the *Building Act 1975*, the *Building Fire Safety Regulation 2008* and the *Building Regulation 2006*.
- [475] Unlike building contractors, building designers and trade contractors who can be issued with PINs and demerit points, the building legislation does not provide for the allocation of demerit points for building certifiers who breach the building legislation.
- [476] The Discussion Paper suggests that the lack of a demerit point system may be resulting in some building certifiers factoring in the costs of paying for PINs. In addition, the absence of a demerit point system does not promote behavioural change because repeated infringements do not lead to more serious outcomes.

Feedback outcomes

- [477] Of the written submissions and completed surveys responding to this question, 59% of submitters supported the introduction of a demerit point system, whilst 23% were opposed. Approximately 7% of submitters had other suggestions on how to resolve the question and 11% did not address the question.

Support for change

Must not lead to unreasonable outcomes

- [478] AIBS supported the concept of a demerit point system in principle provided it did not lead to unreasonable disciplinary outcomes. Its members considered that a demerit point system would:
- Provide incentives to building certifiers to maintain a compliant level of performance;
 - Provide an appropriate mechanism for measuring conduct for repeat offenders;

¹⁰⁶ See Schedule 1 of the *State Penalty Enforcement Regulation 2014*

However, AIBS qualified this support by arguing that accumulated points should be able to be cleared after a given period and that demerit points should not be used as a means of doubling up on penalties¹⁰⁷.

Deterrence

- [479] Local government contract certifier Jason Burger argued that a demerit point system would deter certifiers from continuing to commit the same breaches of the building legislation and the Code of Conduct. However he also was concerned that the system should not lead to unreasonable outcomes. He considered that QBCC should be empowered to issue warnings to building certifiers for first offences.
- [480] Master Builders Association also supported the concept on the basis that it provides the QBCC with another tool in their armory to address misconduct by certifiers¹⁰⁸.

Structured comprehensive system required

- [481] QBCC Senior audit and investigation officer Philip Godfrey provided helpful submissions in respect to the establishment of a demerit point system. He argued:

"If a structured comprehensive system of penalty points can be allocated to breaches of the Act, Regulation and code of conduct than I believe that the inclusion of a demerit point system (option 1.8(a)) is an appropriate improvement of the current disciplinary system.

An advantage of such system is that an accumulation of points can create a trigger for multiple offences to be considered as professional misconduct. Professional misconduct for multiple offences being defined as 'x' number of points accumulated in a 5 year period. Penalty points should be removed after 5 years.

It is often too easy for a Certifier to be found guilty of unsatisfactory conduct after a minor breach. Certifiers with previously good records are often are disgruntled that there is no discretion displayed by the Commission in their decision making process. While I think it is difficult for legislation to allow the Commission to apply discretion (without being open to accusations of bias or inconsistency), I would consider that in some cases of 'first offenders' it may be possible not to display a finding on the Commissions public record.

¹⁰⁷ Similar submissions were made by HIA and private certifier John Mulderry

¹⁰⁸ Similar submissions were made by the Neighbourhood Action Group – Sunnybank, Robertson and Macgregor

A lower point's threshold should be considered that triggers display on the public record. The offender is given an unsatisfactory finding for a minor offence but Certifiers with a previous good record have the 'comfort' of knowing that the finding will not be displayed on the public record unless a further finding of unsatisfactory conduct is found within the next 5 years.

An advantage of a low level threshold is:

- The finding of unsatisfactory conduct is still given to the Certifier.*
- The Certifier should take note and may display more diligence to avoid display on the public record.*

The points allocated for the offence should also be allocated to reflect the conduct of the certifier before and after the breach. In some cases a Certifier may take steps to remedy a breach (eg make application for concurrence assessment after issuing the building approval to resolve the breach).

In such cases the Commission should be given some discretion of reducing the penalty points attached to a finding of unsatisfactory conduct."

Support for status quo

Insufficient checks and balances

- [482] Private certifier Claude McKelvey did not support the introduction of a demerit point system. Whilst he acknowledged that it could result in a reduction of the number of unsatisfactory conduct findings, he argued that such a system would not have sufficient checks and balances to ensure that it was not misused. He also considered that such a system could lead to a rapid accumulation of points in a short space of time for administrative errors¹⁰⁹.

Support for other reforms

QBCC must be more pro-active

- [483] Private certifier Darren Wright was also opposed to the introduction of the demerit point system. He argued that better outcomes for building certifiers and the community would be achieved by the QBCC providing more pro-active technical, educational, advisory and auditing services.

Should a building certifier have his or her licence suspended or canceled for administrative errors?

- [484] Local government building certifier Gary Shumm in his written submissions posed these very valid questions:

¹⁰⁹ Similar submissions were made by private certifier Clayton Baker

“If a demerit point system was introduced would it be for serious issues only or would it be possible to loose (sic) your licence and livelihood for administrative issues. Eg if a certifier does 35 approvals and fails to lodge the documents with the local government with (sic) timeframe, is that 35 offences or one offence? Do you get points back after a period of time demonstrating good behaviour?”

Consideration

Accountability and deterrence

- [485] The Review considers that a demerit point system would assist with developing a culture of greater accountability amongst building certifiers¹¹⁰ and should therefore be pursued. There is currently an insufficient “deterrence factor” in the issuing of an Infringement Notice.
- [486] Just as demerit points for motor vehicle drivers work to ensure their better conduct and adherence to the road rules in the longer term, a demerit point system will provide appropriate incentives to ensure that building certifiers comply with the building legislation.

General framework

- [487] The design of the actual demerit point system is beyond the remit of this Review, however a number of suggestions are made as to its general framework.

Allocation of demerit points should be discretionary

- [488] The decision made by the QBCC whether to allocate demerit points should be discretionary. That is, in some instances a simple caution or Improvement Notice may be issued for a breach. In other instances, it may be appropriate for a PIN to be issued, on other occasions it may be appropriate for a PIN to be issued together with an allocation of demerit points.

Educational focus

- [489] There should be a willingness on the part of the QBCC to educate in the first instance without necessarily formally disciplining a building certifier if the breach is of low magnitude, for example a minor administrative error. However, the system must be

¹¹⁰ Greater accountability of building certifiers was part of the Queensland Government’s 10 point action plan

sufficiently flexible so that it is capable of ‘ratcheting up’ the consequences for recalcitrant behaviour.

The allocation of demerit points is not duplicitous

- [490] The allocation of demerit points and the imposition of a fine or the taking of disciplinary action ought not be considered duplicitous. There is ample precedent to support this view. For example, a driver caught speeding will receive an Infringement Notice and an allocation of demerit points.

Demerit offences must be listed in the Regulations

- [491] All demerit point offences and the number of points allocated to the offence would need to be listed in the *Queensland Building and Construction Commission Regulation 2003*.

Consistency with existing demerit scheme for builders is preferable

- [492] To ensure consistency between builders and trade contractors and building certifiers, it would be preferable for the demerit point system to adopt the demerit point system for builders and trade contractors set out in Part 3E, Division 3 of the *Queensland Building and Construction Commission Act 1991*. Note this Part is the subject of planned amendments as detailed in the *Queensland Building and Construction Commission and other Legislation Amendment Bill 2014*¹¹¹. However, for the reasons discussed below this is not considered practicable at this time.

The existing demerit scheme for builders and trade contractors

- [493] If the existing demerit point scheme for builders and trade contractors were adopted for building certifiers, the accumulation of 30 demerit points in a 3 year period would result in a building certifier being issued with a show cause notice. If after receiving submissions from the building certifier (if any), the QBCC remains satisfied that the building certifier has accumulated 30 demerit points in a 3-year period, the QBCC must cancel the building certifier’s licence. The building certifier would be regarded as a disqualified individual for 3 years for the first time and disqualified for life if the building certifier accumulates another 30 demerit points in a subsequent 3-year period¹¹².

¹¹¹ See clause 27 onwards

¹¹² See s.67AZM of the *Queensland Building and Construction Commission Act 1991*

- [494] There have been no reported QCAT decisions on the effect of Part 3E, Division 3 of the *Queensland Building and Construction Commission Act 1991* which suggests that the current scheme is not being utilised as well as it could be. The provisions in Part 3E, Division 3 appear to mean that the accumulation of 30 demerit points must occur in a three year period, meaning that on the 3rd anniversary of the accumulation of those points, they would not be considered in the tally. For example if 4 demerit points were allocated to a building certifier on 1 January 2015, those same demerit points would not be factored into the overall demerit point count after 1 January 2018.
- [495] The Review's concern is not related to this part of the existing demerit point scheme. The disciplinary regime for building certifiers could work within those parameters.
- [496] The Review is however concerned with the drafting of the existing s.67AZB of the *Queensland Building and Construction Commission Act 1991* and the planned amendments in the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014*.
- [497] Firstly it must be said that the drafting of s.67AZB of the current legislation is very difficult to understand, particularly s.67AZB(4). Once again, there are no reported decisions on these provisions to assist in its understanding. Secondly, pursuant to subsections (2) and (4), the current maximum number of demerit points that can be allocated for demerit offences arising out of the same audit or information received by the QBCC is limited to 6. Under the proposed amendments this will be increased to 20.
- [498] Assumedly this limit is proposed to be increased to 20 demerit points, because the existing limitations are not achieving the desired cultural changes amongst builders and trade contractors. However, the concern is that if this same system is used for building certifiers, a building certifier could have 20 demerit points allocated against him or her from the one audit. That is most unlikely to occur to a builder or trade contractor given the different scope of work and the types and number of demerit offences that would apply to each. However, it could conceivably happen to a building certifier.
- [499] The net result is that if the existing demerit point system for builders and trade contractors as amended by the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* is used, theoretically, a building certifier could be disqualified from holding a licence for three years within the period of two audits.

- [500] Bearing in mind the Review's earlier comments in respect to education, this should not be considered the preferable option.
- [501] Conceivably, the existing demerit point system for builders and trade contractors could be used for building certifiers provided greater restrictions are placed on the number of demerit points that can be allocated from the one audit or from information received by the QBCC from the same source.
- [502] However, the Review also suggests that further amendments be made to the drafting of s.67AZB to more appropriately take into account the totality principle¹¹³.
- [503] Significant work must be done to ensure that unintended consequences are not brought about by making building certifiers bound by the current provisions contained in Part 3E of the *Queensland Building and Construction Commission Act 1991*.

Improvement

- [504] The demerit point scheme must provide sufficient flexibility to ensure that building certifiers are able to reap the rewards of self-improvement without being unreasonably harsh in its consequences. The time frames during which demerit points are calculated should be relatively short. The three-year period contained in the existing demerit scheme for builders and trade contractors is considered appropriate.

Question 1.8.1: Recommendations

[505]

37.	<p>To achieve greater accountability of building certifiers, a demerit point system should be established which provides and promotes:</p> <ul style="list-style-type: none"> (a) Education before punishment; (b) The discretionary allocation of demerit points; (c) Flexibility so that it is capable of 'ratcheting up' the consequences for recalcitrant behaviour; (d) Appropriate deterrence; (e) Improvement within reasonable timeframes; and (f) Cultural change amongst building certifiers. <p>However, further investigation must be undertaken before any conclusions can be reached about the desirability of holding building certifiers to account under the current</p>
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¹¹³ *Mill v The Queen* (1988) 166 CLR 59

	demerit point scheme for building contractors established under Part 3E of the <i>Queensland Building and Construction Commission Act 1991</i>.
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Question 1.9.1: Do you think that mandatory CPD for certifiers should be linked to their licence requirements instead of their accreditation?

Background

- [506] In order to maintain their accreditation with either AIBS or RICS, building certifiers must participate in CPD activities. Currently, whilst the accreditation standards bodies stipulate the extent of the CPD activity required, it is not a requirement in the *Building Act 1975* or the *Building Regulation 2006* for building certifiers to undertake any CPD activities¹¹⁴. However, accreditation standards bodies establish professional development schemes approved by the chief executive¹¹⁵.
- [507] AIBS defines CPD on its website as *"the systematic maintenance, improvement and broadening of knowledge and skill and the development of personal qualities necessary for the competent execution of professional and technical duties"*. The AIBS recommends that building certifiers complete 30 hours of CPD each year¹¹⁶.
- [508] In its CPD Guide dated 23 March 2011, RICS defines CPD as *"the systematic updating and enhancement of skills, knowledge and competence that takes place throughout your working life."* RICS sets as a benchmark the completion of 90 hours of professional development in any three-year period¹¹⁷.
- [509] The accumulation of a limited number of CPD points can also be achieved by being a member of a prescribed body¹¹⁸.
- [510] Following on from Question 1.4.2, the Discussion Paper questions whether the building legislation should mandate CPD as a condition of a building certifier's licence renewal.

¹¹⁴ cf pool safety inspectors who are required under the *Building Regulation 2006* to accumulate 6 CPD points per year unless they are a building certifier, in which case they must accumulate 4 CPD points – see s.16DD of the *Building Regulation 2006*

¹¹⁵ See s.185(2)(c) of the *Building Act 1975*

¹¹⁶ See <https://aibs.com.au/accreditation/accredcontinuing-professional-development>

¹¹⁷ See http://www.rics.org/Global/Downloads/RICS_Accreditation_Standards_Body_Queensland_CPD_Policy_and_Guidance_23_March_2011.pdf

¹¹⁸ See s.16DE and Schedule 2D of the *Building Regulation 2006*

Feedback outcomes

- [511] Of the written submissions and completed surveys responding to this question, 48% of submitters supported the linking of mandatory CPD for building certifiers to their licence requirements instead of their accreditation, whilst 27% were opposed. Approximately 9% of submitters had other suggestions on how to resolve the question and 16% did not address the question.

Support for change

- [512] A number of the submitters who favoured the Commission assuming the responsibility for assessing the qualification and experience requirements for building certifiers, also supported the linking of mandatory CPD requirements to building certifiers' licence requirements rather than their accreditation for the similar reasons they expressed in relation to Question 1.4.2 herein¹¹⁹.
- [513] The Board of Professional Engineers of Queensland supported the introduction of this reform as did the Australian Institute of Architects.
- [514] A number of responses to the survey commented on the costs charged by organisations providing CPD to building certifiers. It was alleged that these costs significantly impacted upon smaller operators.

Support for status quo

- [515] Similarly, many of the submitters who were opposed to the Commission assuming the responsibility for assessing the qualification and experience requirements for building certifiers were also opposed to the linking of mandatory CPD requirements to building certifiers' licence requirements¹²⁰.
- [516] The AIBS in opposing this reform argued, among other things:
- There is currently no cost to the community for the scheme administered by AIBS. The linking of mandatory CPD to building certifiers' licence requirements would result in red tape for "*no demonstrated benefit to the practitioners or the community*";
 - That it is "*fundamentally wrong to take from industry, the measures and balances applied from within the profession*"

¹¹⁹ See for example the written submissions of local government building compliance officer Anna Sissman

¹²⁰ See for example the submissions of: Ain Kuru, AIBS and private certifier Darren Wright

without a clearly demonstrated proven benefit to the community that there needs to be government system in place to administer”;

- That the standard of the building surveying profession could be watered down through regulation if this function was taken from accreditation standards bodies;
- Building surveying is a much wider profession to that of the limited role played by building certifiers and to tamper with the qualification, skills or experience required to be a building certifier will impact upon those required for a building surveyor;
- The *Queensland Building and Construction Commission Act 1991* and the *Queensland Building and Construction Commission Regulation 2003* hampers the ability of the building surveying profession to provide its specialist expertise due to the requirement for multiple licensing.

Support for other reforms

- [517] The HIA are opposed to the concept of mandatory CPD in the first instance arguing that there is no value in compelling well run businesses and skilled operators to undertake training in the hope that it might improve the skills and operation of those businesses that are not run well.
- [518] Several submissions received, criticised the current CPD programs run by a number of different bodies for failing to provide performance based assessment. In other words, the current CPD obligations can be fulfilled by simply ‘turning up’. During the roadshow and individual interviews, numerous complaints were also made to the Review about the repetitive nature of CPD programs run by CPD providers.

Consideration

- [519] One of the fundamental issues at stake here is that the body that licenses building certifiers, namely the QBCC, should have the ability to determine what CPD requirements a building certifier should have to undertake in order for the building certifier to remain licensed.
- [520] There is no suggestion that the QBCC wants to take over the CPD delivery from the current CPD providers, but it does seek to have a much greater say in the requirements that a building certifier must satisfy in order for him or her to renew their licence, just as it should have a greater say in setting the standards for them initially obtaining the licence.

- [521] The Review does not accept that this reform will of itself lead to the 'dumbing down' of the building surveying profession. During the course of the Review many complaints were received about the repetitive nature and sometimes dubious benefit of some of the CPD programs that are currently offered. The QBCC should consult widely with the profession and broader industry before setting those benchmarks. Ultimately however, the role of providing CPD will predominantly be left to the profession. The Review fails to see how this will lead to a reduction in standards.
- [522] The Review does not accept that the proposed reform would lead to burdensome red tape. There will by necessity be greater involvement of the QBCC in setting the required benchmarks for CPD and working with accrediting organisations to provide mandatory CPD, but once established it will be up to the CPD providers to deliver their programs in the manner they see fit.
- [523] These reforms will lead to greater competition between CPD service providers. As was put to the Review by a number of building certifiers, if the current CPD service providers are not delivering appropriately targeted, well run CPD programs, then the market will simply force those players out of the industry and make way for other organisations who can deliver what is required.
- [524] Whilst the Review understands that the QBCC does not want to enter into the 'service delivery' space, the QBCC should be entitled to run its own CPD programs as and when required. This is especially important when the QBCC identifies a particular problem area which may need to be urgently addressed.
- [525] The Review does not accept the submissions of the HIA that CPD should not be mandatory. Whilst the HIA appears to recognise that some businesses may benefit from it, HIA has continued to maintain its stance that it ought not be made mandatory. The recognised benefits of CPD in modern day Australian professional and industry life are well accepted. Many professions in Australia require mandatory CPD including doctors, nurses, pharmacists, teachers, solicitors, barristers, engineers, architects, building designers, accountants, arbitrators, adjudicators, actuaries, town planners, financial planners, quantity surveyors and of course building surveyors. The list is seemingly endless. The benefits of mandatory CPD specifically for building certifiers include:
- Maintains an awareness of the never ending changes to the building legislation, codes, standards and planning laws;
 - Maintains an awareness of recent developments in building technology including new building methods, techniques and materials;

- Maintains an awareness of current specific problem areas or defects experienced in the building industry;
- Most building certifiers work in a micro or small business environment where it is vitally important for them to have regular opportunities to raise and discuss issues which affect their professional lives in a collegiate environment;
- Whilst many building certifiers work alone or in small business, CPD promotes a greater understanding that they are “not alone” and that they work in a broader industry whose overriding duty is to the public interest;
- Regular emphasis on appropriate management of ethical issues that arise in building certifiers’ practices. Without this regular contact with colleagues, it would be easy for building certifiers to become more inward looking;
- Promotes better business management skills; and
- Promotes greater public confidence in the profession as a whole.

[526] For these reasons, mandatory CPD must remain for building certifiers. In addition, for similar reasons considered in respect to Question 1.9.3, the Review is also of the view that CPD should be made mandatory for all builders and trade contractors.

Question 1.9.1 Recommendations

[527]

38.	<p>Further to the Recommendations made in response to Question 1.4.2, mandatory CPD for building certifiers should be linked to their licence requirements instead of their accreditation.</p> <p><i>The Queensland Building and Construction Commission Act 1991 and the Queensland Building and Construction Commission Regulation 2006 should be amended to:</i></p> <ul style="list-style-type: none"> (a) Enable the QBCC to accredit organisations including current accreditation bodies to provide mandatory CPD programs to building certifiers (Certifier CPD Providers) renewable after a five year period; (b) Require Certifier CPD Providers to maintain a register of all CPD programs completed by building certifiers and provide them with certification of participation in those CPD programs; (c) Enable the QBCC to be a provider of CPD Programs.
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Question 1.9.2: Do you think the Commission should have the ability to direct CPD bodies to address specific subject areas?

Background

[528] As a result of its auditing and investigation processes, together with statistics in relation to claims made on the Queensland Home Warranty Scheme, the QBCC is able to identify problem areas which require targeted, specific industry education. The Discussion Paper raises the question as to whether the QBCC after identifying recurring problems, should be able to direct Certifier CPD Providers to address these issues.

Feedback outcomes

[529] Of the written submissions and completed surveys responding to this question, 64% of submitters supported the concept of the QBCC being able to direct CPD providers to address specific subject areas, whilst 11% were opposed. Approximately 8% of submitters had other suggestions on how to resolve the question and 17% did not address the question.

[530] Given the close relationship between this question and question 1.9.3, it is appropriate that they be dealt with concurrently.

Question 1.9.3: Do you think CPD activities for building certifiers should also be made available to other industry practitioners?

Background

[531] As part of the QBCC's role as regulator of the building industry¹²¹ the Discussion Paper raises the importance of a "whole of industry" response to particular problem issues which arise from time to time. For example, in recent years the predecessor to the QBCC has identified that there is a significant problem with the construction and certification of fire separation walls. Having to repair fire separation walls post construction is often extraordinarily expensive, time consuming and disruptive to consumers.

¹²¹ See s.3 of the *Queensland Building and Construction Commission Act 1991*

- [532] In circumstances where the QBCC is able to identify recurring defects in construction, the Discussion Paper refers to the benefits obtained by being able to offer educational programs to builders and trade contractors who, after all, are likely to be responsible for the defective construction in the first instance. The objective of course is to prevent the defects from occurring in the first instance, rather than simply relying on the building certifier to identify the defects during construction.

Feedback outcomes

- [533] Of the written submissions and completed surveys responding to this question, 71% of submitters supported the concept of CPD activities for building certifiers being made available to other industry practitioners, whilst 5% were opposed. Approximately 8% of submitters had other suggestions on how to resolve the question and 16% did not address the question.

Support for change

- [534] Not surprisingly, these two questions elicited some of the strongest responses in favour of reform encountered during the Review. When considered together there was almost universal support for enabling the QBCC to direct Certifier CPD Providers to address specific problem areas. There was even stronger support to make CPD activities available to builders and trade contractors.

Support for status quo

- [535] The only cogent reason in support of the status quo for both these questions was that rural and remote Queensland building certifiers would have difficulty accessing face-to-face training programs.

Consideration

CPD must cater for rural and regional Qld and provide flexible learning opportunities

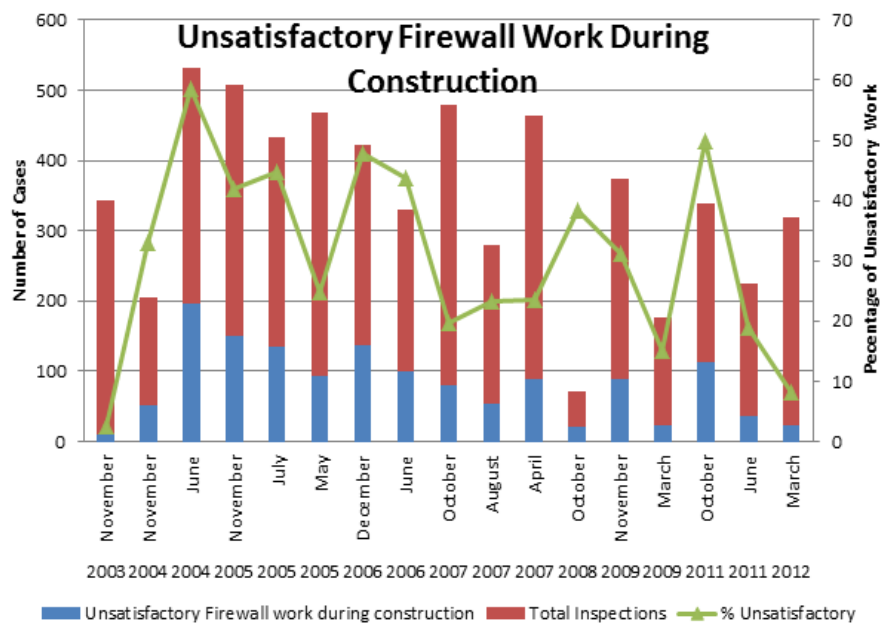
- [536] The Review accepts the concerns of a small number of stakeholders regarding access to CPD for specific subject areas, but this is really no different than having to comply with current CPD requirements now. In rural and remote parts of Queensland, some building certifiers would find it economically unviable to attend CPD activities in person. However, CPD can be delivered in various ways, not just face-to-face. For example, it could be delivered over the internet using software such as Skype to provide remote access.

CPD could also be provided by other electronic means such as the completion of a CPD activity on CD rom.

Reforms will lead to less building defects

- [537] To put it in the vernacular, the answers to these two questions are 'no brainers'.
- [538] The benefits that can be achieved by the QBCC working closely with and directing Certifier CPD Providers to address specific areas of concern are obvious. Properly executed, this reform will result in lower instances of repetitive building defects, lower rectification costs, less drain on the QBCC and the resources of the Queensland Home Warranty Scheme (QHWS) and importantly less detrimental impacts on consumers.
- [539] Graph 1 represents the number and percentage of reported cases of unsatisfactory firewall construction between 2003 and 2012 (2010 results were omitted as a result of incomplete data).
- [540] As can be seen in 2004 there was a noticeable spike in firewall defects. This prompted the then QBSA to require attendance at special firewall construction method seminars as a condition of relevant contractor's licenses. The figures illustrate that since those seminars were conducted from December 2004, the incidents of firewall defects has trended downwards.

Graph 1: Unsatisfactory Firewall Construction 2003-2012



Source: QBCC September 2014

"It takes two to tango"

- [541] Equally, Question 1.9.3 of the Discussion Paper recognises that building certification defects do not occur in a vacuum. Often, although not always, defects occur because a builder or trade contractor has performed defective building work or work that is not in accordance with the plans and specifications. Compounding this error, the building certifier may not identify and/or direct that the defect be rectified.
- [542] It is vital that if building certification defects and omissions are to be limited through these reforms, that builders and building trade contractors have the ability to attend CPD activities so that they may learn the necessary skills required in a rapidly changing industry.
- [543] Notwithstanding this, during every part of the Roadshows and in numerous individual interviews throughout the State, many stakeholders pressed the vital importance of ensuring that mandatory CPD is introduced for all builders and trade contractors. This is also reflected in the written submissions¹²².
- [544] The HIA drew to the attention of the Review what it considered to be the failed mandatory CPD program for builders in New South Wales. However, the Review does not accept these criticisms of the New South Wales model as justification for not introducing a mandatory scheme in Queensland. Firstly, the New South Wales '25-point system' was replaced from 1 January 2008 with a more streamlined and importantly, targeted system which emphasised flexibility and the importance of each activity being interactive and having *"an identifiable learning outcome"*¹²³.
- [545] CPD topics under the old New South Wales '25-point system' were not specified, whereas under the revised system, CPD 'broad learning areas' are targeted to:
- Technical building issues;
 - Sustainability;
 - Compliance;
 - Communication;
 - Dispute resolution;
 - Contracts;
 - Safety; and
 - Business management.

¹²² See for example the submissions of private certifiers Claude McKelvey, Neil Oliveri, Local government contract certifier Jason Burger and building designer Joanne Galea

¹²³ See the Department of Fair Trading, *Home Building Act 1989*, Director-General's Guidelines for Continuing Professional Development, 6 July 2009
http://www.fairtrading.nsw.gov.au/pdfs/Tradespeople/Director_Generals_guidelines_home_building_CPD.pdf

- [546] CPD for builders is required in New South Wales and Tasmania¹²⁴, and is “encouraged” in Victoria by the Victorian Building Authority¹²⁵.
- [547] The Review is mindful of the objections to mandatory CPD, particularly by the HIA. However, it seems preposterous that building certifiers are required to undertake mandatory CPD, yet the people often responsible for making the mistakes in the first place, are not. The benefits of mandatory CPD for building certifiers discussed at paragraph [525] above apply equally to builders and trade contractors.
- [548] The Review is confident that generally speaking, there is a very poor understanding of the National Construction Code, the Queensland Development Code and the Australian Standards as they pertain to construction amongst builders and trade contractors. Many building certifiers in the Roadshows and individual interviews throughout the State confirmed this lack of builders’ regulatory knowledge. Many building certifiers considered that they were now having to play a much greater educative role amongst builders and trade contractors because of the lack of regulatory knowledge within the industry.
- [549] Many builders and trade contractors do not keep pace with modern building techniques, systems or materials. In essence, they build the way they were taught however long ago that may have been. This is not an acceptable service delivery model in modern day Australia.
- [550] If the building and construction industry is to succeed and grow in the long term and if consumers are to have greater levels of confidence in the industry, Government must seize the nettle and introduce mandatory CPD for all builders and trade contractors. The Review however accepts that this may take several years to phase in to allow service providers the opportunity to prepare for its introduction and to allow a settling in period for stakeholders.

Question 1.9.2: Recommendations

[551]

39.	The QBCC should regularly consult with Certifier CPD Providers and industry groups to assist in the identification of emerging trends and common defects and difficulties encountered within the building and construction industry.
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¹²⁴ http://www.justice.tas.gov.au/_data/assets/pdf_file/0007/81754/CPD_Guide_dec.pdf

¹²⁵ <http://www.vba.vic.gov.au/practitioners/continuing-professional-development-cpd>

40.	The <i>Queensland Building and Construction Commission Regulation 2003</i> should be amended to require Certifier CPD Providers to liaise with and take direction from the QBCC in the formulation of specific subject areas identified as requiring attention.
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Question 1.9.3: Recommendations

[552]

41.	CPD Programs hosted by Certifier CPD Providers or the QBCC should also be made available to all QBCC licensees.
42.	<p>The <i>Queensland Building and Construction Commission Act 1991</i> and the <i>Queensland Building and Construction Commission Regulation 2003</i>, should be amended to phase in the introduction of mandatory CPD programs over a two year period for <u>all</u> QBCC licensees, both corporate and personal. The amendments should:</p> <ul style="list-style-type: none"> (a) Require CPD programs be hosted by Certifier CPD Providers and other bodies such as authorised trade membership associations (Contractor CPD Providers); (b) Accredite Contractor CPD Providers, renewable after a five year period; (c) Require Contractor CPD Providers to maintain a register of all CPD programs completed by licensees and provide licensees with certification of participation in those CPD programs; (d) Enable the QBCC to be a provider of Contractor CPD Programs.

Question 1.10.1: Which is your preferred option for improving accountability and record-keeping requirements for private certifier employers?

Option 1.10(a): License private certifier employers, e.g. as partnerships or corporations;
Option 1.10(b): Require private certifier employers to keep records;
Option 1.10(c): Individual private certifiers alone can provide private certification services;
Option 1.10(d): Develop guidelines about record-keeping and contracts of engagement
Other

Background

- [553] Building certifier accountability was identified as one of the key issues arising from the *Transport, Housing and Local Government Committee of the Queensland Parliament Inquiry* and report into the operation and performance of the QBSA and the Government's resultant Ten Point action plan.
- [554] Currently, pursuant to s.138(1) of the *Building Act 1975*, a person wishing to engage a private certifier to perform private certifying functions may enter into a contract with a private certifier or a person or "public sector entity" otherwise known as "private certifier employers" who employ private certifiers.
- [555] There are no rules regarding who can be a private certifier employer, nor are there many obligations imposed upon them under the building legislation. Unlike other licence classes regulated by the QBCC, a private certifier employer does not need to hold a building certifier's licence, nor are they required to have a 'nominee supervisor' or be a 'fit and proper person' to employ building certifiers.
- [556] This raises the rather absurd possibility where a building certifier whose licence is suspended or cancelled could register a company, start a private certification business and employ a private certifier(s) to perform the building certification services, yet the corporate private certifier employer would remain out of the reach of disciplinary action by the QBCC.
- [557] Other difficulties arise from the administration responsibilities of building certifiers who are employed by private certifier employers. Although a private certifier employer may contract to provide the private certifying functions, it is the actual private certifier who

performs the work who is engaged and is therefore accountable to the QBCC¹²⁶.

- [558] This arrangement may cause difficulties for the building certifier employee who is likely to be reliant upon the lawfulness and efficacy of the private certifier employer's administration functions, capabilities and ethics.
- [559] Other difficulties may arise for private certifier employers who may have limited private certifier employees. Given that the contract to perform private certifying functions remains with the private certifier employer, a private certifier employer should have sufficient human resources to deal with circumstances such as a resignation by or termination of a private certifier employee.
- [560] The Discussion Paper raises four options for managing the difficulties surrounding the private certifier employer/private certifier employee relationship and the obligations that are owed to the applicant, the public and the QBCC.

Feedback outcomes

- [561] Of the written submissions and completed surveys responding to this question:
- 21% of submitters supported the concept of licensing private certifier employers;
 - 18% favoured amending the building legislation to transfer the record keeping obligations to private certifier employers and clarifying rights and obligations in respect to contracts of engagement;
 - 9% supported legislative amendments allowing only private certifiers to provide private certification services;
 - 23% of submitters preferred a guideline to be established setting out record-keeping requirements and the rights and obligations in respect to contracts of engagement;
 - Approximately 13% of submitters had other suggestions on how to resolve the question and
 - 16% did not address the question.

¹²⁶ See s.138(4) of the *Building Act 1975*

Submissions in respect to the licensing of private certifier employers

Private certifier employer should be modeled on existing licensee provisions under Part 3 and Part 3A of the Queensland Building and Construction Commission Act 1991

- [562] AIBS supported the licensing of private certifier employers and argued that it should be modeled on the existing licensing provisions for company licensees. They also argued that the concept of ‘excluded individuals’ under Part 3A of the *Queensland Building and Construction Commission Act 1991* should apply equally to building certifiers.
- [563] HIA supported legislative amendments which enabled a business to be licensed as a building certifying entity. It argued that this would alleviate a number of the problems currently experienced by small business private certifier operators such as the inability to take leave or the consequences of illness or an untimely death. HIA suggested that such a regime could be modeled on the existing laws relating to building companies, namely that a corporate building certifier would require a nominee¹²⁷. It also suggested that additional guidelines would assist in relation to the obligations for record-keeping.

Private certifier employees and local government certifiers ought not be held responsible for the administrative functions and omissions of the private certifier employer or local government

- [564] AIBS also argued that private certifier employees or local government building certifiers should not have to carry the administrative responsibilities that flow from performing building certifying functions. AIBS makes the point that if this distinction is not made, there is little attraction to working for local government or a private certifier employer.

Corporate licensing costs must be reasonable

- [565] Private certifier John Mulderry gave qualified approval to the licensing of companies. However he cautioned that the licensing costs must be reasonable and not geared for the larger participants otherwise what is otherwise a good intention may result in “*restrictive trade practices*”. He also voiced some concerns about what impact the introduction of a corporate private certifier licence may have on professional indemnity costs.

¹²⁷ Master Builders also supported this option

Are Local Governments “private certifier employers?”

[566] Ipswich City Council posed the following question:

“Are Local Governments ‘private certifier employers?’”

It argued that there are only two types of certifiers, private certifiers and local government certifiers. Therefore, local government can not become a private certifier employer and therefore should be exempt from any requirement to be licensed.

Who is the engaged party, the private certifier employee or the private certifier employer?

[567] QBCC Senior audit and investigations officer Philip Godfrey argued that s.138 of the *Building Act 1975* was not sufficiently clear in circumstances where an employee private certifier worked for a private certifier employer, as to who was the engaged party. “Is it the employee or the employer?” he asked.

[568] Mr. Godfrey also argued that the QBCC should have the ability to issue an infringement notice to the private certifier employer in circumstances where a breach of the building legislation was administrative, or in circumstances where the private certifier employer has not provided information to the QBCC in relation to a complaint of a past employee.

Licensing of private certifier employers is unnecessary red tape

[569] RICS opposed the introduction of an additional licensing layer for private certifier employers, arguing that it was unnecessary red tape.

Submissions in respect to the transfer of record-keeping obligations to private certifier employers and clarify the rights and obligations regarding contracts of engagement

[570] A local government employee wishing to remain anonymous preferred this option and suggested that the provisions be placed in the *Building Regulation 2006* rather than be contained in a guideline.

Submissions in respect to only individual private certifiers being engaged to provide private certifying function

- [571] This was the least preferred option. In fact it was strongly opposed in some quarters. Private certifier Neil Oliveri argued that this would impact heavily upon functioning business models that already trade under a corporate structure.
- [572] AIBS also opposed this suggestion¹²⁸. They considered that building certifiers should be given the choice whether to practice as a sole trader, partnership or corporate entity.

Submissions in respect to the development of guidelines about record-keeping and contracts of engagement

- [573] Central Highlands Regional Council strongly supported this option. It argued that the transfer of documentation to local government post private certifier disengagement was problematic and it considered that a guideline would be of great assistance.
- [574] Private certifier Neil Oliveri also preferred this option arguing:

“This option seems the least onerous proposed and seems to be an extension of the record keeping requirements currently in place, only extending them to private certifier employers as well. If this option mandates that private certifier employers are responsible for record keeping and reporting it would help to ensure that companies are not wound up overnight with all documentation either legally unobtainable or destroyed.”

He also warned:

“With any of the above options the record keeping function of certifiers and their employers should NOT be extended. Whether it be a manual system or electronic record keeping system either option involves massive storage space and cost implications especially for companies with high workload.

Once a company is wound up or a certifier steps away from the industry, all relevant documentation should be sent to the local government to action.”

Submissions in support of the status quo

- [575] Private certifier Liz Woollard suggested that only either an individual private certifier or a local government should be engaged to provide certifying services. Ms. Woollard considered that allowing persons who are not private certifiers to run building certification businesses would create unacceptable levels of

¹²⁸ HIA also opposed this option

conflicts of interest resulting in poor building outcomes and a lowering of safety standards.

- [576] Ms. Woollard also agreed with a number of other building certifiers that a person who has had their private certifier licence cancelled ought not be able to operate a building certification business. She also considered that a guideline should be developed to provide guidance about record keeping requirements and which set out the rights and obligations regarding contracts of engagement.

Consideration

Options

- [577] It is important to note that two of these options are not mutually exclusive [Options (a) and (d)].
- [578] For the reasons expressed in respect to Option (a), Option (b) is not preferred.
- [579] Option (c) is also not preferred because it would reduce competition and potentially artificially increase the cost of certification services. It would also have significant detrimental affects on persons who operate building certifying businesses but who are not personally licensed. In addition option (c) was the least preferred option amongst submitters receiving only 9% support.

Current legislative regime is inadequate

- [580] The current licensing regime for building certifiers and building certifier employers provides inadequate accountability in that it fails to appropriately regulate building certifier employers. As has been submitted to the Review this has created an unfortunate situation where a building certifier who loses his or her licence for professional misconduct can immediately reopen his or her business provided they employ a licensed building certifier to perform the certifying functions. This can create professional and ethical difficulties for the employed private certifier who would then be taking instruction from a person who has had their licence suspended or cancelled. The conflicts of interest that may arise out of such an arrangement are not difficult to imagine. Clearly the current legislative arrangements do not support a building certifier's overriding duty to the public interest.
- [581] The best way to address these shortcomings is to amend the *Building Act 1975* to provide for the licensing of private certifier employers.

Option (a): Licensing of private certifier employers

Uniform licensing and disciplinary measures

[582] As was submitted by AIBS, there are considerable benefits to consumers, the industry and the building certification profession in adopting the licensing regime established for builders and trade contractors established in Part 3 and Part 3A of the *Queensland Building and Construction Commission Act 1991*. This would create a relatively uniform licensing regime amongst all licensees regulated by the QBCC. It would provide an effective mechanism for the disciplining and regulation of private certifiers and private certifier employers whether they are sole traders or in a partnership or corporate structure. Importantly, it would prevent persons who are not considered to be ‘fit and proper’ from holding a licence in their own right¹²⁹, or from being in partnership with a building certifier¹³⁰ or becoming a director, secretary or influential person in a corporate private certifying business¹³¹.

[583] A person may not be considered “fit and proper” because they may have had their own building certifier licence or even another licence administered by the QBCC, suspended or cancelled. Equally, it would prevent a person from obtaining a private certifier licence or becoming or remaining a director, secretary or influential person of a private certifier employer if for example they had taken advantage of the laws of bankruptcy or had been a director, secretary or influential person of a company within 12 months of the appointment a provisional liquidator, liquidator, administrator or controller, or if the company is wound up or ordered to be wound up. In other words the person would be categorised as an “excluded individual”¹³².

[584] Amendments are planned for s.56AC(2) of the *Queensland Building and Construction Commission Act 1991* in that the “company” must be a “construction company” which subject to the legislation being passed in its draft form will be defined as “a company that directly or indirectly carries out building work or building work services”¹³³. The term “building work services” is currently defined in Schedule 2 of the *Queensland Building and Construction Commission Act 1991* as one or more of the following for building work:

- a. administration services;
- b. advisory services;

¹²⁹ See s.31(1) of the *Queensland Building and Construction Commission Act 1991*

¹³⁰ See s.31A of the *Queensland Building and Construction Commission Act 1991*

¹³¹ See s.31(2) of the *Queensland Building and Construction Commission Act 1991*

¹³² See s.56AC of the *Queensland Building and Construction Commission Act 1991*

¹³³ See clause 19 of the *Queensland Building and Construction Commission and Other legislation Amendment Bill 2014*

- c. management services;
- d. supervisory services.

To remove doubt, this definition should be extended to include “*building certifying function*” as that term is defined in s.10 of the *Building Act 1975*.

- [585] Adopting the existing contractor licensing regime for private certifiers and private certifier employers would also provide additional accountability for building certifiers and building certifier employers by being subject to the ‘two strike’ policy. That is, if a private certifier or private certifier employer were classified as an excluded individual on two occasions, they would be banned from holding that licence or another licence regulated by the QBCC for life¹³⁴.
- [586] Building certifiers and building certifier employers should also be subject to Part 3D of the *Queensland Building and Construction Commission Act 1991*, in that they can be banned from holding a licence if they perform “*grossly defective building work*” that falls below the standard reasonably expected of a building certifier and it adversely affects the structural performance of a building to the extent that a person could not reasonably be expected to use the building for the purpose which it was, or is being erected or constructed, or is likely to cause death of, or grievous bodily harm to a person.
- [587] Note that amendments will be required to s.67AB(1)(a) of the *Queensland Building and Construction Commission Act 1991* to take into account the fact that building certifiers are not licensed “contractors”. The definition of “carry out tier 1 defective work” contained in s.67AB(2)(c) should also be amended to include “building certifying functions”.
- [588] Section 34 of Schedule 1AA of the *Queensland Building and Construction Commission Regulations 2003* will also require amendment to specifically remove the exemption of certification work performed by a building certifier from the definition of building work.

Nominee building certifier

- [589] Under the proposed reform, a private certifier employer would be limited to holding the most senior certifier level to that held by its proprietor, or if it is a partnership, one of its partners, or in the event that it is a company, its nominee supervisor¹³⁵.

¹³⁴ See Part 3B of the *Queensland Building and Construction Commission Act 1991*

¹³⁵ See s.31(2)(b) of the *Queensland Building and Construction Commission Act 1991*

Should private certifier employers be required to employ a minimum number of building certifiers?

- [590] The Discussion Paper suggests that the building legislation could be amended to require private building certifier employers to employ a minimum number of private certifiers to ensure that the public is not unduly inconvenienced if there is an unexpected departure of an employed private certifier. In New South Wales, whilst it is not mandatory for a corporate building certifier to be licensed, it must have at least one director who is an accredited certifier and it must employ at least two other persons who are accredited certifiers¹³⁶.
- [591] Apart from New South Wales, no other jurisdiction in Australia requires a corporate private certifier employer (or its equivalent) to employ a minimum number of private certifiers. This perhaps may be one of the reasons why there are only 5 corporate accredited certifiers in New South Wales. Under the scheme mooted in these Recommendations, a corporate private certifier employer will require a nominee supervisor. If that person dies, leaves, becomes unlicensed etc., the licensed corporate private certifier employer would have 28 days in which to find a replacement¹³⁷. Arguably this provides better protection for the community than is currently offered for private certifiers who are sole traders.
- [592] There is no demonstrable need or benefit in restricting the operations of private certifiers who wish to operate as a corporate entity. There should be no mandatory minimum number of employed private certifiers who must work for a corporate private certifier employer. However, Government should keep a watching brief on this issue to ensure that problems do not arise which unduly impact upon the community.

Additional factors when considering whether to suspend or cancel the licence of a private certifier, private certifier employer or local government certifier

- [593] The QBCC should be able to suspend or cancel the licence of a private certifier, private certifier employer or local government certifier in the same manner as provided for building contractors, pursuant to Part 3 Division 9 of the *Queensland Building and Construction Commission Act 1991*. However there will need to be recognition of the additional disciplinary procedures in respect to breaches of the Code of Conduct, minor administrative errors, unsatisfactory conduct and professional misconduct the subject of Recommendations 29-36.

¹³⁶ See s.5A of the *Building Professionals Act 2005* (NSW)

¹³⁷ See s.42B of the *Queensland Building and Construction Commission Act 1991*

- [594] Any decision to suspend or cancel the licence of a private certifier, private certifier employer or local government certifier could be reviewed by the QBCC Internal Review Unit and further review and stay applications could be made to QCAT.

Private certifier employees and local government certifiers ought not be held responsible for the administrative errors and omissions of the private certifier employer or local government

- [595] The Review accepts the submissions of AIBS, Philip Godfrey and others that if a private certifier employer is responsible for the general day-to-day administration of the private certifier's files and those administrative duties lead to some act, error or omission, the building certifier ought not be penalised. The disciplinary regime should be structured to ensure that the person or entity responsible for the act, error or omission is responsible. In respect to administrative errors, this is likely to be the private certifier employer. The same should apply for local government certifiers.

Corporate licensing costs must be reasonable

- [596] The Review accepts the submissions of private certifier John Mulderry that the licensing costs of corporate private certifier employers should be reasonable. Currently a private certifier's QBCC licence fee is set at \$719.55 per annum (plus a \$135.20 application fee for the first year). Licence fees for building certifiers are not set on an annual turnover basis as with builders and trade contractors.
- [597] A review of the differences between corporate and individual QBCC licence fees for builders and trade contractors reveals that individual licence fees are approximately 55% of the corporate rate¹³⁸. Or to put it another way, to calculate the corporate rate, the individual rate should be multiplied by a factor of 1.815.
- [598] If the current flat rate individual licence fee of \$719.55 is extrapolated on this basis, the corporate licence fee for private certifiers would be \$1,306.00.
- [599] However, consideration should be given to charging licence fees which are commensurate with a building certifier's turnover. This would ensure that private certifiers with a greater turnover and therefore, statistically speaking are more likely to come into contact with the QBCC, are paying more for their licence fees, whilst those who are doing less work would be paying less.

¹³⁸ See <http://www.qbcc.qld.gov.au/contractors/apply-licence/licence-fees>

Are Local Governments “private certifier employers?”

[600] Ipswich City Council is correct in saying that there are only two types of certifiers, private certifiers and local government certifiers. Under the current legislation, building certifier employers are not licensed, they can merely contract with an applicant to provide the services of a private certifier¹³⁹.

[601] Section 138 of the *Building Act 1975* provides:

138 Power to contract to perform private certifying functions

(1) *Subject to sections 140 and 141—*

- (a) *a private certifier may enter into a contract to perform private certifying functions; and*
- (b) *a person or public sector entity (a **private certifier employer**) who employs private certifiers may enter into a contract to provide the services of any of the private certifiers to perform private certifying functions for others.*

(2) *However, a local government can not enter into a contract mentioned in subsection (1)(b).*

(3) *Subsection (2) does not prevent a local government from performing functions required of it under section 51.*

(4) *A contract made under subsection (1) is an **engagement** of the private certifier or certifiers who, under the contract, are to perform private certifying functions.*

(5) *The person for whom private certifying functions are agreed to be performed under an engagement of a private certifier is the certifier’s **client**.*

[602] Section 138(2) of the *Building Act 1975* expressly prohibits a local government from entering into a contract to provide the services of a private certifier, therefore it cannot by definition be a “private certifier employer”. In the premises, Local Governments would not need to be licensed with the QBCC as private certifier employers.

Who is the engaged party, the private certifier employee or the private certifier employer?

[603] The Review has considered the submissions of QBCC Senior audit and investigations officer Philip Godfrey. Section 138 of the *Building Act 1975* is sufficiently clear. The current wording of ss.138(1)(a), (1)(b), (4) and s.141(1) provide that the engaged party is the private certifier who performs private certifying functions if they were the contracted party¹⁴⁰. In the event the

¹³⁹ See s.138(1)(b) of the *Building Act 1975*

¹⁴⁰ See s.138(1)(a) of the *Building Act 1975*

contracted party was a private certifier employer, the engaged party is the private certifier employer¹⁴¹.

- [604] The only located decision which considers s.138 of the *Building Act 1975*, is *Robert James Sternberg t/as Homeworthy Inspection Services v Bielby* (No 1) [2013] QCAT 693, where the learned Member McDonald said at [26]:

"[26] This provision [s.138] makes clear that the power to perform the certification activities arises from the contracts for services. Each disputed file relates to contracts where certification services were offered by Homeworthy Inspection Toowoomba, the business entity, and therefore are engagements with the private certifier employer, Homeworthy Inspection Services, given Mr. Bielby has no proprietary right over that entity.

*...
[31] As Homeworthy was the engaged private certifier employer under the Building Act, Mr. Sternberg is entitled to the original files, and payment. Mr. Bielby's (sic) would be entitled to maintain a copy of the files for his professional purposes.*

*...
[41] Mr. Bielby's contention that he was the engaged certifier under s.138(1) cannot stand as the contracts for these engagements were between Homeworthy Inspection Services, the business and the client."*

- [605] Section 141(1) of the *Building Act 1975* supports the learned Member's view. Section 138(1) is subject to ss.140 and 141 of the *Building Act 1975*. Section 141(1) provides:

(1) An engagement of a private certifier must be written and state the fees payable by the client to the certifier or, for an engagement of a private certifier employer, the employer. [Emphasis added]

- [606] However, if the private certifier employer is the engaged party is there any need for employed private certifiers to be licensed?

- [607] There are very sound policy reasons, why private certifiers must remain licensed and subject to the regulatory and disciplinary provisions administered by the QBCC. Given their overriding statutory duty to act in the public interest, the community rightly has an expectation that the private certifier performing private certifying functions will execute that role independently of any commercial interests that he or she may be subjected to by the private certifier employer. The same can be said in respect to local government certifiers and the local government. Whether in reality the employed private certifier has the intestinal fortitude to protect the interests of the public over those of his or her employer is another matter.

¹⁴¹ See s.138(1)(b) of the *Building Act 1975*

- [608] However, this tension between a private certifier's overriding duty to act in the public interest and what may be the competing interests of his or her employer lends further justification to require the private certifier employer to also be licensed. This would then create the situation where both the private certifier employer and the private certifier's overriding duty is to act in the public interest.
- [609] As for local government officers or elected representatives who may seek to unduly influence or interfere with a local government certifier in the performance of his or her duties, the local government certifier also has an overriding duty to act in the public interest¹⁴² and would have the benefit of being able to make a complaint to the Crime and Corruption Commission ("CCC").

Licensing of private certifier employers is unnecessary red tape

- [610] The Review does not accept the submissions of RICS that the licensing of private certifier employers amounts to unnecessary red tape. The amendments if accepted by Government have significant benefits for both building certifiers and the community. The community will benefit by ensuring significantly improved standards of accountability of persons wishing to operate a private certifier business. Private certifiers themselves will have the ability to better manage asset protection and will have alternatives to how they may arrange their business and personal taxation affairs. Ultimately of course it is a matter for private certifiers how they arrange their own business affairs and they should seek independent legal and financial advice before making any alternative arrangements. If a private certifier wishes to remain trading as a sole trader, he or she may do so.

Guidelines

- [611] In addition to amending the legislation to permit the licensing of private certifier employers there are benefits in creating a guideline to clarify the rights and obligations of private certifier employers, private certifier employees (including cadet building certifiers¹⁴³) and the applicant to a building development application ("the applicant") in relation to:
- The engagement of the private certifier;
 - Ownership of the applicant's file remaining with the private certifier employer;

¹⁴² See s.127(1) of the *Building Act 1975*

¹⁴³ The issue of the appropriate use and supervision of cadet building certifiers is considered further at paragraph [889] – [896] below.

- Obligations of the private certifier employer in relation to the record keeping of the applicant's file;
- Obligations of the private certifier employer to assist the QBCC by among other things, providing copies of the applicant's file when requested, whether or not the certifier employee remains an employee at the relevant time.

Question 1.10.1: Recommendations

[612]

43.	<p>Building certifiers ought to remain licensed by the QBCC and should fall within the usual licensing and disciplinary provisions governed by Parts 3, 3A, 3B, 3C and 3D of the <i>Queensland Building and Construction Commission Act 1991</i>.</p> <p>(Further to Recommendation 37, additional investigations must be performed before any conclusions can be reached about the desirability of holding building certifiers to account under the current demerit point scheme for builders and trade contractors established under Part 3E of the <i>Queensland Building and Construction Commission Act 1991</i>.)</p>
44.	<p>In so doing, the <i>Queensland Building and Construction Commission Act 1991</i> will provide for the licensing of private certifier employers as sole traders, in partnership (whether with other private certifiers or not) or in a corporate structure.</p>
45.	<p>Employed private certifiers ought not be held responsible for the administrative acts, errors or omissions of their private certifier employers, just as local government certifiers ought not be held responsible for the administrative acts, errors or omissions of their employers.</p>
46.	<p>Other than the requirements for a nominee supervisor, there should be no mandatory minimum number of employed private certifiers who must work for a corporate private certifier employer. However, Government should keep a watching brief on this issue to ensure that problems do not arise which unduly impact upon the community.</p>
47.	<p>Legislative amendments required to effect these recommendations include:</p> <p>(a) Section 34 of Schedule 1AA of the <i>Queensland Building and Construction Commission Regulations 2003</i> will require amendment to specifically remove the</p>

	<p>exemption of certification work performed by a building certifier from the definition of building work;</p> <p>(b) The definition of “<i>building work services</i>” in Schedule 2 of the <i>Queensland Building and Construction Commission Act 1991</i> should include “building certifying function” as that term is defined in s.10 of the <i>Building Act 1975</i>;</p> <p>(c) s.67AB(1)(a) of the <i>Queensland Building and Construction Commission Act 1991</i> to take into account the fact that building certifiers are not licensed “contractors”;</p> <p>(d) The definition of “carry out tier 1 defective work” contained in s.67AB(2)(c) should also be amended to include “building certifying function” as that term is defined in s.10 of the <i>Building Act 1975</i>.</p> <p>Note: This list is not intended to be exhaustive</p>
48.	<p>The chief executive should develop a guideline which clarifies the rights and obligations of private certifier employers, private certifier employees and the applicant to a building development application (the applicant) in relation to:</p> <p>(a) The engagement of the private certifier;</p> <p>(b) Ownership of the applicant’s file remaining with the private certifier employer;</p> <p>(c) Obligations of the private certifier employer in relation to the record keeping of the applicant’s file;</p> <p>(d) Obligations of the private certifier employer to assist the QBCC by among other things, providing copies of the applicant’s file when requested, whether or not the certifier employee remains an employee at the relevant time; and</p> <p>(e) The appropriate use and supervision of cadet building certifiers.</p>

2.0 Development Applications and Approvals

Question 2.1.1: Do you think local governments should be required to provide advice to certifiers about planning scheme compliance if requested that can be relied upon by the certifier?

Background

- [613] Building certifiers are required to ensure that all necessary planning approvals are in place and that development is consistent with the local government's planning scheme.
- [614] The difficulty experienced by many building certifiers is that they are not town planners and whilst building certifiers have some training in town planning issues, the evidence provided to the Review was that many struggle navigating the vast array of different town planning schemes and how these schemes interact with the building legislation.
- [615] The complex interaction between town planning schemes and the building legislation sometimes results in errors and omissions by building certifiers which may not be exposed until after construction has been completed. This can result in expensive rectification works or the requirement for local government relaxations. It can also lead to enforcement action being taken by local governments against property owners who may not have been the applicant for the building development approval, ie a subsequent owner.
- [616] Statistics provided by the Certification Unit of the QBCC suggest that approximately 40% of complaints about private certifiers relate to building development approvals being given without the prerequisite planning approval or in ways that are inconsistent with planning scheme provisions.
- [617] A small number of local governments for a fee, do provide private certifiers with advice as to whether a building development application is consistent with their planning schemes. However the Review understands that this advice is often heavily qualified with legal disclaimers. Anecdotal evidence suggests that these disclaimers together with high costs and uncertain timeframes for the delivery of information are resulting in limited uptake by private certifiers.
- [618] The Discussion Paper raises the issue as to whether the Government should legislate to require local governments to

provide town planning scheme advice to private certifiers for a fee, if requested by the private certifier and whether the private certifier should be able to rely on that advice.

Feedback outcomes

- [619] Of the written submissions and completed surveys responding to this question, a resounding 77% of submitters supported the concept of local governments being required to provide advice to private certifiers about planning scheme compliance, if requested and that such advice should be able to be relied upon by the private certifier. Only 3% of submitters were opposed to the suggestion, whilst 8% had other suggestions on how to resolve the question and 12% did not address it.

Support for change

- [620] Support for this reform did not just come from within the ranks of private certifiers. Local governments or in some instances local government certifiers recognised that reform in this space is required.
- [621] The Cassowary Coast Regional Council submitted that it was providing this service already and by all accounts were satisfied with its implementation.

Support for change but there will be resourcing implications

- [622] Local government building compliance officer Anna Sissman acknowledged that local governments should be able to provide this form of planning scheme advice in writing for a capped fee within a designated timeframe to prevent unnecessary delays in the process. She acknowledged that this may have resourcing implications for local governments, however she thought this could be 'factored in' to budgets.
- [623] Gladstone Regional Council also supported the reform¹⁴⁴, suggesting that whilst there will be resourcing implications, these may be off-set by the savings in compliance related matters arising from the existing scheme¹⁴⁵.

¹⁴⁴ As did Goondiwindi Regional Council

¹⁴⁵ Similar submissions regarding the off-setting of costs were made by Lockyer Valley Regional Council and Scenic Rim Council

The scheme must have tight parameters

[624] The Australian Institute of Architects supported the proposal as did AIBS who offered the following advice to enable the scheme to operate effectively:

- Ensure there is a time frame put on local government to respond to requests for information;
- Provide for a penalty to local government if they do not comply with time frames;
- There will be problems in ensuring local government's will apply a reasonable fee;
- Ensure a reasonable fee is set by Government in a regulation otherwise local government fees will be inconsistent and expensive;
- Ensure that the information provided by local government includes clarity of planning scheme overlays and in particular prior approvals that exist on the site;
- One improvement could be that consultant planners seek endorsement by local government to provide planning advice.

Timing is everything

[625] Many submitters referred to the need for certainty in respect to delivery times for the information. Some argued that the planning scheme advice should be provided in as little as two business days¹⁴⁶ whilst the Central Highlands Regional Council, which also supported the reform, suggested that it should be provided within 5 business days. Private certifier John Mulderry suggested that if information is requested from local government and not provided within 2 business days, the private certifier should have the power to enact the Queensland Development Code provisions.

Criticisms of local government

[626] Private certifier Claude McKelvey provided written submissions strongly in favour of the proposal. He said:

"It is a ridiculous situation to have where Local Authorities are the biggest complainer about the actions of private certifiers in relation to town planning matters, but who, when asked are reluctant to provide advice and when they do it is unreliable, often verbal only. If all parties are serious about overcoming issues relating to town planning then this proposal has to be a given. The issue would be timeframes and costs for provision for such advice, see also our comments in 1.1.1 previously with regard town

¹⁴⁶ Private certifiers Clayton Baker and John Mulderry

planning issues. It should not necessarily be a requirement that advice be obtained but where the certifier has a need for this advice it should be a requirement that it is provided."

- [627] HIA was similarly scathing of the approach taken by local governments in what it regarded as their "non-consultative approach to developing new regulations [and for] their unwillingness to make critical information easily accessible for building certifiers". HIA continued in their written submissions saying:

"Increasingly, Local Governments have been imposing building requirements, via their planning approval processes, beyond the scope of the BCA. These relate to such matters as access for people with disabilities, bushfire, water, waste management, energy efficiency and salinity issues. Additionally HIA has observed a propensity to include within development approvals unique siting and car parking requirements that are difficult for certifiers to find years down the track when building applications are lodged.

This approach cuts across building legislation and national standards and has created inconsistencies for building regulation across jurisdictions and undermines gains from national consistency.

Local Governments very rarely if ever conduct an adequate level of impact analysis of their regulations. New regulations are regularly introduced that impose extra requirements on business, with increased costs, for uncertain benefit.

HIA has been requesting for a number of years that the Department of State Development Infrastructure and Planning clearly delineate between matters that are building related and therefore assessed under building legislation and matters that are planning related and therefore assessed under planning legislation. While some progress was made to clarify this issue through the introduction of the Sustainable Planning Act the vast majority of Councils continue to be oblivious to the existence of Building Legislation.

Building Certifiers are being placed in the unenviable position of being required to decide if a Council planning requirement is relevant despite the fact the matter is a building matter and is already dealt with in the building legislation. If they decide to overlook the council requirement they are automatically painted as being incompetent or corrupt.

Legislation already exists establishing the framework under which Councils are supposed to provide information (form 19). The reality is that many councils see the provision of information as an opportunity to derive income and/or are unwilling to commit to a timeframe in which the information will be available. HIA supports initiatives that require Local Governments to improve their level of service in this area. The NSW example where there is an ability to quickly gain records on existing buildings for a nominal fee would make a good starting point."

Use of private town planners

- [628] Local government contract certifier Jason Burger who works in remote areas of far North Queensland also agreed with the proposed reform but commented that local governments in remote areas are unlikely to have the resources to provide these services. He did however acknowledge that these services could be provided by private consultants.
- [629] QBCC Senior audit and investigations officer Philip Godfrey suggested that building certifiers should be able to rely upon town planning advice provided by town planners in private practice just as private certifiers may rely upon the advice given to them by an engineer in respect of structural matters.

Reforms need to be considered in light of the current review of the Sustainable Planning Act 2009

- [630] The LGAQ supported the proposal in principle provided there was an appropriate cost recovery mechanism. It also suggested that the reform needs to be considered in light of the current review of the *Sustainable Planning Act 2009*. It suggested that the existing requirements for limited, standard and full town planning certificates be evaluated in consideration of their use and effectiveness. It also suggested that it may be necessary to modify the purpose of existing town planning certificates to incorporate 'building compliance' and/or implement a new type of certificate for building certification purposes.

Suggested minimum requirements for reports

- [631] Private certifier Neil Oliveri once again made a very valuable contribution to the debate. Whilst strongly in support of the proposal, he did caution that a number of building certification firms were now employing town planners and that the proposed reforms are likely to result in job losses for those town planners. He did acknowledge however that the reforms would result in local government job vacancies. Mr. Oliveri then went on to set out what he regarded should be the minimum requirements for the local government town planning reports as:
- General site details as already required on council Planning and Development Online (PD- Online) searches – such as zoning, lot size, maps, overlays and other constraints;
 - Triggers for planning approvals such as overlays, applicable codes for types of building work or material change of uses (MCU's);
 - Setback requirements for nominated types of self assessable

development; whether it be the Queensland Development Code (QDC), Plan of Development (POD) - which are currently very loosely searchable by councils, approvals over riding the planning scheme - which again are not made public knowledge, building envelopes, etc.

Support for status quo

- [632] No cogent reasons were provided to the Review for the maintenance of the status quo.

Support for other reforms

- [633] Logan City Council (LCC) considered that further local government consultation was required for this reform. It argued that in its experience, building certifiers have not taken advantage of existing information provided by it¹⁴⁷. LCC also submitted that new local government planning schemes will overcome some of these concerns in that they will be *“simple, clear and easy to navigate”*.
- [634] Private certifier Troy Ellerman supported the proposal but suggested that it be made mandatory. He considered that this would prevent some private certifiers from not seeking the advice in order to under-cut the competition.

Consideration

- [635] QBCC statistics support the evidence provided to the Review that the current system of private certifiers being left to their own devices to navigate town-planning schemes is in need of urgent reform. In addition, the evidence before the Review suggests that the current Form 19 – Request for building information, is not delivering the information required by private certifiers within a reasonable time-frame, for a reasonable fee and importantly in a manner that enables the private certifier to rely upon that information.

Resource Implications

- [636] Whilst the support for this reform is not quite universal, it is strongly supported by various stakeholder groups, not the least of which are local governments. The proposed reform will have resource implications for local governments but these pressures are likely to be ameliorated by virtue of the fact that once

¹⁴⁷ Similar submissions were made by Mackay Regional Council

implemented, there should be less compliance costs and councils will be able to charge a regulated fee for the services provided.

The NSW model

[637] The New South Wales model requiring the provision of information from local governments is contained in s.149 of the *Environmental Planning and Assessment Act 1979* (NSW). It acts as a useful reference when considering what, if any, reforms should be adopted in this State. It provides:

149 Planning certificates

- (1) *A person may, on payment of the prescribed fee, apply to a council for a certificate under this section (a **planning certificate**) with respect to any land within the area of the council.*
- (2) *On application made to it under subsection (1), the council shall, as soon as practicable, issue a planning certificate specifying such matters relating to the land to which the certificate relates as may be prescribed (whether arising under or connected with this or any other Act or otherwise).*
- (3) *(Repealed)*
- (4) *The regulations may provide that information to be furnished in a planning certificate shall be set out in the prescribed form and manner.*
- (5) *A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.*
- (6) *A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5). However, this subsection does not apply to advice provided in relation to contaminated land (including the likelihood of land being contaminated land) or to the nature or extent of contamination of land within the meaning of Part 7A.*
- (7) *For the purpose of any proceedings for an offence against this Act or the regulations which may be taken against a person who has obtained a planning certificate or who might reasonably be expected to rely on that certificate, that certificate shall, in favour of that person, be conclusively presumed to be true and correct.*

Tight parameters

[638] The proposed reform in the Discussion Paper will be of significant assistance to private certifiers and therefore it will have a net benefit to the industry and the community by virtue of the fact that it will result in less compliance costs. There is no valid reason why local governments ought not be required to provide detailed information, upon request about their town planning schemes for regulated fees within a set time frame. The reform is also likely to drive efficiencies in the drafting of town planning schemes if local governments know that the simpler the schemes are made, the more economical it will be to administer them.

[639] The Review, accepts that if this scheme is to be successful, it will require regulations to govern:

- What written information must be made available to private certifiers (if requested);
- When it must be provided and an appropriate default mechanism if the advice is not provided within time;
- Costs;
- The ability for local governments to delegate the responsibility of providing the advice to authorised town planners in private practice; and
- The ability for private certifiers and building owners to rely upon the advice provided by local governments or the local government's authorised town planners even if the information proves to be incomplete or incorrect.

Further consultation to drill down on the detail

[640] Whilst the Review supports the reform, Government should consult further with stakeholders to refine how the scheme will work in practice. The 'devil will be in the detail' and that detail is beyond the scope of this review. Notwithstanding this, should Government accept this recommendation, the following comments are made to assist stakeholders in those discussions.

[641] The suggestions provided by Neil Oliveri in paragraph [631] herein are a good starting point for the consideration of what information should be provided (if requested).

[642] As to the requirement for deadlines for the provision of the information there are many variables that must be considered including, the volume and complexity of the material requested, the ease of access to that material and the demands of the resources of local government from other applications. Requiring local governments to provide the information within 2 business days as was submitted by a number of private certifiers is likely to be too onerous, but 5 business days maybe too long. However the Regulations should provide a definitive maximum timeframe. Perhaps a hybrid version of the scheme established under s.149 of the *Environmental Planning and Assessment Act 1979* (NSW) could be adopted, namely that the information should be provided "*as soon as possible*" but no later than say 4 business days after the regulated application fee has been paid.

[643] In respect to the cost of providing the service, the Review notes that s.259 *Environmental Planning and Assessment Regulation 2000* (NSW) regulates the cost of providing the service in the sum of

\$133.00. This seems to be a very affordable sum, however under s.149(6) of the *Environmental Planning and Assessment Act 1979* (NSW), no liability attaches to a local government for the provision of the information provided. This “*get out of jail free card*” defeats the purpose somewhat.

[644] Private certifiers and applicants are likely to be prepared to pay more for the peace of mind that would come from being able to rely upon the information provided. Based on the evidence received during the roadshows and the individual interviews, this is one of the reasons why the uptake of the information service offered presently by some councils in Queensland has been poor. Information received during the Review suggests that the information currently provided by some local governments is heavily qualified with legal disclaimers. Private certifiers should be able to rely upon the information provided by local governments, not just from a disciplinary perspective¹⁴⁸ but from a legal liability perspective. After all, if the advice being given by local government is in respect to its own town planning scheme requirements, why should the private certifier be held civilly liable or the building owner subject to enforcement action if that information proves to be incorrect or incomplete? Local governments ought not consider themselves immune from the heightened requirements for accountability.

[645] All local governments, but particularly those in remote areas should be given the ability to delegate the provision of town planning advice to town planners in private practice who are authorised by the local government to provide that service. This would enable local governments with no or inadequate resources to fulfill their requirements under the scheme and it may also provide local governments with a viable option in respect to risk allocation.

Question 2.1.1: Recommendations

[646]

49.	<p>The <i>Building Act 1975</i> should be amended to require local governments to provide advice to private certifiers if requested, regarding town planning scheme compliance within certain time restrictions and on a cost recovery basis with fees set by regulation. Government should consult further with stakeholders regarding appropriate content, timeframes and costs.</p> <p>It is noteworthy that s.149 of the <i>Environmental Planning</i></p>
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¹⁴⁸ Note that pursuant to s.149(7) *Environmental Planning and Assessment Act 1979* (NSW), no disciplinary action can be taken against a person under that Act who has relied on the information provided

	<i>and Assessment Act 1979 (NSW) provides for a similar facility, the costs of which are regulated under s.259 of the Environmental Planning and Assessment Regulation 2000 (NSW) in the sum of \$133.00. However no liability attaches to a local government in NSW for the provision of that advice which must be given “as soon as practicable”.</i>
50.	In the event that local government does not have the resources to provide appropriate town planning scheme compliance advice, or it does not wish to personally provide that service, it should be able to delegate the responsibility to an authorised town planner.
51.	Private certifiers and building owners should be able to rely upon town planning scheme compliance advice provided by a local government or its authorised town planner.
52.	In the event that the town planning scheme compliance advice provided by a local government or its authorised town planner is incorrect or incomplete, a private certifier should not be personally liable for anything done or omitted to be done in good faith in performing the building certifying function or in the reasonable belief that the thing was done or omitted to be done in the performance of the building certifying function in reliance upon the town planning scheme compliance advice.
53.	<p>No disciplinary action should be brought against a private certifier who in good faith relies upon town planning scheme compliance advice provided by a local government or its authorised town planner.</p> <p>Similarly, no enforcement action should be able to be taken by a local government against a building owner where a building certifier has in good faith relied upon town planning scheme compliance advice provided by a local government or its authorised town planner and that advice proves to be incomplete or incorrect.</p>

Question 2.2.1: Which is your preferred option for improving the current lapsing framework?
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Option 2.2(a) – Remove lapsing provisions; or

Option 2.2(b) – Allow for reinstatement of an approval after it has lapsed
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Other

Background

[647] Under Queensland's building and planning legislation there are two separate processes relating to the lapsing of building development approvals.

[648] Part 7 of the *Building Act 1975* regulates when and how building development approvals lapse and how the lapsing period may be extended.

[649] Pursuant to s.95 of the *Building Act 1975*, despite anything contained in chapter 6, part 5, divisions 5 and 6 of the *Sustainable Planning Act 2009*, a building development approval will only lapse if the building certifier provides the owner with a reminder notice about the lapsing and the time provided in the reminder notice has expired and the development or aspect was not completed prior to the lapsing time.

[650] Part 7 of the *Building Act 1975* enables a building certifier to control when building work should be completed, however the building certifier is not required to place a condition on the approval when the approval will lapse¹⁴⁹.

[651] Similarly, pursuant to s.342 of the *Sustainable Planning Act 2009*¹⁵⁰, a building certifier is not required to place a condition on an approval which limits the time for completion of a building. If no condition is placed on a building development approval and building work starts, the approval will not lapse.

[652] Conditions on approvals, which require building work to be completed within a set time, provide some degree of certainty to the applicant and the building certifier that the work will be completed within a specified period. If an approval does lapse and building work has not been completed, an applicant is required to obtain a further approval, which results in additional costs.

¹⁴⁹ See s.94(1) of the *Building Act 1975*

¹⁵⁰ The Government is considering the replacement of the *Sustainable Planning Act 2009* with a draft Bill known as the *Planning and Development Bill 2014* which has been released for public comment

- [653] If a building development approval does not contain a condition regarding when the approval will lapse, the approval period remains at large and therefore there is no timeframe by which the work must be completed. There are distinct disadvantages for the amenity of the surrounding community if there is no lapsing condition on an approval. In addition, it is possible that in a protracted construction period, a private certifier will disengage and the local government will become the default assessment manager which raises issues regarding the proper transfer of files and information from the private certifier to the local government.
- [654] Two options have been suggested to improve the building legislation in the Discussion Paper:
- a. Remove the lapsing provisions entirely and provide that as long as work under a building development approval has started, the approval will not lapse; or
 - b. Maintain the ability for a building development approval to include a time limit but allow a reinstatement of a lapsed approval within a specified time without having to make a fresh application.

Feedback outcomes

- [655] Of the written submissions and completed surveys responding to this question, only 8% of submitters supported the entire removal of lapsing provisions from the building legislation, whilst 61% of submitters preferred maintaining the ability to set deadlines in an approval with the ability to reinstate a lapsed approval within a specified time. Nearly 18% of submitters made other suggestions on how to resolve the question and 13% did not address the issue.

Submissions in respect to the removal of lapsing provisions

Once work commences it should not lapse

- [656] Gladstone Regional Council considers that if an inspection has been carried out that the application should not lapse.
- [657] Moreton Bay Regional Council suggested that the lapsing provisions should align with the *Plumbing and Drainage Act 2002* as well as planning permits so that once work has commenced, it cannot lapse.

Contrary view

- [658] Cairns Regional Council did not support Option (a) on the basis that having no restrictions on the time it can take to complete building works leads to complaints from neighbouring properties.
- [659] Lockyer Valley Regional Council rejected Option (a) on the basis that local government may end up as the default assessment manager.
- [660] Logan City Council argued against the removal of lapsing provisions suggesting that:
- Unfinalised approvals are a risk to the consumer as each building element declines over time;
 - An approval that has no end date will give a false sense of security and a compliance expectation where the building has been completed and there is no final inspection;
 - Time conditioned approvals provide certainty for the applicant and the building certifier that the work is required to be completed within a certain period of time.

Submissions in respect to allowing reinstatement of an approval after it has lapsed

Re-introduce standard building by-law provisions

- [661] AIBS supported amendments to the *Building Act 1975* which would provide for mandatory lapsing and reinstatement provisions which were previously set out in the standard building by-laws, for example building work for all classes of buildings must be commenced within 12 months of approval and in respect to class 1 or 10 buildings, work must be completed within 18 months of the approval date, whereas in relation to class 2-9 buildings, work must be completed within 3 years of the approval date.
- [662] AIBS also suggested that a similar model to Option (b) is contained in the *Draft Planning and Development Bill 2014* (the Draft Planning Bill). Further, it argued that if more than one reinstatement is required for the development approval, there should be a concurrence agency referral to the local government which applies under the current legislation if more than one extension is sought to the development approval deadline¹⁵¹.

¹⁵¹ See s.97 of the *Building Act 1975*

Option (b) benefits the applicant and the building certifier

- [663] Private certifier Claude McKelvey suggested that Option (b) would be preferred by certifiers because it would alleviate the need to reassess the proposal under a new development application where relevant legislation may have changed and the building as approved may not now meet all the required changes.

Option (b) but only if requirements have not changed

- [664] Fire Protection Association Australia also supported Option (b) but only where the requirements that applied at the time of the original development approval have not changed. Where requirements have changed, FPA Australia considered that the “associated application” must be amended to ensure new requirements are incorporated into the approval.

Certifiers acting outside the legislation

- [665] HIA argued that the current lapsing provisions contained in the *Building Act 1975* are creating difficulties for building certifiers and builders in that there is no ability to revive an approval once it has lapsed. This leads to situations where private certifiers are disengaging where there is incomplete work and in some instances, building certifiers are acting outside the boundaries of the legislation by assisting applicants to finalise work even though the approval has lapsed.

Guidelines

- [666] HIA supports the concept of approvals having timeframes, however it supports amendments allowing for approvals to be extended or re-instated after a lapsing period based on a set of guidelines.

The Draft Planning Bill

- [667] The HIA also submitted that this issue is being addressed in the the Draft Planning Bill and that preferably any amendments to the *Building Act 1975* should be consistent with that approach.

Conditional Support

- [668] Private certifier John Mulderry supported Option (b) but suggested that if the original certifier refuses to reinstate the approval after it has lapsed, then the application for reinstatement *must* be made to

the local government who must then become the assessment manager.

[669] Lockyer Valley Regional Council also argued that the decision to grant an application for re-instatement should be discretionary. Further it suggested that an application for re-instatement should be able to be made to an alternative certifier.

[670] Logan City Council preferred Option (b) suggesting that:

- There should be a legislative timeframe in which a re-instatement application should be made (within 6 or 12 months of lapsing); and
- If the approval does lapse and building work has not been completed, an applicant should be required to obtain another approval.

Support for other reforms

Reminder notices: “cumbersome, labour intensive spoon feeding”

[671] Private certifier Neil Oliveri supported the retention of lapsing provisions for building approvals for the current time limit of 2 years and also supported the current system of referring applications to local government for an extension past 2 years. Mr. Oliveri also suggested the removal of the requirement to issue reminder notices under s.95 of the *Building Act 1975*¹⁵² describing the process as “cumbersome, labour intensive spoon feeding”.

[672] Mr. Oliveri also suggested that giving building certifiers the ability to re-instate an approval must be controlled to ensure the system is not abused. He argued that the decision to re-instate should only be made on set criteria which could include:

- The work must have been substantially commenced;
- Approvals can only be re-instated within a 12-month period from the date of lapsing (grace period);
- Approvals cannot be revived at all if the work has not substantially commenced or if after the 12 month grace period;
- The building certifier is under no compulsion to re-instate the approval, should not have to give reasons and there should be no appeal provisions to the certifier’s decision; and
- Should the building certifier refuse the re-instatement application, the applicant must apply to another certifier.

¹⁵² Similar submissions were made by private certifier Neil Oliveri

Prevent building certifiers from setting short time frames for building work

- [673] QBCC senior audit and investigations officer Philip Godfrey argued that to avoid building certifiers setting short time periods on approvals, the *Building Act 1975* should impose a minimum time limit of two years for building approvals (except demolition approvals) with an option of a minimum 1 year extension. He also suggested that time limits and fees for extensions of time could be displayed as mandatory information on the engagement agreement with the owner and may be the subject of negotiation.

Neither option provides sufficient incentive to commence building work

- [674] Brisbane City Council opposed the implementation of both Options (a) and (b) arguing that neither provides sufficient incentive to commence or to complete building work. It identified the failure to ensure completed building work in a timely fashion as a detraction from the amenity of the surrounding area.

Consideration

Building Act amendments should be consistent with the finalised provisions in the mooted Draft Planning Bill

- [675] The Review accepts the submissions of the HIA that first and foremost any amendments to the lapsing provisions of the *Building Act 1975* should be consistent with the provisions contained in what is likely to become the *Planning and Development Act 2015*.
- [676] It is important to note that the Draft Planning Bill has only been released in draft form and therefore is subject to amendment after the public consultation period and of course is subject to being passed by the Parliament. That is, the Draft Planning Bill is not law. Notwithstanding this, it gives considerable insight into Government's current intentions.
- [677] Section 89(1)(b)(iii) of the Draft Planning Bill provides that a building development approval will lapse 2 years after the approval takes effect if the development does not substantially start in that time. If the building development approval does not contain a condition by when the development must be completed, the approval will not lapse¹⁵³. This provision is consistent with s.94(1) of the *Building Act 1975*.
- [678] If a lapsing condition is made on the approval, under s.89(2) of the Draft Planning Bill, the building certifier must give the applicant and the owner notice that the aspect is due to lapse on a stated date

¹⁵³ See s.89 of the Draft Planning Bill

and the currency period may be extended. The notice must be given no earlier than 6 months and no later than 3 months before the aspect is due to lapse.

- [679] Pursuant to s.90 of the Draft Planning Bill, a person may apply for an extension before the development approval lapses. The Draft Planning Bill does not appear to expressly provide for or set parameters for what period the approval may be extended.
- [680] Pursuant to s.92(2) of the Draft Planning Bill, an aspect of development approval lapses if the development relating to the aspect is not completed within the period required under a development condition.
- [681] Whilst the Draft Planning Bill does provide for the granting of an extension of the approval, it does not expressly provide for its reinstatement once it has lapsed [Option (b)].
- [682] The following reasons should be read subject to the initial comments at paragraph [675] that whatever amendments are made to the *Building Act 1975*, they should be consistent with the provisions in what is likely to become the *Planning and Development Act 2015*. However given that the Draft Planning Bill is not even a Bill before Parliament as yet, for the sake of this exercise, the Review puts to one side the lapsing provisions contained therein and considers the various submissions raised by stakeholders.

Removal of lapsing provisions is problematic

- [683] The Review agrees with the significant majority of submitters that to remove the lapsing provisions contained in the *Building Act 1975* is likely to lead to unintended consequences. Removing the lapsing provisions entirely would result in an increase in the number of unfinished buildings, which will impact negatively on the amenity of the community. It will also impact upon the efficacy of those buildings as they remain open to the elements for indefinite periods.
- [684] Removing lapsing provisions would also be problematic for building certifiers whose best interests are served by finalising the construction of buildings as quickly as possible, particularly if Recommendation 109 is accepted (limitation of liability).

Allow for reinstatement after approval

Building certifiers failing to comply with legislative requirements

- [685] During the course of the Review a number of private certifiers explained how they have assisted applicants to finalise their buildings and in so doing were acting outside of the law, by informally reinstating the approval after it had lapsed. This was confirmed in the submissions of the HIA. This ‘unsanctioned’ practice whilst perhaps a decent business approach, leaves the building certifier exposed to disciplinary action by failing to comply with legislative requirements as required in Item 3 of the Code of Conduct.

Granting of reinstatement should be discretionary

- [686] The Review accepts the submissions of the Lockyer Valley Regional Council that the decision whether to grant reinstatement should be at the discretion of the building certifier, provided certain time frames are met.

“Certifier Shopping”

- [687] The Review does not consider it appropriate to allow a disaffected applicant whose reinstatement application has been refused by a private certifier, to remake the application before the local government or another private certifier because that simply promotes ‘certifier shopping’. If the building certifier refuses an application for reinstatement, that decision should be reviewable by the proposed Building and Development Dispute Resolution Committee¹⁵⁴, but the applicant ought not be able to keep looking for an alternative assessment manager to give them the answer they desire. The Review also notes that this would be inconsistent with Recommendations 11-14 in respect to the tightening of the disengagement rules (see Question 1.3.1).

Reinstatement of approval should be on original conditions and requirements

- [688] The Review accepts the submissions of Claude McKelvey over those of FPA Australia, namely that reinstatement of an approval should be on the original approval conditions and requirements, rather than having to amend those conditions to take into account new legislative or code requirements which may have commenced since

¹⁵⁴ See s.202 of the Draft Planning Bill and see by comparison to applications for extension of a development approval under s.91(7) and Item 13, Table 1, Schedule 1 of the Draft Planning Bill

the original approval. To do otherwise would act as unnecessary impediment to development in this State.

Reminder notices to remain

- [689] The Review accepts that the requirement to issue reminder notices to building development approval applicants may be inconvenient to building certifiers, but is satisfied they are a necessary part of the certifier's function and should remain. No statistical data has been provided which supports the argument that the reminder notices are disregarded by all or a significant majority of applicants. In any event, it is appropriate from a procedural fairness perspective that applicants receive proper warning that their approval is nearing its lapsing date. What applicants choose to do with that information is a matter for them.

Conclusion

- [690] Of all the various options provided during the course of the Review, the hybrid scheme modeled on the AIBS submission, which provides for mandatory lapsing and discretionary reinstatement provisions based on the timeframes previously set out in the standard building by-laws is preferred. The hybrid version settled upon provides a greater discretion to be exercised by the building certifier in the:

- a. Setting of the lapsing period, whilst maintaining a minimum default period; and
- b. The granting of extended timeframes on a case-by-case basis.

- [691] These discretionary powers provide greater flexibility to the building certifier rather than relying purely upon a specified default period. However, if Recommendation 109 is accepted, it will also be in the best interests of building certifiers to have buildings finalised as soon as possible.

Question 2.2.1: Recommendations

[692]

54.	<p>Any amendments to the lapsing provisions of the <i>Building Act 1975</i> should be consistent with the provisions contained in what is likely to become the <i>Planning and Development Act 2015</i>.</p> <p>Whilst s.90 of the Draft Planning Bill does provide for the granting of an extension of a building development approval, it does not expressly provide for its reinstatement once it has lapsed although the Minister may make rules about the revival of lapsed applications under</p>
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	s.72(2) and (3) of the Draft Planning Bill.
55.	<p>Subject to Recommendation 54, the <i>Building Act 1975</i> should be amended to provide:</p> <ul style="list-style-type: none"> (a) In the case of Class 1 & 10 buildings, a building approval will lapse within the later of the following period to end: <ul style="list-style-type: none"> (i) The period determined by the building certifier; or (ii) 18 months of the date of approval. (b) In the case of Class 2-9 buildings, a building approval will lapse within the later of the following period to end: <ul style="list-style-type: none"> (i) The period determined by the building certifier; or (ii) 36 months of the date of approval. (c) For all classes of buildings, upon application, provided the building work has substantially commenced, a building approval may be reinstated within the later of the following period to end: <ul style="list-style-type: none"> (i) The period determined by the building certifier; or (ii) 12 months of lapsing. (d) In the event of reinstatement, the building approval may be extended to the later of the following period to end: <ul style="list-style-type: none"> (i) The period determined by the building certifier; or (ii) 12 months after reinstatement; <p>failing which the approval shall lapse, requiring a new building development application.</p>
56.	The lapsing provisions contained in the <i>Building Act 1975</i> (ss.89-93) in respect to building development approvals for demolition and removal should remain unchanged.

Question 2.3.1: Do you think the current referral triggers should be reviewed with the aim of reducing the number of referrals needed for building development applications?

Background

[693] The referral system managed by a building certifier enables regulatory bodies to provide input into a building development application as part of a single application process. This removes the requirement for an applicant to seek the individual approval of various agencies who may have an interest in the application. The referral system is established in Chapter 6, Part 1, Division 4 of the *Sustainable Planning Act 2009*.

[694] Referral agencies are either “*concurrence agencies*” or “*advice agencies*”¹⁵⁵.

[695] The powers of a concurrence agency include the ability to¹⁵⁶:

- Attach conditions to the development approval;
- Issue a preliminary approval;
- Provide advice to the assessment manager about the application;
- Advise the assessment manager that it has no requirements relating to the application;
- Refuse the application.

[696] The powers of an advice agency are more limited and include the ability to make recommendations to the assessment manager about any aspect of the application relevant to the assessment manager’s decision on the application including¹⁵⁷:

- The conditions that should attach to any development approval;
- That any approval should be for part only of the application;
- That any approval should be a preliminary approval only;
- Advising the assessment manager that it has no recommendations in relation to the application;
- That the application should be refused.

[697] The complete list of referral agencies for building work is listed in Schedule 7, Table 1 of the *Sustainable Planning Regulation 2009*.

¹⁵⁵ See s.252 of the *Sustainable Planning Act 2009*

¹⁵⁶ See s.287 of the *Sustainable Planning Act 2009*

¹⁵⁷ See s.292 of the *Sustainable Planning Act 2009*

[698] The following building work is assessed by the chief executive of the Department of State Development, Infrastructure and Planning (DSDIP) as a concurrence agency and therefore through the State Assessment and Referral Agency (SARA):

- Building work associated with a State-controlled road¹⁵⁸;
- Building work on land completely or partly seaward of a coastal building line under the *Coastal Protection and Management Act 1995*¹⁵⁹;
- Building work on a Queensland heritage place¹⁶⁰;
- Building work on a future public transport corridor¹⁶¹;
- Building work on future railway land¹⁶².

[699] All other referral triggers progress through the prescribed referral entity directly¹⁶³.

[700] Attached hereto and marked Annexure D is a Table which identifies the referral agencies for the various Parts of the QDC.

[701] As part of the State Government's commitment to reduce red tape by 20% by 2018 and drive regulatory reform across the Queensland Government the Discussion Paper poses the question as to whether the Department of Housing and Public Works should review, in consultation with referral agencies, the current scope of work that is subject to a referral with the aim of identifying any referrals that may be able to be reduced or eliminated.

Feedback outcomes

[702] Of the written submissions and completed surveys responding to this question, 64% of submitters supported a review of the current scope of work that is subject to a referral, with the aim of identifying any referrals that may be able to be reduced or eliminated, whilst 14% of submitters were opposed to the suggestion, 6% had other suggestions on how to resolve the question and 16% did not address it.

¹⁵⁸ Schedule 7, Table 1, Item 8 of the *Sustainable Planning Regulation 2009*

¹⁵⁹ Schedule 7, Table 1, Item 11 of the *Sustainable Planning Regulation 2009*

¹⁶⁰ Schedule 7, Table 1, Item 12 of the *Sustainable Planning Regulation 2009*

¹⁶¹ Schedule 7, Table 1, Item 14 of the *Sustainable Planning Regulation 2009*

¹⁶² Schedule 7, Table 1, Item 16 of the *Sustainable Planning Regulation 2009*

¹⁶³ Schedule 7, Table 1 of the *Sustainable Planning Regulation 2009*

Submissions in support of a review

Wholesale changes to the referral system are not required

- [703] AIBS argued that whilst the current system should remain largely unchanged, there may be some benefit in a review of the scope of work that is subject to a referral to identify any minor improvements. AIBS argued that building certifiers should still have to seek advice from referral agencies which are staffed by experts in their fields. In other words, AIBS is concerned that any relaxation in the referral triggers could result in additional work for building certifiers that is likely to be outside their general areas of expertise.

Boundary setback referrals unnecessary

- [704] A representative of the Cassowary Coast Regional Council supported a review arguing that some of the referrals are pointless and should be removed and assessed during the building application or under the relevant local law. He argued that the main unnecessary referral received was in respect to boundary set back dispensations, particularly in circumstances where local governments seem to rarely refuse an application¹⁶⁴.

Matters pertaining to QFES

- [705] A common and recurring complaint amongst stakeholders during the Review was in relation to the QFES. Stakeholders did not generally object to being required to seek the specialist advice of QFES as an advice agency, but rather the costs associated with providing that advice¹⁶⁵ and the time taken to provide it¹⁶⁶.
- [706] Mr. Steve Bartley is a private certifier who works in Queensland, the Northern Territory and in Victoria. In an individual interview, he advised the Review of some cost comparisons he had performed between the services provided by QFES and their counterparts in Melbourne, the Melbourne Metropolitan Fire Brigade (MMFB). Mr. Bartley alleged that the costs charged by MMFB were a fraction of those charged by QFES.

¹⁶⁴ Similar submissions were made by local government certifier Laurence Eves

¹⁶⁵ See the submissions of Claude McKelvey, Neil Oliveri, unnamed building designer or architect in a survey response

¹⁶⁶ AIBS argued that it can take QFES up to 15 business days to simply advise when they will carry out an inspection of Special Fire Services

Consider implementing a SARA type arrangement for building development applications

- [707] The LGAQ supported a review of referral triggers with the relevant referral agencies. It argued that:

“Such a review should be undertaken with a view not simply to reduce the current scope of work, but rather evaluate whether the referral triggers actually improve building development applications or reduce potential risks. The LGAQ suggests that it may also be prudent for the State Government to consider utilising the State Assessment and Referral Agency (SARA) or implementing a similar ‘one stop shop’ for building and development applications.”

Draft Planning Bill to do away with ‘advice agencies’

- [708] HIA submitted that the Draft Planning Bill is proposing to eliminate the term ‘advice agencies’. It argued that the State Government over the past two years has reduced the number of referral agencies in recognition that *“far too many matters were triggering referral and there was an overwhelming need to deliver a more streamlined approval system”*. On this basis alone HIA argued in support of a review of the referral triggers.

Support for status quo

- [709] No cogent reasons were provided as to why a review should not be conducted.

Consideration

Thorough consultation required with stakeholders

- [710] Identifying what, if any referral triggers to referral agencies should be reduced or eliminated is outside the scope of this review. A review of the referral triggers requires thorough consultation with all of the referral agencies and other stakeholders to determine what if any reductions can or should be made.

Object of the referral agency review

- [711] The Review agrees with the submissions of the LGAQ that the review should focus attention on whether the existing referral triggers actually provide tangible benefits to the community, whether they reduce potential risks and if they should remain, whether in this age of contestability, the advice can be obtained in a

more cost effective and time efficient manner without impacting on the public interest.

QFES

- [712] Unfortunately, the only referral agency to take part in this Review was QFES therefore the comments made below are necessarily restricted to that referral agency and should be taken into consideration by Government when considering what red tape reduction and cost savings should be made for the benefit of the building industry balanced against the public interest.
- [713] Further to an individual interview with private certifier Steve Bartley referred to in paragraph [706], Mr. Bartley provided a cost comparison for fees charged by the MMFB for a 'Building Control Act Report' in respect to the construction of a large warehouse for a hardware chain. The MMFB invoice amounted to the sum of \$242.00. Mr. Bartley estimated the QFES costs if that same building were to be constructed in Queensland would amount to the sum of \$23,939.68.
- [714] Mr. Bartley also provided a further example, this time comparing the costs of a similar report by the Victorian Country Fire Authority (CFA) in respect to the construction of the same building approximately 40 kilometres northwest of Melbourne. The CFA tax invoice provided by Mr. Bartley was in the sum of \$550.00.
- [715] Concerned that Mr. Bartley may not have been 'comparing apples with apples', the Review provided the Fire Engineering Command of the State Community Safety Operations Branch of QFES with copies of the MMFB and CFA tax invoices and Mr. Bartley's calculations, with the request that QFES explain why the fees vary so markedly.
- [716] In a written response, QFES argued that the role of QFES was very different to that undertaken by the MMFB and the CFA. They described the key differences as:
- "QFES provides advice on fire systems that are defined as Special Fire Services, regardless of whether these are considered Deemed-to-Satisfy or an Alternative Solution. Additionally, QFES provides advice on Alternative Solutions that involve any fire safety system, including fire safety measures that are not defined as a Special Fire Service."*
- [717] Having explained what the QFES does, it did not adequately explain the differences between the services provided by QFES and their Victorian counterparts, preferring instead to refer to the Victorian Auditor General's report *Compliance with Building Permits*, dated

December 2011¹⁶⁷, which was highly critical of the Victorian building control system. QFES also provided a copy of correspondence from the Victorian Building Authority purportedly sent to all Victorian building surveyors which supports the Victorian Auditor General's report that questioned Victorian building surveyors' acceptance of alternative solutions in respect to fire performance requirements of the BCA.

[718] However, irrespective of whether the Victorian building control system or the work performed by Victorian building surveyors was or remains deficient, that does not explain why two different interstate fire services can provide referral advice for between 1-2% of the costs charged by QFES.

[719] QFES again sought to justify the price disparity on the different funding models adopted by the two states. QFES explained that its funding model for referral agency work is based on full cost recovery whereas the MMFB and CFA, according to QFES, are funded almost entirely by consolidated revenue.

[720] The different funding model is the most likely reason for the significant disparity in the fees charged by the different organisations.

[721] The complaints made by stakeholders about the fees charged by QFES are not new. In the recent report led by retired Australian Federal Police Commissioner Mick Keelty entitled *Sustaining the unsustainable – Police and Community Safety Review – final report August 2013*¹⁶⁸, the review team stated:

"There are strong feelings of discontent within the building industry regarding the Queensland Fire and Rescue Service involvement in the building process. This dissatisfaction seems to relate to a key few factors, but the primary factor seems to be the fee-for-service charged by the Queensland Fire and Rescue Service. The Queensland Fire and Rescue Service have progressively moved towards a full cost recovery model for inspections of plans and buildings which has added to the cost of construction in Queensland. It has also added a layer of bureaucracy to building approvals at the front end."

[722] The review team made the following finding at page 195:

"The Review team has some sympathy for both arguments but believe that the true driver for the Queensland Fire and Rescue Service's continued involvement should be subject to a review of the current costing policy. The Review team acknowledges that in a time of fiscal restraint a decrease in revenue may not be desirable for the Queensland Fire and Rescue Service,

¹⁶⁷ http://www.audit.vic.gov.au/reports_and_publications/latest_reports/2011-12/20111207-building-permits.aspx

¹⁶⁸ <http://statements.qld.gov.au/Content/MediaAttachments/2013/pdf/Police%20and%20Community%20Safety%20Review%20Report.pdf>

however it is likely that in a contestable market others could provide this advice to industry with the Queensland Fire and Rescue Service providing an audit role.”

[723] The review team continued at page 196:

*“While generation of revenue is helpful to the balance sheet of the Queensland Fire and Rescue Service it is not **core business**. The safety of the public is the foremost reason for the effort of this Building Fire Safety Unit. Prices which impose an unacceptable burden to the building industry could encourage counterproductive behaviour.”* [Emphasis added]

[724] QFES is well aware of the nature of complaints being made against it. QFES advised that it has undertaken *“multiple evaluations of alternative and modified fee systems (since 2011) that would replace the current system and address issues of complaint, cost recovery (referral agency service), acceptability and project cost estimation.”*

[725] In its detailed submissions to the Review, based on consultation with Building Codes Queensland, AIBS and other stakeholder groups, QFES identified a number of referral jurisdictions that could be removed without adversely affecting the safety of the community and fire-fighters:

1. Fire hydrant coverage via single street hydrant

QFES referral advice need not be obtained for building work:

- (i) In any Class of building where a fire hydrant system is the only Special Fire Service required by the Deemed to Satisfy (DTS) provisions of the Building Code of Australia (BCA), providing the DTS-compliant hydrant system is achieved using a single street hydrant.*
- (ii) In a Class 2 building where a fire hydrant system and/or interconnected smoke alarms are the only Special Fire Services required by the DTS provisions of the BCA, providing the DTS-compliant hydrant system is achieved using a single street hydrant.*

2. Fit-out works, where Special Fire Services (SFS) not affected

QFES referral advice need not be obtained for building work for a fit-out providing:-

- The fit-out has a floor area <300m²; **and***
- There is no modification, replacement or addition of SFS; **and***
- If the main building has an Alternative Solution the fit-out in accordance with this Alternative Solution.*

If the fit-out introduces its own Alternative Solution or is not in accordance with the existing Alternative Solution, the application must be forwarded to QFES for assessment and inspection as per the usual procedure.

3. Free-standing fabric shade structures over car parks / swimming pools/ sporting fields and the like

QFES referral advice need not be obtained for building work that solely involves fabric free-standing shade structures.

4. Alternative Solutions in buildings where DTS provisions do not require special fire services

QFES referral advice need not be obtained for building work that includes an Alternative Solution assessed against the Performance Requirements of the BCA Volume 1 for the fire safety system:

- (i) In any Class building where the DTS provisions of the BCA do not require any Special Fire Services to be provided to the building; or*
- (ii) In a Class 2 building where a fire hydrant system and/or interconnected smoke alarms are the only Special Fire Services required by the DTS provisions of the BCA, providing the DTS-compliant hydrant system is achieved using a single street hydrant.*
- (iii) In a Class 3, 4, 5, 6, 7, 8 and 9 building where a fire hydrant system is the only Special Fire Service required by the DTS provisions of the BCA and the DTS-compliant hydrant system is achieved using a single street hydrant.*

5. Fire safety management procedures for marinas

Remove from Sustainable Planning Regulation 2009

[726] In addition, QFES submitted that after evaluating its fee structure, it “has identified a significant reduction in the calculated fee for alternative solution building applications (generally in the order of 50%)”. Its modified fee structure is still subject to State Government review and QFES has advised the Review that it will announce the full details of any fee reductions at a later date.

[727] Whilst QFES should be applauded for its work in identifying a number of referral jurisdictions that could be removed and for its work in reducing fees, QFES and all referral agencies should be required to justify their pricing structures as part of the review to assist in determining whether their services can be obtained in a more cost effective and time efficient manner without impacting on the public interest.

Relevant changes to the Draft Planning Bill

[728] Should the Draft Planning Bill be introduced to and passed by the Parliament in its present form, referral agencies will remain but will not be separately described as “concurrence” and “advice”

agencies. Rather, any limitation on a referral agencies powers will be prescribed for each agency in the Planning Regulation¹⁶⁹.

SARA – a one-stop shop for building development applications?

- [729] Given the number of instances where local governments are a concurrence agency¹⁷⁰, it is not immediately apparent how the LGAQ would intend for SARA or an equivalent would become a one-stop shop in respect to building development applications.

Question 2.3.1: Recommendations

[730]

57.	A review of the current referral triggers requires thorough consultation with all of the referral agencies and other stakeholders to determine what if any reductions can or should be made.
58.	The review should focus attention on whether the existing referral triggers actually provide tangible benefits to the community, whether they reduce potential risks and if they should remain, whether in this age of contestability, the advice can be obtained in a more cost effective and time efficient manner without impacting on the public interest.

¹⁶⁹ See s.52(2) of the Draft Planning Bill

¹⁷⁰ See Schedule 7 of the *Sustainable Planning Regulation 2009* and Annexure D in respect to the QDC Parts

2.4 Self-assessable and exempt building work

Question 2.4.1: Do you think the scope of building work that does not require an approval should be increased?

Question 2.4.2: If yes, can you list any examples of building work that could be made self-assessable or exempt?

Background

- [731] The Discussion Paper raises the prospect of expanding the current scope of building work that does not require a building development approval in an effort to reduce costs, delays and red tape. However the desire to streamline the building process by removing unwanted regulatory intervention should not come at the expense of the public interest.
- [732] When considering this question, it should be noted that there is a close connection between the building legislation and that of the planning legislation. It is also important to note, as has been identified in the previous question, that the *Sustainable Planning Act 2009* is under review and that DSDIP has released the Draft Planning Bill for public consultation.

Feedback outcomes

- [733] Of the written submissions and completed surveys responding to this question, 28% of submitters supported increasing the scope of building work that does not require an approval, whilst 50% of submitters were opposed to the suggestion, 9% had other suggestions on how to resolve the question and 13% did not address it.

Support for change

Draft Planning Bill needs to be considered

- [734] AIBS submitted that various parts of the QDC and the *Building Act 1975* will need to be reviewed in light of the proposed changes to self-assessable development in the Draft Planning Bill. It also sought clarification in the building legislation that council overlays cannot override what is currently classified as self-assessable building work. AIBS offered to join a working party to work through the necessary changes to the *Building Act 1975* resulting

from the removal of self-assessable development in the Draft Planning Bill.

Special consideration for cyclonic region

- [735] Private certifier Clayton Baker agreed with the proposal in principle but suggested that special consideration ought to be given to building work carried out in the cyclonic region. This issue will be revisited again below when considering Question 5.1.1.

Greater clarity of what is self-assessable and exempt building work needed

- [736] HIA suggested that there is a need to provide greater clarity around the scope of self-assessable and exempt building work before consideration is given to expand the categories. HIA claimed to have received many requests for assistance from its members who have been advised by local government staff that building work required council approval when in fact the work was self-assessable under schedule 1 of the *Building Regulation 2006*. That aside, HIA agreed that there is a need to revisit the scope of work that is exempt or self-assessable, particularly in relation to Class 10 buildings.

Limit amendments to domestic building work which do not compromise health, safety and amenity

- [737] Brisbane City Council supported increasing the scope of building work that can be carried out without a building development approval, provided that the increase was limited to domestic building work which does not compromise the health, safety and amenity of occupants of the subject premises or its neighbours.

Support for status quo

Proposal not in the public interest

- [738] Cairns Regional Council rejected the proposal arguing that the risk of non-compliance with codes together with being located in a cyclone region meant that the reforms were not in the public interest. It argued that the current scope of self-assessable and exempt building work should not be expanded upon, if anything, it should be further clarified and restricted.
- [739] For similar reasons, a representative of the Cassowary Coast Regional Council also rejected the proposal to expand the scope of

self-assessable building work. In respect to the risk to public safety from flying debris in a cyclone, the representative said:

“A piece of iron from a garden shed flying at full force is exactly the same as a piece of roof from a dwelling flying at full force. All work in this area should be assessed and inspected as per the current standards. There would be an increased risk to public safety in a severe weather event in having Class 10a buildings (however small) exempt from building approval and inspection process.”

- [740] Similar submissions were made in a response to the survey by a local government certifier who said:

“I do not believe that increasing the scope for self-assessable building work (such as class 10 buildings) in cyclonic areas (such as Region C) will produce any more than greater issues during cyclonic event. This determination is form (sic) the number of class 10 unlawful buildings which failed during such events in the past 10 years and have cause may (sic) problems with surrounding properties of such structures, especially small shed of around nine square metres. Therefore, the reduction in the regulation of these structures will only increase the number of poorly constructed sheds and increase the fail rate in further cyclonic events.”

Proposed reforms would create more problems than they would resolve

- [741] Central Highlands Regional Council argued that due to the number of sub-standard building works, particularly in relation to structural adequacy, it was reluctant to support the proposal¹⁷¹. Similar submissions were made by local government certifier Laurence Eves who was concerned that the proposal would lead to a “massive influx of illegal work, including siting errors that dog the building industry.”
- [742] The Lockyer Valley Regional Council argued that an increase in self-assessable and exempt building work could lead to an increase in the compliance resources required to deal with customer complaints.

Support for other reforms

Built over infrastructure issues

- [743] Whilst private certifier Richard Shann saw a need for expanding the scope of self-assessable building work for small structures such as cubby houses, play equipment and small sheds, he considered that larger class 10a buildings such as carports, patios and larger garden sheds should still be assessable otherwise there is likely to be a rise

¹⁷¹ Similar concerns were raised by private certifier Gordon Heelan

in structurally substandard and dangerous buildings that could be built over sewers and easements¹⁷².

Clarification required

[744] The following clarifications were sought by various stakeholders:

- Whether rural sheds which exceed 200 metres from boundaries require an approval;
- Whether all prescribed structures within a cyclonic region require approval.

Qualifications on self-assessable building work

[745] Private certifier Neil Oliveri suggested that what would otherwise be regarded as self-assessable building work should require building development approval where:

- The proposed work is within the zone of influence of any service such as water, sewer, or stormwater; and
- Within the zone of influence or 1.5m horizontal distance of any retaining wall.

Consideration

[746] Before examining whether the scope of self-assessable and exempt building work should be increased, it is helpful to identify the meaning of those terms and where the prescribed work can be located.

[747] Pursuant to s.20 of the *Building Act 1975*, all building work is “assessable development” unless it is “exempt development” or it is “self-assessable development”.

[748] Pursuant to s.21 of the *Building Act 1975*, s.232(1) of the *Sustainable Planning Act 2009* prescribes that, for assessing building work under the *Building Act 1975*, the *Building Act 1975* may declare building work to be self-assessable development.

[749] Pursuant to s.21(2) of the *Building Act 1975*, building work is declared to be self-assessable for the Planning Act if it:

- a. is prescribed under a regulation; and
- b. complies with:

¹⁷² Similar concerns were raised by a number of submitters, particularly in relation to the increased risk of building over infrastructure

- (i) generally – any relevant deemed to satisfy provision under the BCA or relevant acceptable solution under the QDC for the building work; or
- (ii) ...

[750] Pursuant to s.21(3) of the *Building Act 1975*, building work that is self-assessable development under the Planning Act or subsection (2) is self-assessable building work.

[751] Pursuant to s.238 of the *Sustainable Planning Act 2009*, a development permit is necessary for assessable development.

[752] Pursuant to s.236 of the *Sustainable Planning Act 2009*, a development permit is not necessary for self-assessable development, however self-assessable development must comply with applicable codes.

[753] Section 4 of the *Building Regulation 2006* provides that self-assessable building work is prescribed under schedule 1 of the Regulation.

[754] Pursuant to s.22 of the *Building Act 1975*, building work prescribed under a regulation is declared exempt development.

[755] Section 5 of the *Building Regulation 2006* provides that exempt building work is building work prescribed under schedule 2 of the Regulation.

Impacts of the Draft Planning Bill

[756] The mooted changes to the planning legislation will impact upon the building legislation, although the extent of that impact remains unclear as the Draft Planning Bill remains unfinalised and no draft regulations have yet been provided.

[757] Pursuant to s.37 of the Draft Planning Bill, there will be three categories of development:

- Prohibited development;
- Assessable development; and
- Accepted development.

[758] Prohibited development must not be carried out unless the development is carried out under a development approval given for a superseded scheme development application¹⁷³.

¹⁷³ See s.169 of the Draft Planning Bill

- [759] Under the Draft Planning Bill, the designation “assessable development” is the category of development for which a development approval is required¹⁷⁴.
- [760] “Accepted development” will replace the current “exempt development” designation under the Draft Planning Bill. A categorising instrument (a regulation of a local instrument) will prescribe development as accepted development and the Regulation will also prescribe development that a local instrument cannot provide is accepted development¹⁷⁵.
- [761] Self-assessable development will be removed under the Draft Planning Bill. Development that is currently self-assessable will be able to transition to accepted development under the regulation or a local instrument¹⁷⁶.
- [762] However, pursuant to s.37(7) of the Draft Planning Bill, to the extent the development is building work that is building assessment work under the *Building Act 1975*, it will be assessable development and therefore a development approval will be required.
- [763] Without draft regulations it is difficult to fully comprehend the interaction between the *Building Act* and the *Draft Planning Bill*. For the purposes of this report however, it is assumed that what is currently exempt building work as listed in Schedule 2 of the *Building Regulation 2006* will remain accepted development under the Draft Planning Bill, just as what is currently self-assessable building work as listed in Schedule 1 of the *Building Regulation 2006* will remain accepted development under the Draft Planning Bill.
- [764] Further work will be required to identify what impacts the Draft Planning Bill will have on the type of building work that will not require a building development approval. Clearly there will also need to be amendments made to the *Building Act* and the *Building Regulations* to ensure there is consistency in the use of terminology and to ensure that the two pieces of legislation are harmonised.
- [765] There is currently a clumsy interplay between the assessment provisions contained in Chapter 2 of the *Building Act 1975*, Schedules 1 and 2 of the *Building Regulation 2006* and how these interact with the *Sustainable Planning Act 2009* and the *Sustainable Planning Regulations 2009*. There would be benefit in seeking to streamline these interactions in the proposed planning legislation

¹⁷⁴ See s.170 of the Draft Planning Bill

¹⁷⁵ See s.37(6) of the Draft Planning Bill

¹⁷⁶ See Planning and Development Bill – Information Paper, Department of State Development, Infrastructure and Planning, 18

and the consequential amendments to the building legislation but it should be recognised that some degree of interaction and overlap between the two pieces of legislation are likely to be unavoidable.

Special consideration for cyclonic region

[766] In the Australian Building Codes Board (ABCB) report entitled *Final RIS – Construction in Cyclone Regions*¹⁷⁷, the level of risk to a building from cyclonic activity was identified as a combination of the following factors:

- Building materials used and the structural capacity incorporated in the design and construction of the building;
- The topography in the immediate vicinity of the site and the level of shielding available to protect the building; and
- The geographical location of the site.

For present purposes, the most pertinent of these issues relates to the materials used and the structural capacity of the building.

[767] The ABCB engaged engineer and Adjunct Professor Dr John Holmes¹⁷⁸ to provide advice on whether there is sufficient data and justification to change design wind speeds in the cyclonic regions of Australia. Dr Holmes concluded that modeling by global climate change models for the Australian region predict an average fall in the number of cyclones of 30% by the end of the century. However, he concluded that there is evidence that the number of the more intense cyclones (category 3 and above) has slightly increased in the last thirty years. Dr. Holmes found that the global climate models predict an increase in more intense cyclones due to global warming and some models predict a 2-3 degree southward shift in average cyclone occurrences off the Queensland coast¹⁷⁹.

[768] The Review has considered all of the submissions in respect to expanding the scope of works that do not require a building development approval in cyclonic areas. The Review has also considered the advice provided to ABCB by Dr. John Holmes that based on current modeling, whilst cyclonic activity is predicted to decrease in number, it is expected to increase in intensity. Whilst Dr. Holmes' views were not shared by all wind experts¹⁸⁰, the Review accepts those submissions which argued that allowing such work would result in an unacceptable risk to the health, safety and wellbeing of building occupants during a cyclone or significant

¹⁷⁷ February 2012, 20-21

¹⁷⁸ See: <http://www.jdhconsult.com/dridholmes.html#dridh>

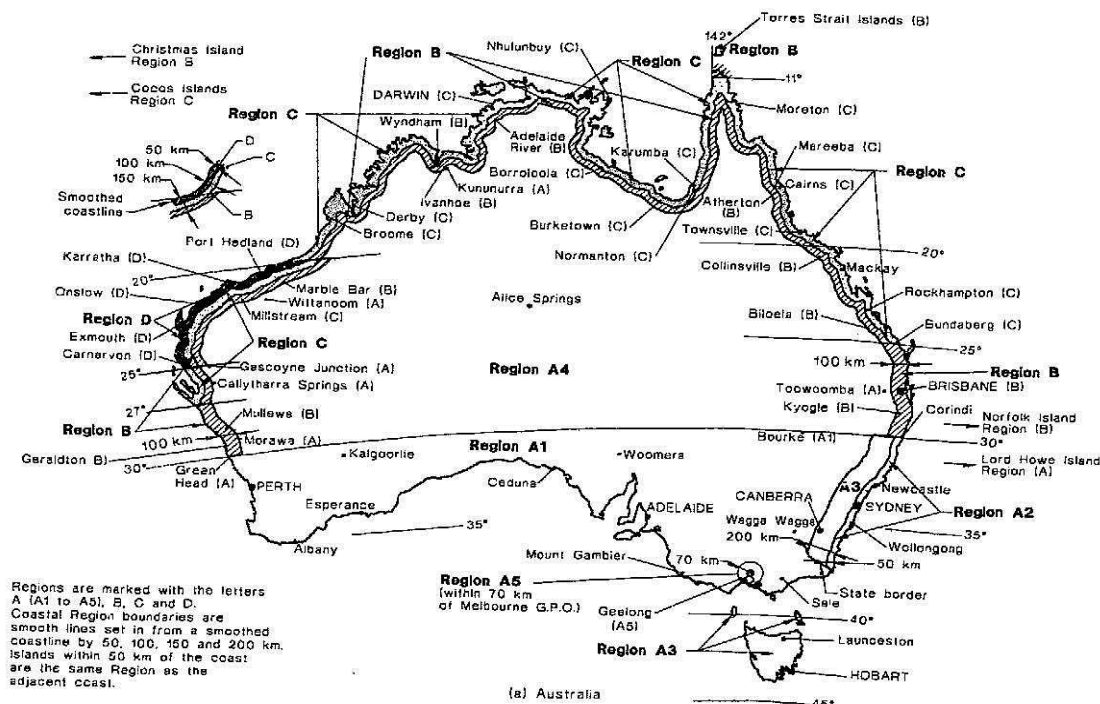
¹⁷⁹ Australian Building Codes Board (ABCB) report entitled *Final RIS – Construction in Cyclone Regions*, February 2012, 32-33; <http://www.abcb.gov.au/consultation/regulation-impact-analysis/final-ris-for-decision>

¹⁸⁰ *id.*, 81-84

weather event. As was submitted, debris caused from a failed structure can also cause significant damage to surrounding buildings and potentially injure its occupants.

[769] For these reasons, there is no demonstrable case for Government to increase the scope of self-assessable and exempt building work in locations contained within Wind Region C (tropical cyclone area) as identified in Figure 1 below.

Figure 1¹⁸¹



Suggestions for expanding the scope

[770] During the course of the Review, numerous suggestions were received regarding the various types of building work that should be made exempt or self-assessable. Table 6 below identifies a number of types of building work that it was suggested should be made exempt or self-assessable. It also identifies whether the suggestion is already provided for in either Schedule 1 or Schedule 2 of the *Building Regulations 2006* as being self-assessable or exempt. Where the type of work is not currently contained in either Schedule 1 or Schedule 2 of the *Building Regulations 2006*, the author's view is provided as to whether an amendment should be made to make it self-assessable or exempt.

¹⁸¹ Figure 3.1(A) of AS/NZS1170.2:2011

Table 6 – Building work suggested to be exempt or self-assessable

Description of work	Self-assessable in Sch 1 of the Regulations	Exempt in Sch 2 of the Regulations	Review author's comments
Unroofed timber decks or pergolas < 1m in height of unlimited floor area	Item 13		
Swimming pools			Should remain assessable (Reason 1)
Gatehouses	Item 13(2)		
Play equipment and cubby houses up to 3.0m high		Item 1	
Shade sails up to 20m ² (not within wind region c and not attached to a building)			Agreed – Self-assessable
Small open horse shelters and similar structures on rural properties		Item 4	Should remain exempt as is. Insufficient technical data to warrant amending the distance to boundary
Small sheds, bird aviaries, dog houses	Item 13(2) provided <10m ²		Amend to allow <15m ² but retain current height restrictions
Above ground rainwater tanks < 2.4m in height located outside the front setback or prescribed building envelope under a planning scheme	Arguably contained in Item 13(2)(b) provided <10m ²		Agreed this should be clarified and amended to allow <15m ² as Self-assessable
Solar installations on roofs where under 10m ² in plan area and not more than 0.3m above the roof surface	Item 15(a) no restriction on area		
A reduction in the distance from 200 metres from a boundary of a rural property for the construction of a Class 10 structure		Item 4	Should remain exempt as is. Insufficient technical data to warrant amending the distance to boundary
All detached garages, sheds and carports unless in a cyclone area			Should remain assessable if >15m ² or if in Wind Region C (Reason 1)
Sheds less than 20m ² in a cyclonic area should be self-assessable, sheds less than 10m ² should be exempt			Should remain assessable if in Wind Region C (Reason 1)
Attaching patios to dwellings <10m ²	Arguably Item 13(2) but should be clarified		Should be clarified as self-assessable if <15m ² unless in Wind Region C

Flagpoles up to 4.0 m in height	Item 2(1)(d)		
Replacement of approved: ➤ Stairs and handrails as maintenance; ➤ Pool fencing; ➤ Above ground pool or spa; Provided the works are done to the current code	- Item 7		Replacement of pool fencing (other than minor repairs) should remain assessable. Should remain assessable
All class 10a prescribed building works			Should remain assessable if >15m ² or if in Wind Region C (Reason 1)

[771] Where the Review has indicated in Table 6 above, that the works should remain assessable development ‘(Reason 1)’, the Review has done so on the grounds that making the building work self-assessable or exempt could lead to health and safety issues for occupants of the building or the general public.

Greater clarity of what is self-assessable and exempt building work needed

[772] It is not surprising to learn that a number of submissions were put to the Review that called for various types of work to be classified as self-assessable when it appears, at least to the Review, that they already are. The Review agrees with the submissions of the HIA that the different types of work contained within Schedules 1 and 2 do require clarifying. In particular the Review refers to:

- The self-assessable work identified in Item 13 of Schedule 1 (Other work for class 10 buildings or structures) of the *Building Act 1975* is clumsily worded and has been the source of some confusion. It should be re-worded to make it clear that:
 - Class 10 structures within Wind Region C (tropical cyclone area) mentioned in AS 1170.2 SAA Wind Loading Code; and
 - A rainwater tank for a new building; and
 - A deck that is roofed or higher than 1m above the deck’s natural ground surface; and
 - A chapter 8 pool or its fence

are not self-assessable work even if they otherwise comply with, among other things the maximum 10m² rule contained in Item 13(2).

- The provision of rainwater tanks. It was submitted that rainwater tanks with a maximum height of 2.4mts should be permitted as self-assessable building work. It appears that they already are under Item 13(2)(b) of Schedule 1 of the *Building*

Regulations 2006. However, the wording of the provision should be clarified.

- The exempt work identified in Item 4 of Schedule 2 of the *Building Act 1975* as they relate to buildings on land used for agricultural, floricultural, horticultural or pastoral purposes. Further investigations should be undertaken to determine whether the 200m minimum setback for Class 10 buildings is appropriate.

Change in plan area to no more than 15m²

- [773] For areas other than in Wind Region C, the Review is satisfied that the plan area referred to in Item 13(2)(a) of Schedule 1 of the *Building Regulations 2006* could be increased to no more than 15m², provided that any one length of a wall does not exceed 5m. This would essentially mean that the current “garden variety” 3m x 3m garden shed could be increased to 5m x 3m.
- [774] Whilst the following remarks should be confirmed with a registered structural engineer, it is likely that the current commonly used metal cladding which constitutes the structural elements of a 3m x 3m shed would similarly be able to be used on a shed of up to 5m x 3m. This would prevent the necessity of having more solidly framed buildings which could cause more damage to nearby buildings and property in the event of failure in a severe weather event. It would also obviate the need for the inspection of footings and tie downs and the like.
- [775] There is unlikely to be any significantly greater proportional uplift on a 5m x 3m shed than a 3m x 3m shed, by virtue of its greater tie down capacity and the roof sheeting would continue to brace the 5m long walls. However, the Review considers that the length of such a building should be capped at 5m to prevent such from being used as a carport. This is also consistent with the requirement in Item 13(2)(c) of Schedule 1 of the *Building Act 1975*.
- [776] The Review is satisfied that the plan area of Class 10a buildings in non-cyclonic areas should be able to be increased from 10m² to 15 m² without representing an undue risk to the health, safety and wellbeing of building occupants or the general public. The proposed permitted size of these class 10a buildings would allow for larger sheds and other structures to be self-assessable, whilst buildings the size of single carports and larger, with their necessary heavier frames and building components would remain assessable development and therefore requiring building development approval.

Qualifications on self-assessable work

[777] The Review also agrees with the submissions of Neil Oliveri that for the sake of ensuring the structural integrity of a building and surrounding building work and the health, safety and amenity of its occupants, what would otherwise be regarded as self-assessable work should require building development approval where:

- The proposed work is within the zone of influence of any service such as water, sewer, or stormwater; and
- Within the zone of influence or 1.5m horizontal distance of any retaining wall.

Questions 2.4.1 and 2.4.2: Recommendations

[778]

59.	In the interests of public safety, there is no demonstrable case for Government to increase the scope of self-assessable and exempt building work in locations contained within Wind Region C (tropical cyclone area) as mentioned in AS/NZS1170.2:2011.
60.	In the case of building work in locations contained within Wind Region B, as mentioned in AS/NZS1170.2:2011, it is recommended that Schedule 1 of the <i>Building Regulations 2006</i> be amended to allow the following additional work to be constructed without a building approval (self-assessable building work): (a) Shade sails up to 20m², not attached to a building; (b) Class 10a buildings with a plan area not more than 15 m²; (c) Above ground water tanks not more than 15m² in plan area and not more than 2.4m in height located outside the front setback or prescribed building envelope under a planning scheme; (d) Patios with a plan area not more than 15m² and attached to a dwelling should be classified as self-assessable.
61.	The prescribed work contained in Schedules 1 and 2 of the <i>Building Regulation 2006</i> should be clarified: (a) In accordance with paragraph [772] herein; and (b) To ensure that the self-assessable or exempt building work identified therein, overrides any contrary provision in a local law or local planning scheme.
62.	Schedule 1 of the <i>Building Regulations 2006</i> should be

	<p>amended to provide that what would otherwise be regarded as self-assessable building work should require building development approval where:</p> <p>(a) The proposed work is within the zone of influence of any service such as water, sewer, or stormwater; and</p> <p>(b) Within the zone of influence or 1.5m horizontal distance of any retaining wall.</p>
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3.0 Inspection and certificates

Question 3.1.1: Do you think the current [Form 15] and Form 16 should be reviewed?

Question 3.1.2: If so list any possible changes or improvements.

Question 3.1.3: Do you think the use of competent persons should be restricted to certain aspects of building work?

Background (General)

[779] A common criticism made of building certifiers encountered during the Review is that they have simply become “paper shufflers”. It has been alleged that some building certifiers no longer perform building inspections but rather delegate this responsibility to cadet building certifiers, or engineers, or QBCC licensees. Some submitters argued that the purported relaxation in building standards in Queensland is attributable to the “cop no longer being on the beat”, but rather the “cop choosing to remain inside the station house”.



Feature on: www.theoilstone.com.au

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[780] The Review hastens to add that this perception held by some, was vigorously opposed by many building certifiers who insist that they diligently go about their business and take their responsibilities to

¹⁸² <http://theoilstone.com.au/guide-to-understanding-form-16s-first-installment/>

the public very seriously. That said, some of the harshest criticisms leveled at a small number of certifiers came from within their own ranks.

- [781] Similarly during the course of the Review, a number of submissions criticised the misuse of the Form 15 and Form 16 certificates. It has been alleged that the Form 15 and to a much greater extent the Form 16 has become a means by which tradespeople, suppliers, builders and building certifiers seek to absolve themselves from any and all liability for the building work. In addition, many building certifiers complained bitterly about the wholesale lack of understanding within the industry about the purpose of the Form 16 and how it ought to be properly completed.
- [782] The efficacy of the competent person regime and the alleged misuse of Form 15s and 16s were amongst two of the most serious issues considered during the Review. To some extent, the success or failure of the private certification system in Queensland rides on the competent person regime and the use of Form 15s and 16s. Given the interrelation between these issues, it is appropriate that they be considered together.

3.1.1 Form 15s and 16s

Further background

- [783] The Discussion Paper queries whether the Form 16 provides sufficient information for its purpose and whether the QBCC should implement increased and targeted auditing of the use of Form 16s. It also raises the prospect of whether an education campaign would be beneficial.
- [784] Although the Discussion Paper does not expressly refer to a review of the Form 15 (the compliance certificate for building design or specification), given its connection with the inspection/reporting process under the Building Act 1975 and Building Regulation 2006 and as a number of submissions were made in respect to it, a review of the Form 15 has been incorporated into this report.

Relevant legislative provisions

Inspections of assessable work

- [785] The inspection of assessable work is considered in detail in respect to Questions 3.2.1 – 3.3.1 below.

Inspection Certificates - Form 16s

- [786] Pursuant to s.31 of the *Building Regulation 2006*, the inspecting person must inspect the work to ensure the person is satisfied all relevant aspects of the stage under the building development approval have been completed and comply with the approval. However, subject to subsection (4), the inspecting person may accept an aspect inspection certificate (Form 16) for an aspect of the stage, instead of inspecting the work.
- [787] Pursuant to s.31(4) of the *Building Regulation 2006*, for a single detached class 1a building, the inspecting person must not accept inspection certificates for *all* aspects of the final stage. In other words, the building certifier must personally or via another building certifier, at least inspect the final stage of the assessable building work.
- [788] Pursuant to s.32 of the *Building Regulation 2006*, if the inspecting person has complied with s.31 and is satisfied all relevant aspects of the stage under the building development approval have been completed and comply with the approval, the inspecting person must give the builder a certificate of inspection for the stage (Form 16).
- [789] Pursuant to s.32(3) of the *Building Regulation 2006*, the certificate of inspection must:
- Be in the approved form; and
 - Be signed by the inspecting person; and
 - State in detail:
 - The basis for giving the certificate; and
 - The extent to which the inspecting person has, in carrying out the inspection, relied on tests, specifications, rules, standards, codes of practice or other publications.
- [790] Pursuant to s.33 of the *Building Regulation 2006*, if the inspecting person is not satisfied that all relevant aspects of the stage under the building development approval have been completed and comply with the approval, the inspecting person must give the builder a noncompliance notice stating:
- The stage does not comply with the building development approval; and
 - How it does not comply with the approval.

If the inspecting person is a competent person, the inspecting person must also give the building certifier a copy of the noncompliance notice.

- [791] Pursuant to s.34 of the *Building Regulation 2006*, a builder who has been given a noncompliance notice must perform the work required to ensure the stage the subject of the notice complies with the building development approval and must give the building certifier another notice for inspection of the work.
- [792] Pursuant to s.35(1) of the *Building Regulation 2006*, if a builder does not comply with s.34, the building certifier must take enforcement action against the builder. If the building certifier gives the builder an enforcement notice and the builder does not comply, the certifier must notify the QBCC and if the assessment manager was a private certifier, the local government.

Pool inspections – Form 16

- [793] Pursuant to s.35B of the *Building Regulation 2006*, the building certifier must inspect, or ensure that another building certifier inspects a pool as soon as practicable after the inspection day and before the building development approval lapses. If the inspecting certifier is satisfied that all relevant aspects of the final stage of the pool work have been completed and comply with the building development approval, the inspecting certifier must give the pool builder a certificate of inspection for the stage (Form 16).

Certificate for an aspect of building work – Form 16

- [794] Pursuant to ss.42 and 43 of the *Planning Regulation 2006*, if building work which is performed in relation to a single detached class 1a building or a class 10 building or structure is carried out for an aspect of the building work and the aspect was carried out by a QBCC licensee of an appropriate class for the aspect work or the person may give a QBCC licensee certificate for the aspect work, a QBCC licensee may give the building certifier a certificate in the approved form (Form 16) that the aspect work complies with the approval.

QBCC licensee certificate for self-assessable building work – Form 16

- [795] If building work is prescribed under Schedule 1 of the *Building Regulation 2006* and is not subject to a building development approval, the QBCC licensee may give the builder for the building work or the owner a certificate (Form 16) that the aspect work complies with s.21(1)(b) of the Building Act 1975.

Building work other than class 1a or class 10 – Form 16

- [796] For building work other than a single detached class 1a or class 10 building or structure, a competent person may under s.47 of the *Building Regulation 2006* give the building certifier a certificate (Form 16) for a stated aspect of the work if the competent person has inspected the aspect of the work and is satisfied that the aspect has been completed and complies with the building development approval.

Certificate about building design or specification - Form 15

- [797] Pursuant to s.46 of the *Planning Regulation 2006*, a competent person (in respect to design/specification) may give the building certifier a certificate (Form 15) that a building design or specification will, if installed or carried out under the certificate, comply with the building assessment provisions.

Competent person must inspect and be satisfied that it complies with the BDA

- [798] Subject to the specific requirements contained in s.47A of the *Building Schedule 20006* in respect to certificates for aspects in relation to boundary clearances and the reinforcement of footing systems, provided the certificate complies with the requirements set out in s.48, a competent person (in respect to inspections) may give the building certifier a certificate for a stated aspect of the work if:

- The competent person inspects the aspect of the work; and
- The competent person is satisfied that the aspects of the work have been completed and comply with the building development approval.

- [799] Pursuant to s.48 of the *Building Regulation 2006*, the certificate of inspection must:

- Be in the approved form; and
- Be signed by the inspecting person; and
- State in detail:
 - The basis for giving the certificate; and
 - The extent to which the inspecting person has, in carrying out the inspection, relied on tests, specifications, rules, standards, codes of practice or other publications.

Relying on the inspection certificate

[800] Pursuant to s.49 of the *Building Regulation 2006*, a building certifier may accept and without further checking, rely on a certificate from a competent person if:

- The certifier has under part 5 decided the person is a competent person of a type relevant to the functions; and
- If the person was decided to be a competent person only for a particular aspect of the decided type – the certificate relates to the aspect; and
- If the person was decided to be a competent person only for particular assessable building work – the certificate relates to the building work; and
- The person was, under part 5 and this part, permitted to give the certificate; and
- For a certificate that is an aspect inspection certificate, the person complied with s.47A; and
- The certificate complies with s.48.

[801] In a similar fashion to s.49 of the *Building Regulation 2006*, pursuant to s.50 of the *Building Regulation 2006*, a competent person may accept and, without further checking, rely on a certificate from another competent person determined by the building certifier.

Feedback outcomes

[802] Of the written submissions and completed surveys responding to Question 3.1.1, 50% of submitters agreed that the current Form 16 should be reviewed, whilst 29% of submitters did not, 6% had other suggestions on how to resolve the question and 15% did not address the question.

[803] Where a submitter has made separate submissions in respect to the Form 15s and 16s and the competent person regime, the Review has sought to deal with those submissions separately. Some submitters however dealt with the submissions concurrently.

Support for reviewing the use of Form 15s and 16s

Form 15s

[804] The Australian Institute of Architects argued that in respect to Form 15s, some certifiers are requesting signed 'Design Statements' from architects that should be covered by Form 16s signed by the relevant services and structural engineers and/or they should be

assessed by the certifier themselves. The Australian Institute of Architects argued that these were in essence a defacto 'Form 15' which it argued was not intended for architects. It called for clarification in a guideline to be issued.

- [805] Builder and building designer Glen Place argued that there is an over-reliance on competent persons for matters which are clearly within the scope of a competent building certifier's expertise. He argued that this over-reliance was impacting on the efficient operation of building design practices. He suggested that the use of Form 15s and the competent person regime be the subject of greater scrutiny¹⁸³.

Form 16s

Delaying Certificate of Classification

- [806] As to the issue of the misuse of Form 16s, the Australian Institute of Architects argued that there are increasing instances of delaying the issuing of a Certificate of Classification as a result of unfulfilled requests for Form 16s for matters that do not fall under the jurisdiction of the BCA, for example a structural engineer's certificate requested for a light fitting bracket or other matters not covered or required under Section B – Structure of the BCA.

Further education is required / split the forms

- [807] As was rightly submitted by AIBS, the current Form 16 is a multi-use form. It can be used for an inspection certificate for a stage of work, an inspection certificate for an aspect of work, or a QBCC Licensee Aspect certificate. AIBS argued that this multi-use dimension has made the form confusing which has resulted in the form not being completed correctly. AIBS argued that many competent persons still do not understand the difference between a stage and an aspect of a stage, nor the difference between an aspect and QBCC licensee aspect certificate. Further, AIBS argued that many industry stakeholders view Form 16s as some form of absolution of responsibility.
- [808] AIBS advocated for:
- Three separate forms with a clear warning at the signature section of what it was that the competent person was in fact certifying;
 - To ensure greater consistency and to provide assistance to trade contractors who are often unaware of what to include in

¹⁸³ Building Designers Association of Queensland made identical submissions

Form 16s, standard template forms should be made available to trade contractors to ensure that the correct reference is given to appropriate Australian Standards for example.

- [809] Mr. Ain Kuru suggested that a new form should be developed for each stage so as to make it clear that the stage is complete. Mr. Kuru argued that having an inspection document for each stage would make it clear what aspects have been inspected by competent persons.
- [810] Private certifier Tony Jaques suggested there was merit in separating the 'inspection' and 'aspect' components of the Form 16 into two different forms.
- [811] In a number of survey responses, it was argued that the current Form 16 is complicated because it deals with aspects as well as stages. The submitters argued that the aspect form should be simplified because contractors do not seem to understand it. In addition, a form strictly used for stages should be introduced. It was argued that the current form is too long.
- [812] In another survey, the submitter stated:

"I know you are chasing a red tape reduction in one ideal but the form should have been three separate forms from day one. To do so is in effect a red tape reduction of the waste of time spent chasing competent persons to fill out the form the correct way."

Form 15s/16s and competent persons

- [813] Whilst HIA considered that the use of competent persons and Form 16s work reasonably well, particularly in regional Queensland, HIA advised that it has lobbied BCQ for a number of years to provide additional guidance about when and where it is appropriate to require the use of both Form 15s and 16s acknowledging that in some instances there appears to be an over-reliance on the use of these forms. HIA supports a more robust auditing program of construction work (and assumedly of certification work) by the QBCC.
- [814] QFES raised concerns that some private certifiers appear to accept Form 15s and 16s without question, even when they may be incorrect or incomplete. QFES acknowledges the important role that these forms can play if all parties fulfill their obligations in providing and receiving them, however it supports a review into their use as it does in respect to the competent person regime.
- [815] Timber Queensland offered the following suggestions to improve the competent person regime and the use of Form 15s and 16s:

- *“Certifiers need to be provided with clear Guidelines to enable them to adequately assess the ‘competence’ of a person for specific tasks. For example, provision of Form 15’s for the design and fabrication of timber wall and floor frames and roof trusses. What makes a person competent for this task? Truss and Frame Estimators typically provide the Form 15’s for these products and systems but they are not licensed, may or may not have formal qualifications and will have varying years of industry experience.*
- *What records are required to be established and recorded by certifiers for the “competent person” that they accept Form 15 and 16’s from?*
- *Greater clarity is required on Form 15 or 16’s to specifically detail what they cover. Many that are provided are very vague in respect of what they actually cover.”*

Support for status quo

[816] Although the statistics in Annexure A reveal that 29% of submitters did not think that the Form 16s should be reviewed, the vast majority of written submissions provided at least some feedback or suggestions on how the current Form 16s could be improved.

Support for other reforms

Form 16s – Insurance policy

[817] The National Fire Industry Association made a valuable contribution to the debate. Its submissions are worth extracting in full:

“While on the face of it, the actual form itself is satisfactory for the purpose intended, the real fault is that it is widely perceived to be used simply as a form of insurance policy to protect the BC [Building Certifier] – rather than as a genuine assessment of the correctness and compliance of the work performed. That perception is generated by particularly anecdotal evidence of unqualified persons signing off the form without question by the BC...

The present BC / Builder/ Principal Contractor relationship has confused the work, role and outcomes of Building Certification, the most glaring example being the F16 sign-off requirement often specified and enforced through the commercial contractual demands of the Builder/ Principal Contractor upon the subcontractor – and required to be actioned by the Builder/ Principal Contractor’s BC – where there is simply no connection to any legislative or building code requirement. The Builder/ Principal Contractor demand in these circumstances is simply a commercial practice aimed to create inequitable risk allocation onto the subcontractor.”
[Emphasis added]

[818] To gain another perspective from that provided by the National Fire Industry Association, private certifier Neil Oliveri submitted:

“Unfortunately the certification industry has developed a culture of certificate collection. I believe the increase in reliance on certificates is twofold; Firstly, that through the civil litigation process we are liable for a building to the day we die and secondly that when questioned by our very own Commission, council or even a buyers solicitor the question is always asked – where is your Form 16 (for that relevant aspect of work).

We have by and large relied on certificates as a backup should a problem arise in the future. It is neigh on impossible to justify ourselves years down the track should a problem like waterproofing arise if we don’t have a certificate for the installation.

Limitations and more importantly, clarifications on which aspect certificates can be relied upon would help the industry immensely. This would seek to ensure that we as certifiers are not too onerous to our clients on the paperwork required, that certifiers are not too reliant on certificates for aspect we can or should inspect and finally that the remainder of the industry understands their obligations.” [Emphasis added].

- [819] Local Government building compliance officer Anna Sissman suggested that the use of Form 16s should be the subject of more auditing by the QBCC. She also suggested that a brief guideline could be introduced which outlines the expectation of how and when the Form 16 should be used.

Consideration

- [820] It is apparent that the use of Form 16s and to a significantly lesser extent, the Form 15s are being misused by industry stakeholders. It is also clear that a culture has emerged whereby building certifiers seem to be of the view that if they have a signed Form 16 they are ‘off the hook’ from a liability perspective. There is anecdotal evidence that some building certifiers seem willing to accept a Form 16 whether or not they know or suspect that the work has not been performed correctly.
- [821] It is perhaps understandable that a building certifier will seek to limit their liability in an often-litigious environment, but the fact remains an invalid Form 16 is as good as having no Form 16 at all¹⁸⁴.
- [822] In the Victorian Supreme Court decision of *Toomey v Scolaro’s Concrete Constructions Pty Ltd (in liq) (No.2)*¹⁸⁵, Eames J held the building surveyor (certifier) was not afforded immunity under s.128 of the *Building Act 1993* (Vic) for the actions of an inspector who approved a balustrade less than the BCA required 1000mm

¹⁸⁴ *QBCC v Weber* [2014] QCAT 448 at [59] – [67] per Member Browne; *Cullinan v QBCC* [2014] QCAT 337 at [60] [61] per Member A Fitzpatrick

¹⁸⁵ [2001] VSC 279

height. The plaintiff, who was “severely intoxicated” and “skylarking” fell over the handrail suffering quadriplegia.

- [823] Eames J held at [270] that the equivalent of the Form 16 was not completed with sufficient particularity because it failed to identify the sections of the Act, regulations or code that the work the subject of the inspection was required to comply with. At [271] –[272] Eames J said:

“Given, further, that the surveyor is meant to be an expert as to the legislative provisions (and is much more highly qualified than an inspector) it would be perfectly reasonable that the inspector’s opinion of the relevant provisions should be specified so that they might be checked by the surveyor before acting on the certificate. After all, what service is it for which the surveyor charges his fee - a much larger fee than that of the inspector? The fee charged is for the performance of a duty which under the legislation remains the surveyor’s own obligation, notwithstanding that the mechanical task of inspection may be delegated.

I conclude that the certificate presented by Smith [the inspector] did not comply with the regulations, and on that basis alone the immunity provisions would not apply. However, be I wrong as to that, the very fact that the form was completed in the minimalist manner in which it was would be an important factor in the question whether there was good faith accompanying the reliance on it.”

- [824] Then at [282] – [284] Eames J found the building surveyor Young and the company for which he worked liable. In what should be a salutary warning to all building certifiers and inspectors, he said:

“The situation was that Smith had completed a Form 14 (after seeking advice as to how he should do so) in terms which were so sparse as to provide no information at all. He was unknown to Young personally. If Smith held the absurd belief that the inspector did not need to measure a balustrade, Young did not ask a single question to establish that fact. The surveyors knew that Smith was being paid an absurdly low monthly fee, from which he had to pay all expenses. A reading of the list of site inspections would have demonstrated that he could not have been earning more than about \$10 per visit, in some months when he made multiple site visits. There was every reason to fear that he might cut corners in those circumstances.

In my opinion, Young adopted an entirely “hands off” approach towards his own and Bigridge’s statutory and contractual obligations to inspect the project. It can not be acting in good faith to do nothing at all, in these circumstances, so as to check that the inspections were being properly conducted. Smith was inspecting for safety issues. Bigridge was being well paid for inspections under its contract and its income from its fees for inspection was not greatly reduced by virtue of its payment of the modest fees charged by the man who was doing all the work.

In my opinion, blind disinterest is not good faith and the s. 128 statutory immunity is not available to Young, nor, therefore, can Bigridge gain any indirect protection as to its vicarious liability for any negligence of Young."

[825] There are a number of issues at stake with the misuse of Form 15s and 16s and these are:

1. Lack of knowledge and/or understanding by building professionals, building certifiers, builders and subcontractors as to:
 - When Form 15s and 16s are required;
 - Why they are required;
 - What the distinction is between:
 - An inspection certificate for a stage of building work; and
 - An inspection certificate for an aspect of building work; and
 - A QBCC Licensee Aspect Certificate.
2. The design of the Form 16 itself;
3. Lack of accountability.

Education

[826] The first of the above issues should be addressed by:

- (a) The development of a guideline to assist stakeholders about the purpose, significance, how and when it is appropriate to complete and accept Form 15s and Form 16s.
- (b) An education program for all building professionals and all licensees including building certifiers, builders and trade contractors. This issue should be the focus of CPD training.

Design

[827] Subject to Recommendation 68, the current Form 15 does not require any major amendments.

[828] The second of the above issues should be addressed by making amendments to the Form 16 itself. A very common submission made to the Review is that having one form for three different types of certificates is simply not working. This well-intentioned desire to cut red tape by joining three forms into one is creating more problems for stakeholders than it addresses. Given the extent of misunderstanding within the industry about what the Form 16 is and when it should be used, the Form 16 should be split into three separate forms and that the website which provides copies of the forms should also provide properly completed pro forma example forms to assist those who are required to fill them out.

[829] Greater assistance also needs to be provided in respect to section 5 of Form 16 which requires the person completing the form to detail the basis for giving the certificate and the extent to which tests, specifications, rules, standards, codes of practice and other publications were relied upon in certifying the stage or aspect. Anecdotal evidence provided to the Review is that this section of the Form 16 is often filled out incorrectly or not at all. The Review suspects that this is more a matter of ignorance than recalcitrance and is something that is capable of being addressed via targeted CPD programs.

Accountability

- [830] In an effort to increase the accountability of all building industry stakeholders:
1. The QBCC should instigate the targeted auditing of building certifiers to identify the inappropriate use of what are currently Form 15s and Form 16s; and
 2. Form 15s and 16s should be amended to require an acknowledgement that the design/work has been prepared/completed in accordance with the relevant tests, specifications, rules, standards, codes of practice and other publications and that the person acknowledges that the inappropriate issuing and acceptance of the Form may result in demerit points being allocated for both the offending licensee (where applicable) who issues it and the building certifier who accepts it.

Question 3.1.1: Recommendations

[829]

63.	The <i>Building Act 1975</i> Forms 15 and 16 should be reviewed and amended in accordance with these Recommendations.
64.	All QBCC licensees, including building certifiers and other building professionals such as architects, engineers and cadastral surveyors require education about the purpose, significance, how and when it is appropriate to complete and accept Form 15s and 16s. This could be achieved by the development of a guideline issued by the chief executive, appropriate CPD programs and liaising with professional bodies.
65.	Subject to the changes in Recommendation 68, the current Form 15 should remain unchanged.

66.	<p>The current Form 16 should be split into three separate forms:</p> <ul style="list-style-type: none"> (1) Inspection certificate for a stage of building work; (2) Inspection certificate for an aspect of building work; and (3) QBCC Licensee Aspect Certificate. <p>The website which provides copies of the forms should also provide properly completed pro forma example forms to assist those who are required to fill them out.</p>
67.	<p>The inappropriate issuing <u>and acceptance of</u> Form 15s and 16s should be subject to stricter auditing by the QBCC and demerit points should be allocated for both the offending licensee (where applicable) who issues it and the building certifier who accepts it.</p>
68.	<p>Both Form 15s and 16s should be amended to require an acknowledgement that the design/stage/aspect has been prepared/completed in accordance with the relevant tests, specifications, rules, standards, codes of practice and other publications and that the person acknowledges that the inappropriate issuing and acceptance of the Form may result in demerit points being allocated and/or an infringement notice to both the offending licensee (where applicable) who issues it and the building certifier who accepts it.</p>

3.1.2: Competent person regime

Feedback outcomes

[831] Of the written submissions and completed surveys responding to Question 3.1.3, 51% of submitters supported restricting the use of competent persons to certain aspects of building work, whilst 23% of submitters were opposed to the suggestion, 11% had other suggestions on how to resolve the question and 15% did not address it.

Further background

[832] The Discussion Paper raises the prospect of restricting the use of competent persons to only obtaining help for:

- Aspects of construction that are outside of the certifier's particular areas of expertise;
- Aspects of construction that involve an alternative solution;
- Construction that is undertaken in a remote location; and
- Certain aspects of building work that pose particular problems for certifiers undertaking inspections, for example waterproofing.

[833] The Discussion Paper also refers to the introduction of the fourth level of building certifier for inspection work. This issue has been addressed in Recommendations 16-18.

Relevant legislative provisions

Competent person regime

[834] The competent person regime is established in Part 5 of the *Building Regulation 2006*.

[835] Pursuant to s.17 of the *Building Regulation 2006*, the purpose of the competent person regime is to provide building certifiers with an option to seek assistance from a third party who is:

- Competent to perform functions that help the certifier perform building certifying functions for building design or specification; or
- Competent to perform functions that help the certifier perform building certifying functions for the inspection of assessable building work.

In either instance, the third party is known as a competent person and can fulfill one or both duties.

- [836] Pursuant to s.18 of the *Building Regulation 2006*, if the competent person is required to be licensed or registered by law, they must be so and the building certifier must also satisfy themselves that the person is competent to be able to give the help required by assessing the person's experience, qualifications or skills. If the person is not required by law to be licensed or registered, the building certifier must still satisfy themselves that the person is competent to be able to give the help required by assessing the person's experience, qualifications or skills.
- [837] The chief executive has, pursuant to s.18(4) of the *Building Regulation 2006* approved guidelines for making an assessment of whether a person is competent¹⁸⁶. A building certifier must have regard to the guidelines made by the chief executive under s.258 of the Building Act 1975 that are relevant to performing a building certifying function¹⁸⁷.
- [838] Some aspects of building work can only be assessed by a competent person with particular qualifications, for example an individual must be a cadastral surveyor to be competent to give inspection help for the boundary clearances of building work for a single detached class 1a building. Similarly, an individual must be a registered professional engineer to be competent to give inspection help for the reinforcement of footing system aspects for a single detached class 1a building¹⁸⁸.
- [839] Pursuant to s.19 of the *Building Regulation 2006*, a building certifier who decides an individual is a competent person, must for at least 5 years keep a record of the decision setting out certain requirements including the details of the documents relied upon to make the decision and his or her reasons for the decision.
- [840] Pursuant to s.21(1) and (2) of the *Building Regulation 2006*, in respect to assessable building work for a single detached class 1a building or a class 10 building, unless a competent person is a building certifier, the competent person cannot sign a certificate of inspection for:
- The stage of the work that is after excavation of the foundation material and before any footings for the building or structure are laid; or
 - The final stage of the work.

¹⁸⁶ <http://www.hpw.qld.gov.au/SiteCollectionDocuments/guidelines-assessment-competent-persons.pdf>

¹⁸⁷ See s.133A of the *Building Act 1975*

¹⁸⁸ See s.18A of the *Building Regulation 2006*

- [841] However, s21(3) of the *Building Regulation 2006* renders this exclusionary provision almost devoid of any purpose because pursuant to subsection (3), a competent person who is not a building certifier may give 'other inspection help' if the building certifier decides the person can give the help.
- [842] Pursuant to s.22 of the *Building Regulation 2006*, a competent person can only give inspection help if the building certifier has already decided that the person is a competent person for the work. A competent person can not sign a certificate of inspection for a stage of the building work if the person:
- Is the builder for the work; or
 - Has carried out building work for any aspect of the stage.
- However, this does not prevent the person giving a certificate under part 7 for the work, if under that part, the person can give the certificate, that is, if the person is a QBCC licensee and is providing a QBCC licensee certificate for the aspect of the work.
- [843] Pursuant to s.23C of the *Building Regulation 2006*, a building certifier may decide a cadet building certifier is a competent person, unless the building certifier is:
- The cadet's supervising certifier; or
 - The cadet's employer; or
 - Employed by the same employer as the cadet.

Support for change

- [844] The competent person regime in its current form was identified by AIBS as being problematic. It provided the following suggestions and comments on how the regime could be improved:
- Due to both commercial reasons and or client pressures the use of competent persons for particularly "inspection help" is being over used for aspects and stages that are clearly within the level of competency of the building certifier;
 - The term 'remote area' in the legislation needs to be refocussed to the location of the certifier to the particular job, not where the job is located on a map;
 - Builders should not be permitted to inspect work on behalf of certifiers, but AIBS acknowledges that it is happening;
 - The introduction of a Level 4 building inspector would go a long way to reducing the overuse of competent persons being used by industry;

- Rationalisation of the assessment of competent persons is required and it is essentially a doubling up of the licensing or accrediting body's actions;
- The fundamental intent of the inspection guidelines is to promote a requirement that a building certifier periodically inspect critical areas of the project in order to establish that works are being carried out in accordance with building legislative requirements.

Remote certifying

- [845] A number of submissions were received which questioned the practice of what appears to be commonly referred to as 'remote certifying'. That is when a building certifier performs his or her certifying function from a location which is remote to the subject property.
- [846] In a written submission from the Cassowary Coast Regional Council, it was suggested that post Tropical Cyclone Yasi, when hundreds of houses suffered significant damage, many of the private certifiers who assessed applications for building development approval never attended the sites, but instead, relied upon competent persons to inspect the works. The submitter argued that this was not consistent with the original intent of the building legislation.

Assessing the competency of competent persons

- [847] Central Highlands Regional Council argued that building certifiers should not have to assess the competency of a qualified professional. It suggested that this assessment should be done by either the QBCC or a professional body who has experience in accrediting and/or regulating the profession. It argued that judging by the Form 15s and 16s presented to it by building professionals, it is they who need education and awareness not the building certifiers.
- [848] The Board of Professional Engineers of Queensland, which supports the review into the use of competent persons and the Form 15s and 16s, said that building certifiers need to take greater responsibility to ensure that where a building certifier relies upon a competent person, that that person is in fact competent.
- [849] On the other hand, one private certifier who argued that he did 90% of his own building inspections and only used other building certifiers to do the rest. The building certifier said that he refused to use engineers as competent persons because of what he

considered was their predisposition to using non-qualified people to inspect the works on the engineer's behalf. The building certifier expressed concerns about the contents of some Form 16s provided by engineers but said that because they are issued by an engineer, the Form 16s cannot be questioned.

- [850] Private certifier Styles Magwood argued in his written submissions that the assessment of whether a person is competent is supposed to be made before they do the work, but often building certifiers are called upon to accept a Form 16 from a person that they know nothing about. Consistent with a number of submissions that have been made, Mr. Magwood argued that often, the Form 16s are filled out incorrectly by contractors.
- [851] One survey respondent argued that where a competent person is licensed or registered by a professional body, the building certifier should be able to rely upon a Form 15 or 16 issued by such a licensed or registered person without the certifier having to further satisfy themselves that the person is competent.

Licensing system is confusing and needs greater accountability

- [852] Private certifier Claude McKelvey contended that tradespeople need a greater degree of accountability than is presently the case. He contended that the current licensing regime is "*so convoluted it would seem designed to confuse*". He suggested that a building certifier in reality performs an audit on certain stages of work to determine whether, to the best of their ability, aspects of construction meet regulatory requirements. As part of that process, a building certifier must rely upon competent persons and Form 16s because there will always be aspects of work that are outside the building certifier's expertise. Mr. McKelvey preferred a better education program on the use of competent persons and the use of Form 15s and 16s¹⁸⁹.

Restrict the use of competent persons

- [853] Private certifier Neil Oliveri accepted that the use of competent persons should be restricted to the inspection of certain aspects of work that pose particular problems for certifiers including, but not limited to:
- Termite barriers (outside area of expertise);
 - Waterproofing (outside area of expertise);
 - Electrical installations (outside area of expertise);
 - Any surveying (outside area of expertise);

¹⁸⁹ Private certifier Neil Oliveri made similar submissions

- Any structural inspections (outside area of expertise);
- Aspects of construction outside a certifiers expertise in general;
- Aspects of construction that involve an alternative solution;
- Window and door installation (not generally visible at frame inspection);
- Aspects of energy efficiency not visible at final stage;
- Aspects of bushfire construction requirements not visible at final stage;
- Aspects of structural balustrade designs and installations;
- Aspects of subsurface stormwater/roof-water system installation (not visible at inspection); and
- Construction undertaken in a remote location.

Support for status quo

[854] Local government building compliance officer Anna Sissman considered that the restrictions proposed in the Discussion Paper on the use of competent persons were too restrictive. She argued that if all stakeholders complied with their obligations under the building legislation, the current competent person regime and Form 16s are acceptable.

[855] Further Ms. Sissman suggested that building certifiers must maintain their ability to be able to call upon advice and inspection help because they cannot be expected to know everything. She also warned that to remove the ability of a building certifier to rely upon a competent person would increase their responsibilities and their risk of liability and be a further disincentive to remain or join the profession. Ms. Sissman considered that any change to limit the reliance on competent persons would also have cost consequences for building owners.

Cadet Building Certifiers

[856] In a survey response it was suggested that cadet building certifiers (with some limited exceptions) should be permitted to undertake inspections as 'competent persons'. In another survey, the submitter held the contrary view.

Support for other reforms

Action against private certifier employers

[857] QBCC Senior audit and investigations officer Philip Godfrey opposed the concept of restricting the use of competent persons. Rather, he considered that in cases involving employed certifiers, the QBCC should be able to investigate and take action against

private certifier employers and/or their directors if they or their business systems have been found to not be acting in the public interest, particularly in respect to the assessment of competent persons. The issue of accountability of certifier employers has been considered in Question 1.10.1.

Consideration

Misuse of the competent person regime

- [858] Based on the information received during the roadshows, individual interviews and the submissions and survey responses, the Review is satisfied that the current competent person regime is being misused by a number of building certifiers. The competent person regime, together with the misuse and general misunderstanding of the Form 15s and 16s has led to an unhealthy culture dominated by risk aversion rather than a desire to ensure that the work being certified has been properly performed by an appropriately qualified person.

Guidelines

- [859] The chief executive has issued a guideline for the assessment of competent persons, effective from 14 November 2003 (the competent person guideline)¹⁹⁰. The competent person guideline is outdated in that it contains a definition of the term 'competent person' from and other references to, the *Standard Building Regulation 1993* which was repealed on 31 August 2006. On that basis alone, the competent person guideline should be reviewed and amended.
- [860] The term 'competent person' is now defined in s.17 of the *Building Regulation 2006*.
- [861] The competent person guideline provides assistance to a building certifier when assessing whether a third party can be classified as a competent person. It suggests that building certifiers take into account the following considerations:
- What aspects of building work are to be certified and what is the extent of the certification?
 - Some competent persons are required to be registered or licensed under the law for example:
 - Engineers;

¹⁹⁰ *Guidelines for the assessment of competent persons* (14 November 2003)
<http://www.hpw.qld.gov.au/SiteCollectionDocuments/guidelines-assessment-competent-persons.pdf>

- Architects;
- Specialist tradespeople like electricians, pest control operators, plumbers etc.
- Only a person registered or licensed under a law applying in the state to practice in the aspect of the design, building or inspection of the building work may be assessed as a competent person. However, membership of a professional association may be an indication of the competence of a practitioner;
- The building certifier should obtain a resume from the person, detailing projects or aspect of building work previously certified of a similar nature to the type or work being certified;
- The building certifier should be careful of accepting certification from competent persons who may have questionable objectivity such as those certifying their own work. The guideline states:
"Whilst self-certification of an aspect of a stage of building work by a competent person is not unlawful, this practice is not considered to be desirable and should not be permitted to become standard practice."
- Certificates provided by a person should contain their personal signature. Certificates provided by a licensed company should contain the personal signature of the authorised person of the company who is competent to certify a material, system, method of building, building element design "or other thing under the provisions of the Standard Building Regulation" (which has since been repealed).
- Pursuant to s.19 of the *Building Regulation 2006*, a building certifier who decides an individual is a competent person, must for at least 5 years keep a record of the decision setting out certain requirements including the details of the documents relied upon to make the decision and his or her reasons for the decision. [The requirement for the documentation of reasons refers to s.23(3A) of the now repealed *Standard Building Regulation*].

Intent of the building legislation

- [862] The Review accepts the submission of AIBS that the fundamental intent of the building legislation and the inspection guidelines is to promote a requirement that a building certifier should periodically inspect critical areas of a project in order to establish that works are being carried out in accordance with building legislative requirements.
- [863] A building certifier should be able to delegate the carrying out of a mandatory inspection of a stage of assessable building work to another appropriately graded building certifier or appropriately graded inspector.

Assessing the competency of competent persons

- [864] The Review accepts the submissions of a number of stakeholders that some building certifiers have over the years slipped into the habit of blindly accepting Form 16s without satisfying themselves that the person is in fact a competent person and without satisfying themselves that the form has been correctly filled out in that the purported competent person is aware and states the appropriate standards by which they have certified the relevant work.
- [865] The Review also accepts that it is likely that some building certifiers are accepting Form 16s without any regard as to whether the work has been performed correctly and in some instances knowing that the work has not been done correctly, some certifiers are prepared to ‘turn a blind eye’ thinking that they are able to sheet responsibility home to the competent person.
- [866] In defence of their reliance upon competent persons and Form 16s, a number of building certifiers relied heavily upon the provisions contained in ss.49 and 50 of the *Building Regulation 2006* which provide:

49 Optional acceptability by building certifier

- (1) A building certifier may, in performing functions under the Act for a building development application or assessable building work, accept and, without further checking, rely on a certificate from a competent person if—
- (a) the certifier has, under part 5, decided the person is a competent person of a type relevant to the functions; and
 - (b) if the person was decided to be a competent person only for a particular aspect of the decided type—the certificate relates to the aspect; and
 - (c) if the person was decided to be a competent person only for particular assessable building work—the certificate relates to the building work; and
 - (d) the person was, under part 5 and this part, permitted to give the certificate; and
 - (e) for a certificate that is an aspect inspection certificate, the person complied with section 47A; and
 - (f) the certificate complies with section 48.
- (2) A building certifier may, in performing functions under the Act for assessable building work, accept and, without further checking, rely on a QBCC licensee certificate given under section 43 if the certificate relates to the work.

50 Optional acceptability by competent person (inspections)

- (1) This section applies to a competent person (inspections) who is giving a building certifier inspection help for assessable building work.
- (2) The competent person may accept and, without further checking, rely on a certificate from another competent person if—
 - (a) the building certifier has, under part 5, decided the other competent person is a competent person of a type relevant to the inspection help; and
 - (b) if the other competent person was decided to be a competent person only for a particular aspect of the decided type—the certificate relates to the aspect; and
 - (c) if the other competent person was decided to be a competent person only for particular assessable building work—the certificate relates to the building work; and
 - (d) the person was, under part 5 and this part, permitted to give the certificate; and
 - (e) for a certificate that is an aspect inspection certificate, the person complied with section 47A; and
 - (f) the certificate complies with section 48.
- (3) The competent person may accept and, without further checking, rely on a QBCC licensee certificate given under section 43 if the certificate relates to the work. [Emphasis added]

[867] Some building certifiers and some competent persons appear to read ss.49 and 50 of the *Building Regulation 2006* without comprehending the qualifying provisions which follow the basic premise. The purported competent person must have been properly assessed by the building certifier for the building certifier (or the competent person in respect to s.50 of the *Building Regulation 2006*) to be able to rely upon the Form 15 or Form 16 issued by that person.

[868] If for instance, the building certifier has assessed the competent person after the work has been done or after the 16 has been provided, that is not an assessment upon which the building certifier can properly rely¹⁹¹. The Review accepts the submissions of private certifier Styles Magwood that the assessment of competent persons after the event is a regular occurrence, but this is not consistent with the requirements of s.22(2) of the *Building Regulations 2006* which provides:

¹⁹¹ See the restriction contained in s.22(2) of the *Building Regulation 2006*

(2) A competent person can only give inspection help if the building certifier has already decided the person is a competent person (inspections) for the work.

- [869] The Review accepts that building certifiers are being placed in a difficult position by some builders and trade contractors in that once the work is done and the forms are provided, some building certifiers feel compelled to accept them. The policy behind s.22(2) of the *Building Regulations 2006* is sound. The competency of a person should be assessed before they provide the inspection help. Appropriate penalties should apply where s.22(2) has not been complied with for both the purported competent person who provides the purported Form 16 and the certifier who accepts it.

Assessment of QBCC Licensees

- [870] It has been suggested by AIBS and other submitters that the requirements provided under s.18(2) of the *Building Regulation 2006* are essentially a doubling up of the licensing or accrediting body's actions. Section 18(2) requires that where an individual must be licensed or registered under a relevant law to be able to give design/ specification help or inspection help to a building certifier, they must be so licensed or registered **and** the building certifier must still assess the individual as having the appropriate experience, qualifications or skills to be able to give that help. This applies equally to building professionals such as architects and engineers as it applies to licensed tradespeople.
- [871] This is a difficult and quite complex issue. On the one hand the submissions of the AIBS seem perfectly reasonable. Why shouldn't a building certifier be able to rely upon the fact that a person is licensed or registered when assessing that person's competence? On the other hand, there is more to being competent than holding a 'ticket'. There are many tradespeople and building professionals who whilst they may be licensed may not have been working in the industry for many years, or who may have no or limited experience in the particular area in which they are seeking to help. Are they competent in those circumstances?
- [872] The Review is satisfied that s.18(2) of the *Building Regulation 2006* serves a valid purpose. A person who is licensed or registered should not be automatically deemed to be competent by virtue of that registration or licence.

Outside the building certifier's areas of expertise

- [873] The Review accepts the submissions of Ms. Anna Sissman and others that building certifiers simply cannot be expected to be

experts in every aspect of building work. To remove a building certifier's access to competent persons would in effect require building certifiers to either find other building certifiers or inspectors to provide that assistance or they would have to do that work themselves. That is an unreasonable requirement particularly given the current work pressures experienced by many building certifiers and could lead to departures from the profession.

Remote certifying

- [874] Anecdotal evidence was received from building certifiers and builders complaining about a number of building certifiers who engage in what is referred to as 'remote certifying'. The allegations were that some building certifiers who are not from a particular geographical location had never been to a particular building site, but instead relied heavily upon other local building certifiers or other competent persons. In some instances it was alleged that no inspections had been conducted at all.
- [875] These problems were compounded when remote certifiers and remote builders were unaware of building requirements specific to a region, such as in cyclone prone regions. The HIA has argued that there is no evidence to support these allegations. The results of the Mackay audits demonstrate that the concerns have some validity.
- [876] The loose description of 'remote certifying' is somewhat confusing in that it conjures up images of the certifying function being provided in a remote part of the State. The concept of 'remote areas' has some legislative background in the *Building Act 1975*¹⁹². However, the term 'remote certifying' may include for example, a Brisbane based certifier engaged on a project in Rockhampton.
- [877] Table 7 below demonstrates the percentage of failure rate by aspect from the recent audits conducted by the QBCC in Mackay in March 2014.

Table 7 - % of failure rate by aspect

	% FAILURE RATE BY ASPECT							
	TOTAL UNSATISFACTORY	% Unsatisfactory by Local Builder	% of all failures by Local	% Unsatisfactory by local CTFR	% of all failures by Local	% Unsatisfactory by Remote Builder	% of all failures by Remote	% Unsatisfactory by Remote CTFR
1: Tie down	12%	0%	0%	0%	0%	12%	100%	100%
2: Bracing	11%	7%	60%	0%	0%	4%	40%	100%
3: Roof and Wall Framing	5%	3%	63%	1%	25%	2%	38%	75%
4: Windows Installation	60%	10%	17%	10%	17%	50%	83%	83%

¹⁹² See s.104 of the *Building Act 1975* in respect to the provision of interim certificates; s.246ACA of the *Building Act 1975* in respect to special provisions permitted for pool inspections in remote areas

- [878] Based on these statistics, it appears that the cocktail of remote certifiers and remote builders is problematic to say the least.
- [879] Whilst the Review accepts that there are problems with the concept and delivery of remote certifying, the answer is not to simply prohibit the practice. Over the past decade, Queensland has experienced numerous wide scale natural disasters. If remote certifiers and builders were unable to practice in certain geographical locations (not that such a prohibition would be legally possible) this would have devastating effects on the ability for towns and cities to be able to rebuild post natural disasters. Put simply, in times of crisis, the people of Queensland need to be able to call upon resources throughout the State and sometimes beyond to be able to meet demand.
- [880] In so far as 'remote certifying' is concerned, building certifiers who are not based in Cyclone Region C to be able to provide certifying services in Cyclone Region C should be required to satisfy an additional licence requirement that they have completed further mandatory relevant CPD approved by the QBCC¹⁹³.
- [881] The Review considers that builders and some tradespeople including carpenters, blocklayers and roofers should also be required to have completed further mandatory relevant CPD approved by the QBCC if they are not based in Cyclone Region C.
- [882] These changes will not by themselves be enough to counter the problems experienced as a result of the practice of 'remote certifying'. However if the suite of recommendations made in this Review are adopted by Government, they will go a long way to address the current deficiencies.

Confusing licensing system and the need for greater accountability

- [883] The QBCC licensing system is comprehensive and whilst there remains some ambiguity in regard to some licence class categories, the QBCC licence system is one of, if not the best system in the country. The Review is not alone in that belief¹⁹⁴.
- [884] The Review also accepts that there is a greater need for all industry stakeholders to be more accountable for their actions¹⁹⁵. Ensuring

¹⁹³ The QBCC has the power to impose conditions on a licensee pursuant to s.36 of the *Queensland Building and Construction Commission Act 1991*, in particular see (3A)

¹⁹⁴ See the remarks of Bruce Collins QC in his report *Final Report into Construction Industry Insolvency in NSW*, November 2012 extracted at paragraph [323] above

¹⁹⁵ Greater accountability of building certifiers was part of the Queensland Government's 10 Point action plan

the accountability for all industry stakeholders, not just building certifiers, underpins the recommendations of this Review.

Certain aspects of building work that pose particular problems for building certifiers

- [885] The Review accepts the submission that building certifiers cannot remain on site '24/7' during the construction of a building project. A building certifier is not able to see each and every aspect or component of a building before it is covered up. The Review accepts that in their current role, building certifiers are not supervisors, nor are they clerks of works.
- [886] The Review also accepts that in some instances whilst ideally a particular aspect may be the subject of an inspection by a building certifier, some aspects would require a building certifier to remain on site for inordinate periods of time. For example, the waterproofing of wet areas has been the subject of some debate as to whether it should be made a mandatory inspection stage for class 1 buildings.
- [887] Given that the process of waterproofing often requires the application of several coats of a flexible membrane, it is not reasonable to expect that a building certifier should inspect the application of each one of those coats. Nor is it reasonable to require a building certifier to inspect the finished waterproofing product and expect the certifier to sign off on the work performed. For instance, how would the certifier know whether the right mixture of product was used, or the correct thickness of product? How would the certifier be expected to know whether the manufacturer's specifications were complied with?
- [888] For these reasons, the Review is satisfied that there are instances which pose particular problems for certifiers undertaking inspections and that in such cases, it is appropriate that the person performing the work, provided the building certifier has previously assessed the person is competent, should be able to rely upon a Form 16 from that person as a competent person.

Cadet Certifiers

- [889] Amongst the terms of reference of this Review is an underlying requirement to examine ways in which to retain building certifiers and ways in which more people may be attracted to becoming a building certifier. In paragraph [286] above the Review referred to the significant lengthy period some cadet certifiers take to become qualified as building certifiers.

- [890] Just as every employee has strengths and weaknesses, it is important that cadet certifiers are encouraged to develop professionally and experientially as they progress through their training provided of course that they are under appropriate supervision.
- [891] Tempered against the desire to attract and retain more entrants to the profession is the need to ensure that certifier employers do not misuse cadet certifiers and that cadet certifiers are not placed in positions of responsibility beyond their own capabilities¹⁹⁶. The Review has received concerning anecdotal evidence in relation to the inappropriate use of cadet certifiers where they have been employed to perform building certifying functions out of an office in a geographical location that is far removed from that of their supervising certifier. The Review does not regard this type of arrangement to conform with the intent of the supervising certifier's obligations under s.23A(2) of the *Building Regulation 2006* which provides:

"(2) In this section-

***direct supervision**, of a cadet building certifier by a supervising certifier, means that the supervising certifier gives or has given the cadet building certifier technical direction about assisting in the performance of a building certifying function before or during the giving of the assistance, or as soon as reasonably practicable after it has been given."*

- [892] The Review has not been able to locate any judicial authority which has considered the application of s.23A(2) of the *Building Regulation 2006*. However, the review is satisfied that the level of appropriate 'direct supervision' of cadet certifiers should not be delivered solely over the end of a long distance phone line or over the internet. Provided Recommendation 44 (the licensing of private certifier employers) is accepted, the Review encourages the QBCC to take disciplinary action against a private certifier employer for at least unsatisfactory conduct, if such an arrangement comes to its attention.
- [893] Notwithstanding these concerns, there is greater scope for providing more inspection responsibilities for appropriately experienced cadet certifiers. However this should always be subject to the discretion of the employer who must maintain appropriate supervision and reporting procedures. Ultimately the certifier employer would remain liable for the acts and omissions of the cadet, just as an employer carpenter remains liable for the acts and omissions of his or her apprentice.

¹⁹⁶ This could of itself be a factor which acts as a disincentive to remain in the profession

[894] Section 23C of the *Building Regulation 2006* deals with the assessment of cadet certifiers as competent persons. It appears to the Review that s.23C(2) of the *Building Regulation 2006* is unnecessarily restrictive. It provides that a building certifier can not decide a cadet certifier is a competent person if the building certifier is –

- (a) The cadet's supervising certifier; or
- (b) The cadet's employer; or
- (c) Employed by the same employer as the cadet.

[895] The cadet's supervising certifier, or the cadet's building certifier employer is best placed to make that assessment, particularly given that the building certifier will be held accountable for the acts, errors or omissions of the cadet.

[896] Section 23C(2) of the *Building Regulation 2006* should be amended to permit cadet certifiers to be able to perform inspections according to Recommendation 71(e). However, cadet certifiers should NOT have the ability to:

- Inspect aspects of building work that involve matters of life-safety, such as fire-separation walls; or
- Conduct final inspections.

Restrict the use of competent persons

[897] The use of competent persons should be restricted in accordance with the Recommendations listed below.

Stricter auditing of the competent person regime

[898] The Review accepts the submissions of the HIA that the competent person regime should be the subject of stricter and more targeted auditing of building certifiers by QBCC with appropriate penalties including the use of demerit points and/or infringement notices for offending licensees (where applicable) and building certifiers.

Question 3.1.3: Recommendations

[899]

69.	Subject to recommendations 70, 71 and 72, building certifiers should conduct physical on-site inspections in relation to all mandatory inspections.
70.	Building certifiers should be able to delegate the carrying out of a mandatory inspection of a stage or aspect of assessable building work to another appropriately graded building certifier

	<p>or appropriately graded inspector. (Note however, an inspector should not be able to perform a final inspection - see Recommendation 79.)</p>
71.	<p>The use of competent persons should be restricted to the inspection of an aspect of a stage of building work:</p> <ul style="list-style-type: none"> (a) Subject to Recommendation 72, by persons who have been assessed by the building certifier as competent in accordance with the guidelines entitled 'Guideline for the assessment of competent persons'; (b) For aspects of construction that are outside the building certifier's particular areas of expertise; (c) For construction that is undertaken in a location that is remote from that of the building certifier; (d) For certain aspects of building work that pose particular problems for certifiers undertaking inspections, for example waterproofing; (e) By cadet certifiers who: <ul style="list-style-type: none"> (i) Have completed the equivalent of a minimum of 1 year full-time academic study in furtherance of obtaining their certification qualification; and (ii) Have completed the equivalent of a minimum of 1 year full-time employment as a cadet certifier under the supervision of a building certifier level 1 or 2; and (iii) Have satisfied his/her certifier employer that they are competent to carry out the function required; and (iv) Continue to remain appropriately supervised by a building certifier level 1 or 2, bearing in mind the level of experience and knowledge of the cadet and the type of certification work performed. <p>Note in respect to cadet certifiers:</p> <ul style="list-style-type: none"> (i) Section 23C of the <i>Building Regulations 2006</i> should be amended to reflect the above; and (ii) It is NOT recommended that cadet certifiers have the ability to: <ul style="list-style-type: none"> - Inspect aspects of building work that involve matters of life-safety, such as fire-separation walls; or - Conduct final inspections. <p>The over-reliance on competent persons by certifiers is likely to be addressed in part, if Recommendations 16-18 are adopted (the introduction of the fourth level inspector).</p>
72.	<p>A building certifier should be required to continue to assess licensed and registered persons for their competency pursuant to s.18(2)(b) of the <i>Building Regulation 2006</i>. In circumstances involving 'inspection help' this assessment should be done before the inspection help is provided pursuant to s.22(2) of the</p>

	<i>Building Regulation 2006</i> . Appropriate penalties should apply where s.22(2) has not been complied with for both the purported competent person who provides the purported Form 16 and the certifier who accepts it.
73.	<p>For building certifiers whose principal place of business is not located in Cyclone Region C to be able to provide certifying services in Cyclone Region C must satisfy an additional licence requirement that they have completed further mandatory CPD approved by the QBCC.</p> <p>Similarly, builders and some tradespeople including carpenters, blocklayers and roofers should also be required to have completed further mandatory relevant CPD approved by the QBCC if they are not based in Cyclone Region C.</p>
74.	The inappropriate use of competent persons (that is where a purported competent person is not assessed in accordance with the <i>Building Regulation 2006</i> and/or the Guideline) should be subject to stricter auditing by the QBCC and demerit points should be allocated and/or infringement notices issued to both offending licensees (where applicable) and the building certifiers who rely on them.
75.	The Guideline for the assessment of competent persons should be amended to reflect the above recommendations and should be amended to reflect current legislation.

Question 3.2.1: Do you think additional mandatory inspections should be introduced in relation to houses, duplexes, villas and townhouses (class 1a buildings)?

Question 3.2.2: If yes list the type of inspections you think should be considered for class 1a buildings.

Question 3.2.3: Do you think mandatory inspections should be introduced for other types of buildings?

Question 3.2.4: If so list the types of inspections you think should be considered for other classes of buildings.

Background

[897] Given their interrelatedness it is appropriate that Questions 3.2.1 to 3.2.4 be considered together.

Class 1a buildings

[898] Class 1a buildings are defined in part A3.2 of the NCC as:

A single dwelling house being –

(i) a detached house; or

(ii) one of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit.

[899] The building legislation prescribes mandatory minimum inspections to be conducted for detached class 1a and class 10 buildings and structures but does not do so in respect of attached class 1a buildings.

[900] The Discussion Paper poses the question as to whether additional mandatory inspections should be introduced for class 1a buildings such as waterproofing and whether an additional mandatory inspection at the fire separating wall aspect should be considered in respect to attached class 1a buildings.

Guidelines for inspections

[901] Pursuant to s.26 of the *Building Regulation 2006*, the chief executive has under s.258 of the *Building Act 1975* made guidelines for the

inspection of class 1a detached houses and class 10 buildings and structures¹⁹⁷.

Feedback outcomes

[902] Of the written submissions and completed surveys responding to Question 3.2.1, 42% of submitters supported additional mandatory inspections being introduced in relation to houses, duplexes, villas and townhouses, whilst 36% of submitters were opposed to the suggestion, 9% had other suggestions on how to resolve the question and 13% did not address it.

Relevant legislative provisions

[903] The provisions in relation to inspections of assessable work are found in Part 6 of the *Building Regulation 2006*.

[904] Pursuant to s.24(3) of the *Building Regulation 2006*, the stages for the inspection of assessable building work in respect to a single detached class 1a building include:

- After excavation of foundation material and before the footings for the building are laid; and
- If the building is to have a slab – after the placement of formwork and steel for the slab but before the concrete for the slab is poured; and
- To the extent the bracing for the frame consists of cladding or lining – after the cladding or lining has been fixed to the frame; and
- To the extent the bracing for the frame of the building does not consist of cladding or lining – before the cladding or lining is fixed to the frame; and
- If reinforced masonry construction is used for the frame of the building – before the wall cavities are filled; and
- At the completion of all aspects of the work.

[905] Pursuant to s.24(5) of the *Building Regulation 2006*, if the work is the construction of, or an alteration to, a class 10 building or structure, other than a swimming pool, the stages for inspection of the assessable building work also include at the completion of the building or structure or the alteration.

¹⁹⁷ See: *Guidelines for inspection of class 1a buildings and class 10 buildings and structures*, Building Codes Queensland Version 1, December 2011 - <http://www.hpw.qld.gov.au/SiteCollectionDocuments/final-inspection-guidelines-class-1a-and-10.pdf>

Compliance provisions

- [906] Pursuant to s.27 of the *Building Regulation 2006*, it is an offence for the builder responsible for assessable building work not to have given the building certifier notice, claiming the stage has been completed (a notice for inspection).
- [907] Pursuant to s.28 of the *Building Regulation 2006*, it is an offence for a builder for assessable building work who has given the notice for inspection to start the next stage of the work until the builder has been given a certificate of inspection for the relevant stage stating the stage complies with the building development approval.
- [908] Pursuant to s.29 of the *Building Regulation 2006*, if the builder is a licensed builder and the builder does not give a notice for inspection for a stage of the work as required under s.27, the building certifier must as soon as practicable give the QBCC notice of that fact.

Support for change

Support for mandatory fire separating wall inspection but not waterproofing

- [909] Local government building compliance officer Anna Sissman supported the introduction of a mandatory inspection for firewalls in class 1a attached buildings, however for similar reasons expressed by the Review at paragraph [887] above, Ms. Sissman does not consider it necessary or advisable for a mandatory inspection to be introduced upon the completion of waterproofing of wet areas for class 1a buildings whether attached or detached¹⁹⁸.
- [910] HIA supported amendments requiring the inspection of fire separating walls on attached class 1a buildings but thought that the time they should be performed should be at the discretion of the building certifier. It did not support the introduction of a waterproofing inspection, preferring instead that subcontractors be held more accountable by the QBCC.

Fire separating walls may require numerous inspections

- [911] A number of survey responses raised concerns that one inspection of fire separating walls is often not sufficient, dependent upon the type of construction.

¹⁹⁸ Similar submissions were made by Cairns Regional Council and Clayton Baker

Fire separating walls being compromised post pc

- [912] A number of responses to the survey identified issues with services being installed after practical completion that compromise fire separating walls, such as data and other cabling.

Mandatory fire separating wall and waterproofing inspections required

- [913] Lockyer Valley Regional Council argued that both fire separating walls and waterproofing should be the subject of mandatory inspections.

Attached class 1a buildings should have the same mandatory inspections as detached class 1a buildings + a mandatory inspection for fire separating walls

- [914] AIBS argued that the current mandatory inspections for class 1a detached buildings as set out in the Guidelines for inspection of class 1a buildings (detached) and class 10 buildings and structures are adequate and do not require amendment. However, it supported the introduction of mandatory inspections for attached class 1a buildings (duplexes, villas and townhouses) so that they mirror the mandatory inspection stages of class 1a attached buildings, with an additional requirement for the inspection of fire separating walls.

Mandatory inspections for 'key safety matters'

- [915] FPA Australia argued that mandatory inspections should be introduced for all types of buildings which go to 'key safety matters' including¹⁹⁹:

- Structural elements;
- Wet areas, if there is evidence demonstrating consistent failures leading to health, safety or amenity issues; and
- Essential fire safety measure requirements.

- [916] QFES also argued in support of mandatory inspections for passive fire separation elements in class 1, 2 and 3 (boarding house, guest house, hotel, motel, accommodation for the aged, children or people with a disability, residential part of a health care facility²⁰⁰) residential buildings.

¹⁹⁹ Similar submissions were made by Brisbane City Council

²⁰⁰ See part A3.2 of the NCC

Support for status quo

- [917] Numerous submissions were received arguing the maintenance of the status quo. Some submitters argued that increasing the number of mandatory inspections would result in an imbalance in liability issues for the certifier and encourage builders and trade contractors to assume less responsibility for their own work²⁰¹.
- [918] A simple reading of the survey statistics reveals that there were almost as many supporters for the maintenance of the status quo as there were for introducing additional inspections (35% v 38%). However, the Review does not consider the statistics in support of the negative proposition to be entirely accurate. Whilst a number of submitters did not support the introduction of waterproofing inspections and to a much lesser extent the introduction of fire separating walls, many submissions were made about various other alternatives, some of which are discussed below.

Support for other reforms

Education is the key

- [919] Many submissions were received which supported a concerted emphasis on increased education by QBCC for builders and trade contractors in an effort to reduce the number of defects in the first instance²⁰².

Set outs to be done by surveyors

- [920] In their written submissions, Matrix Certifiers suggested that fire separating wall inspections should be mandatory and that a building set out should be required to be performed by cadastral surveyors²⁰³.

Only licensed waterproofers should be able to perform waterproofing irrespective of the price

- [921] Private certifier Neil Oliveri argued in support of mandatory fire separating wall inspections on all attached class 1a buildings (with the exception of fire rated external boundary walls), however he too rejected the introduction of mandatory waterproofing

²⁰¹ For example, see the written submissions of Gladstone Regional Council

²⁰² See the written submissions of Claude McKelvey

²⁰³ Similar submissions were made by Ain Kuru although he did not specify that the site survey must be performed by a cadastral surveyor. In a survey submission, it was suggested that if the applicant does not provide a contour plan prepared by a cadastral surveyor, then the certifier should be required to carry out a site inspection before issuing the decision notice

inspections. Mr. Oliveri strongly advocated for the removal of the current \$3,300 cap on the work a waterproofer is able to perform without being licensed. He considered that all waterproofing work should be performed by a licensed waterproofer or builder.

Mandatory fire separating wall inspections and roof water disposal designs

- [922] Private certifier Troy Ellerman supported the introduction of mandatory fire separating wall inspections on attached class 1a buildings, but he also recommended the mandatory preparation and design of roof water disposal by an appropriately qualified person, assumedly a hydraulics engineer.

Consideration

Minimise red tape and wherever possible don't add to the cost of building a house in Qld

- [923] A number of submissions have been made about the introduction of additional mandatory inspections or additional mandatory requirements such as the design of roof water disposal and site surveys by cadastral surveyors. On face value whilst some of these arguments may appear attractive, the Review is not convinced that the need for them is so compelling that they ought to be made mandatory. The case for these additional mandatory inspections has not been made out sufficiently that they would warrant the additional expense to home owners.

Current mandatory inspections sufficient

- [924] In relation to class 1a detached buildings, the Review considers that the mandatory minimum inspections set out in the *Guidelines for inspection of class 1a buildings and class 10 buildings and structures* are sufficient. However, this does not prevent the building certifier from requiring more inspections and similarly, the applicant to a building development application should be able to ask the building certifier to perform more than the minimum mandatory inspections, however this should be by agreement – See Recommendation 8.
- [925] For the reasons already expressed at paragraph [887] the Review does not accept that mandatory inspections should be introduced for waterproofing of wet areas or external decks. However the Review does accept the submissions of Neil Oliveri that only licensed waterproofer and licensed builders should be entitled to perform waterproofing work, irrespective of the value of the work performed. The author in his work has seen too many instances of

failed waterproof membranes performed by subcontractors who seek to perform their role with impunity.

- [926] The issue of reducing the maximum value of unlicensed work performed by waterproofers to \$nil is the subject of Recommendation 108 below. With respect to the submissions of HIA that subcontractors should be held more accountable, this is dealt with in Recommendations 41, 42, 73, 74, and 107(d).

Attached class 1a buildings should have the same mandatory inspections + mandatory fire separating wall inspections

- [927] The Review does not comprehend the purpose of limiting the *Guidelines for inspection of class 1a buildings and class 10 buildings and structures* to only detached class 1a buildings. The owners of attached class 1a buildings have just as much right to know that their unit or townhouse has been constructed in accordance with the regulatory requirements as the owner of a detached class 1a building.
- [928] The mandatory minimum inspections for single detached houses should be replicated for attached class 1a buildings with additional inspections required for fire separating walls.
- [929] The final inspection should not be performed by a building inspector, competent person or cadet certifier. This is consistent with the requirements set out in s.21(2)(b) of the *Building Regulation 2006* for assessable building work in respect to a detached class 1a or class 10 building.

Question 3.2.1: Recommendations

[930]

76.	In relation to single detached houses, it is considered that the number and type of mandatory inspections are sufficient as a minimum. It is not considered desirable to introduce a mandatory inspection for the waterproofing of wet areas or external decks given the difficulties that can be encountered in properly assessing the correct application of waterproofing membranes by anyone other than the applicator. Further provision is made at Recommendation 108 in relation to the application of waterproofing.
77.	It is recommended that the mandatory minimum inspections for single detached houses be replicated for

	<p>duplexes, villas and townhouses (attached class 1a buildings) with additional inspections required for fire separating walls. Therefore, in relation to attached class 1a buildings, the mandatory minimum inspections should be:</p> <ul style="list-style-type: none"> (a) Footings (b) Slab (c) Frame (d) Passive fire separation elements (fire separating walls, floors and penetrations/collars). <i>Note: It may be necessary to conduct more than one inspection depending upon the design, construction method and materials used.</i> (e) Final. The final inspection should include a re-inspection of passive fire separation elements after all services have been connected to the building to ensure the integrity of those elements. The final inspection should only be performed by the building certifier or another building certifier of the relevant class.
78.	<p>Section 24 of the <i>Building Regulations 2006</i> and the Guidelines for inspection of class 1 and 10 buildings and structures should be amended to reflect these recommendations if accepted.</p>

Question 3.2.3: [Mandatory inspections for class 2 - 9 buildings]

Background

- [931] There are significant differences between the types of class 2-9 buildings, which include multi-storey residential buildings, office buildings, shops, public halls and commercial and industrial buildings. As a consequence, historically it has not been considered practical to provide uniform mandatory inspection stages to all classes. Rather, the number and type of inspections are determined by the building certifier on a 'risk based' approach in accordance with a risk matrix set out in the *Guidelines for inspection of class 2-9 buildings*²⁰⁴.
- [932] The Discussion Paper queries whether it is now appropriate for mandatory inspections to be required for some or all class 2-9 buildings, such as on the completion of waterproofing and whether an additional mandatory inspection at the fire separating wall aspect should be considered in respect to class 2 buildings (a building containing 2 or more *sole-occupancy units* each being a separate dwelling²⁰⁵).

Feedback outcomes

- [933] Of the written submissions and completed surveys responding to Question 3.2.3, 38% of submitters supported additional mandatory inspections being introduced in relation to other classes of buildings, whilst 35% of submitters were opposed to the suggestion, 7% had other suggestions on how to resolve the question and a rather unusually high 20% of submitters did not address it.

Support for change

Mandatory inspections for class 2-9 buildings should be consistent with detached class 1a buildings

- [934] The Australian Institute of Architects suggested that the inspection requirements for class 2-9 buildings should be similar to those for detached class 1a buildings (houses)²⁰⁶. It also suggested that:

²⁰⁴ See: *Guidelines for inspection of class 2-9 buildings*, Building Codes Queensland, Version 1, 29 June 2012 <http://www.hpw.qld.gov.au/SiteCollectionDocuments/guidelines-inspection-of-class-2-to-9-buildings.pdf>

²⁰⁵ See part A3.2 Classifications of the NCC

²⁰⁶ Similar submissions were made by Cairns Regional Council and Liz Woollard

- Inspections on passive fire protection systems should be mandatory²⁰⁷; and
- Total reliance on Form 16s was not good practice and at the very least, a final inspection should be conducted by a building certifier.

Inspection of passive fire separation elements should be mandatory

[935] QFES strongly supported extending mandatory inspections of passive fire separation elements to class 2-9 buildings where it is warranted by the risk profile of the building class. For example, it argued that it should be mandatory to inspect passive fire separation elements on nursing homes and hospitals where occupants are often non-ambulatory.

Final inspections must be made mandatory

[936] AIBS once again made a valuable contribution to the debate. Its suggestions included:

- The final inspection must be made mandatory;
- Section 258 of the *Building Act 1975* (the provision which empowers the chief executive to make guidelines) should be amended so that subsection (2) includes a reference to the guidelines for the inspection of class 2-9 buildings.

Private certifier fed up with being told what he can and can't inspect

[937] Private certifier Gordon Heelan argued that there should be a more prescriptive approach taken to conducting inspections on class 2-9 buildings. He made the following enlightening submission in response to Question 3.2.3:

"Yes as I am sick of architects or project managers telling me I can not come to site until final inspection. How in the world can I say I am working in the public interest or the client's interests for that matter if I don't know what is going on at site."

Different rules for class 2-9 buildings in Cyclone Region C

[938] A private certifier in a response to the survey argued that in Cyclone Region C the following inspections should be conducted on all classes of buildings:

²⁰⁷ Similar submissions were made by the Institute of Fire Engineers and Matrix Certifiers

- Footing;
- Slab;
- Bond-beam (masonry reinforcement);
- Frame; and
- Final.

Risk-based inspections ‘express elevator’ to the bottom

[939] Another private certifier in a response to the survey submitted that the:

“Risk based inspections for class 2-9 is the express elevator to bargain basement inspections and certification. Yes this needs to be removed and some reasonable mandatory inspections introduced.”

Risk-based guidelines too complicated

[940] One private certifier in his survey response suggested that the current guideline for class 2-9 buildings was too complicated and was not being used by building certifiers, nor was its lack of use being audited by the QBCC.

Support for status quo

Too many variables

[941] Despite the submissions of AIBS that the final inspection should be made mandatory, it also argued that:

- There are otherwise too many variables between class 2-9 buildings to have minimum mandatory inspections as is provided for detached class 1a buildings and class 10 buildings and structures;
- The current risk-based approach adopted in the *Guidelines for inspection of class 2-9 buildings* is appropriate, however these *Guidelines* should be amended to provide a greater range of examples²⁰⁸.

[942] A number of submitters agreed that the concept of mandatory inspections on class 2-9 buildings was attractive on face value, but questioned how such an approach would work in reality, given the very broad differences between the different types of construction²⁰⁹.

²⁰⁸ Similar submissions were made by private certifier Claude McKelvey

²⁰⁹ See for example the submissions of AIBS, HIA and a number of survey responses

Class 2-9 buildings are generally designed and built better

- [943] Other submitters argued that generally speaking class 2-9 buildings are constructed to a better standard and quality, therefore negating the requirement for mandatory inspections²¹⁰.

Support for other reforms

Local government to approve assessment by private certifier

- [944] The Australian Institute of Building (AIB) supported the maintenance of a risk-based approach for class 2-9 buildings with the suggestion that the local government be required to 'sign-off' on the certification plan prepared by the private certifier.

Consideration

Undue pressures

- [945] The concerns raised by private certifier Gordon Heelan about the undue pressures that are placed on building certifiers are not new to the Review. In fact private certifiers at a number of the Roadshow events made similar complaints.
- [946] The Review accepts that the majority of building certifiers are hard working small business people who take their role and their obligations under the building legislation very seriously. The Review also accepts that there are some principals, building contractors, project managers and other building professionals who will overstep the mark and attempt to subvert the building control system for their own means.
- [947] As has been discussed many times during this Review, a building certifier's overriding obligation is to the public interest. Sometimes, in fact oftentimes, the public interest will clash with the interests of the applicant, whether that be the builder or the owner, or one of the owner's consultants.
- [948] Long after the builder has left the site and long after the original owner has sold the property and the project consultants have moved on to other jobs, the building certifier remains responsible (as do the aforementioned parties) for the works. It is then, entirely unacceptable that building certifiers can be held to ransom as to what they can and cannot provide in their building certifying function. All persons involved in the building process should be

²¹⁰ See for example the submissions of Neil Oliveri

held accountable, not just building certifiers. Therefore, significant penalties should apply where a building certifier is unfairly pressured not to act in the public interest. The penalty for such an offence should act as a real deterrent to errant conduct.

Different rules for class 2-9 buildings in Cyclone Region C

- [949] The Review is not satisfied that the risk-based assessment of when inspections should be conducted for class 2-9 buildings in Cyclone Region C is dysfunctional. If there are specific and recurring issues that require special attention, this could be the subject of CPD and the additional requirement for targeted CPD under licence conditions for building certifiers, builders and trade contractors. (See Recommendation 73).

Risk-based guidelines too complicated

- [950] This complaint was an isolated one. The Review is not convinced that it is a view that is held by many building certifiers. The evidence is to the contrary. AIBS supports the retention of the current guidelines for the inspection of class 2-9 buildings. Assumedly they would not support the guidelines if they were overly complicated. The Review however notes that AIBS does call for additional examples to be provided in the guidelines. That appears to be a sensible request.

Local government to approve assessment by private certifier

- [951] This hybrid model, if implemented, would detract from the benefits achieved from private certification since its inception. It has the potential to further delay approval times and unnecessarily adds to red tape. Wherever possible, the system of private certification should be encouraged to be self-reliant, particularly in respect to matters that are within the competence of the private certifier to deliver. The Review does not accept this as a suitable alternative for the allocation of stages of inspections for class 2-9 buildings.

'Express elevator' to the bottom

- [952] The Review appreciates the concerns of some, that a risk-based approach to the inspection of class 2-9 buildings creates a non-level playing field. The question of whether certain inspections should be conducted becomes a subjective exercise that is prone to result in significant price variations, although there is no factual evidence before Review of this. Notwithstanding this, subject to the Recommendations below, the Review is not convinced that a

system of mandatory inspections is workable for class 2-9 buildings.

Additional mandatory inspections

Too many variables

- [953] The Review agrees with the submissions of AIBS, HIA and a number of others that given the extent of the variables which exist between the various class 2-9 buildings, it is difficult to list desirable hard and fast minimum mandatory inspections.

Passive fire separation elements

- [954] That notwithstanding, for the sake of the health and safety of building occupants and the broader community, the inspection of passive fire separation elements should be the subject of mandatory inspections on all class 2-9 buildings which incorporate them as part of their design. Any attempt to differentiate between the class 2-9 buildings would only lead to confusion and unnecessary complexity.
- [955] In short, if a class 2-9 building has as part of its design, passive fire separation elements, it should be mandatory for them to be inspected.

Final inspections

- [956] Final inspections should be mandatory on all classes of buildings. Whilst the Review understands that in almost all cases, final inspections are being carried out, this should be standardised. Final inspections should be performed by the building certifier personally or another building certifier of the relevant class. The final inspection should not be performed by a building inspector, competent person or cadet certifier. This is consistent with the requirements set out in s.21(2)(b) of the *Building Regulation 2006* for assessable building work in respect to a detached class 1a or class 10 building.
- [957] To ensure that no damage has been done during construction, passive fire separation elements should be the subject of a further inspection at the final inspection stage to determine that they remain in compliance with the building development approval. This should apply to all class 2-9 buildings and attached class 1a buildings (see Recommendation 77).

Question 3.2.3: Recommendations

[958]

79.	<p>Given the number of variables which exist between the various class 2-9 buildings, it is difficult to list desirable hard and fast minimum mandatory inspections. Notwithstanding, it is recommended that the current approach of risk-based assessment for inspection stages should remain as set out in the Guidelines for the inspection of class 2 to 9 buildings made by the chief executive under s.258 of the <i>Building Act 1975</i>, with the exception of the following minimum mandated inspections:</p> <p>(a) Passive fire separation elements (fire separating walls, floors and penetrations/collars). <i>Note: It may be necessary to conduct more than one inspection depending upon the design, construction method and materials used.</i></p> <p>(b) Final. The final inspection due at substantial completion should include a re-inspection of passive fire separation elements after all services have been connected to the building to ensure the integrity of those elements. The final inspection should only be performed by the building certifier or another building certifier of the relevant class.</p>
80.	<p>The <i>Building Act 1975</i> should be amended to make it an offence for <i>any person</i> to obstruct, interfere, unlawfully influence by way of offering a commission, benefit or advantage, attempt to unlawfully influence by way of offering a commission, benefit or advantage or threaten a certifier to the detriment of the certifier whilst in the performance of his or her duties or proposed duties. (Recommended maximum 1000 penalty unit offence).</p>
81.	<p>Section 258(2) of the <i>Building Act 1975</i> should be amended to include the Guidelines for the inspection of class 1a buildings (as amended to incorporate attached class 1a buildings – see Recommendations 77 and 78) and guidelines for the inspection of class 2-9 buildings.</p>

Question 3.3.1: Which is your preferred option for providing clarification on the use of technology in inspections?

Option 3.3(a): Clarify inspection requirements in existing inspection guidelines

Option 3.3(b): Create a new guideline about the use of technology

Question 3.3.2: To what extent should a building certifier rely on technology when performing an inspection?

Background

- [959] The Discussion Paper at part 3.3 refers to the benefits obtained from the use of technology by builders and building certifiers during the building and building certification processes.
- [960] There is little doubt that technology has been responsible for significant productivity increases in the building and construction industry. However, this question focuses attention on the appropriate use of technology used by building certifiers to assist them in performing their certifying function. Put simply, whilst buildings are being constructed more efficiently with the aid of modern technology, is the end result a better-built building?

Feedback outcomes

- [961] Of the written submissions and completed surveys responding to Question 3.3.1, 34% of submitters supported clarifying the appropriate use of technology in the existing inspection guidelines, whilst 37% of submitters supported the implementation of a new guideline, 13% had other suggestions on how to resolve the question and 16% of submitters did not address it.

Support for clarification in existing guidelines

Building legislation does not allow certifiers to rely solely on photos

- [962] Local government building compliance officer Anna Sissman preferred clarifying a building certifier's obligations with respect to the use of technology during inspections in the existing inspection guidelines, rather than creating a new one. She also suggested that:
- The building legislation does not allow building certifiers to rely solely on photographs for conducting inspections, however

- she conceded that the use of photographs may be appropriate in designated remote geographical locations; and
- Ongoing QBCC audits of building certifiers plays an important function in maintaining accountability.

Technology should only ever be an aid to the inspection process

- [963] AIBS acknowledged that there are benefits in the use of technology to support the inspection process but cautioned that it should only ever be used as an inspection aid and not a substitution for carrying out on-site inspections of building work²¹¹. AIBS preferred the option of amending the existing inspection guidelines rather than creating a new technology guideline.

Certifiers would have a greater understanding of what it is they are required to inspect

- [964] Private certifier Claude Baker also supported clarifying the use of technology in the existing inspection guidelines. He considered that by so doing, certifiers would have a greater understanding of what it is they are required to inspect. Mr. Baker did however urge that the industry be consulted in the formulation of the amended guidelines.

Support for the establishment of a new guideline

Technology is being used already

- [965] HIA supported the introduction of a new guideline to assist building certifiers to determine the appropriate use of technology during inspections. It argued that a failure to produce a guideline, ignored the advances in technology and importantly, HIA stressed that technology is already being used to varying extents, particularly in rural and regional areas of Queensland.

Support for other reforms

Technology guideline is destined for irrelevancy the day it is released

- [966] Private certifier Claude McKelvey argued that amending the existing guidelines or creating a new guideline on the use of technology during inspections “*is fraught with irrelevancy the minute it is released*”²¹². He suggested that the only benefit from

²¹¹ Similar submissions were made on behalf of the Cassowary Coast Regional Council, Neil Oliveri and numerous other survey responses

²¹² Similar submissions were made by private certifier Morgan Bleek

doing either, was that it would reinforce the expectation that building certifiers are required to physically visit the site and carry out an inspection.

Technology assisted remote certifying: make a decision, in or out?

- [967] Local government certifier Laurence Eves was relatively ambivalent as to the approach of clarifying a building certifier's responsibilities. However, he stressed that a decision should be made as to whether technology could be used in place of a physical inspection of the building certifier. Mr. Eves argued that if technology were permitted to be used in place of a physical inspection of the building certifier, then the guideline should provide details as to the approved systems, approved equipment and processes that could be used to assist building certifiers so as to remove the current shroud of uncertainty.

3.3.2: To what extent should a building certifier be able rely on technology when performing an inspection?

Submissions for:

Final decision to accept the use of technology should be the building certifiers'

- [968] Private certifier Neil Oliveri argued that the use of technology to aid in performing an inspection should be embraced and promoted with the qualification that it should never replace a physical inspection. He considered that the final decision to accept the use of technology should rest "with the certifier undertaking the inspection", whether that be photographic, video or real-time video. Mr. Oliveri considered that any such evidence should be kept on the certifier's file to be kept as evidence and for auditing purposes.

Guidelines for remote inspections must provide for inspection of the entire building

- [969] In a survey response submitted by a building certifier in the employ of the QBCC, it was argued that:

"I understand that the use of technology is being used more and more in inspections, but some guidelines need to be established to ensure that if a certifier is remote and is using some form of video app then they are getting to see all of the construction being inspected. From experience I know that photos don't show anywhere near enough detail and it is too easy for a licensee to video good parts of the construction and avoid other parts that might be potentially dubious construction. I know cadets are currently

using this technology and I believe the Building Regulation allows it under section 23A(2). In relation to this section, I have been to sites where a cadet has done a final inspection and has completely missed the fact that no termite management system at all was installed with the result that termites had infested the dwelling.”

Provision of special builders’ licences

- [970] Mr. Ain Kuru, suggested that builders who work in remote, but non-cyclonic areas should have a ‘special one-off licence’ issued by the QBCC, assumedly enabling them to use technology to assist a remote certifier in performing building inspections.

Photos are a useful tool

- [971] Mr. Claude McKelvey suggested that there was no impediment in building certifiers taking photos during a physical inspection, nor using other technology to assist in the inspection process. He also argued that it was appropriate for a building certifier to request photos to verify rectification work for issues detected during an inspection²¹³.

Sometimes not viable to perform physical inspections in remote and rural Queensland

- [972] A number of submitters advocated for allowing technology to replace physical inspections, particularly in remote and rural Queensland. One private certifier in his survey response argued:

“Being within a rural area, we are sometimes required to rely on technology for inspections that are beyond our reaches. It is sometimes not viable for us to perform certain inspection (sic) in person and we are unable to engage a competent person in that region. This is where we use our knowledge and various forms of technology to perform these inspections.”

Utilise a similar system to interim certificates of classification for remote sites

- [973] Another private certifier in a survey response argued that the use of technology should be permitted, particularly in remote locations. The submitter also suggested implementing similar provisions to the issuing of interim certificates of classification for remote locations.

²¹³ Similar submissions were made by private certifier Liz Woollard

Submissions against:

Virtual inspections should not be permitted

- [974] A representative of Goondiwindi Regional Council made the following submission:

"We seem to have gone from the issue of drive by inspections to virtual inspections using technology. Clients are charged for inspections generally as part of the approval process and the decision notice outlines what inspections are to be requested. The use of technology as a replacement for a physical inspection by the certifier should not be permitted. The practice has been used and should be nipped in the bud before it becomes common practice²¹⁴."

- [975] A number of submitters spoke against the practice of 'virtual inspections' arguing that it was inappropriate for a building certifier to rely upon 'unskilled persons' to attend site with recording equipment, which may sometimes simply be a 'smart phone', to undertake recorded or 'real-time' inspections on behalf of the building certifier.

It should be accepted that the certification of a building in rural and remote Queensland will cost more

- [976] Private certifier Ross Rippingale opposed the use of technology as a replacement to physical inspections. In respect to building and certifying in regional and remote areas, Mr. Rippingale argued that it should simply be accepted that there will be additional costs in doing so and likened the increased certification costs to additional freight charges in these areas. He argued that when certifiers are quoting for these sorts of remote area jobs, they should charge appropriate fees that will cover the additional costs.

Remote certifying ok for aspects but not stages

- [977] One submitter in a survey response suggested that whilst every job should be assessed on a case by case basis, inspections undertaken by the use of technology, should only be for an aspect of a stage, not a stage itself.

²¹⁴ Similar submissions were made by building designer Joanne Galea and private certifier Ross Rippingale

You have to be joking

[978] In a survey response, one private certifier submitted:

"If you are a building certifier and you rely on photographs you are joking. I have heard of a concreter sending the same photos for three different jobs."

A builder's viewpoint

[979] Many of the submissions examined thus far, have been the competing considerations of building certifiers. However, in a survey response provided by a building contractor it was argued that:

"The certifier should be onsite to do his inspections. You cannot rely on photos taken by someone else to sign off on a stage. I agreed (sic) that photos and or video is a good way to record the inspection, but it needs to be done by the certifier or competent person."

What is the definition of inspection?

[980] The final word on this issue goes to a private certifier who in his survey response argued:

"The definition of inspection goes something like 'a close examining of something, a formal or official check or examination of something for faults or errors; look carefully at or over, view closely and critically'.

Not sure how remote technology can achieve the above with an interested party in control of the technology.

As a Building Certifier I do not rely on remote technology or use of 'other' Consultants to complete inspections.

I only rely on myself to complete all inspections with the use of a tape, digital camera, digital level, approved drawings plus our checksheets.

The only time I would rely on providing a digital photograph are for very minor issues [eg roof safety access signs etc] then a followup inspection is usually completed.

I trust nobody [Contractors, Licenced Contractors and Consultants] as experience has shown other parties show little regard for compliance. All Contractors are interested in is obtaining the Certifier's signature on a Certificate of Classification.

Our issue is that if you do your work diligently, you do not get a phone call or asked to be involved in the next project.

Our suggestion is a Building Certifier using remote technology to approve inspections [especially critical elements] must have a better PI Insurance than I can obtain and has a 'relaxed' lifestyle."

Consideration

Preferred Option

- [981] A number of submissions were made to the Review which discussed the merits of using modern technology to more broadly assist a building certifier in the performance of the certifying function. These ranged from the use of tablets, smart phones, building information modeling (BIM), ground penetrating radar, instruments to gauge thickness of materials, laser levels, instruments able to 'see through' blockwork to identify the existence and size of reinforcing steel, thermal imaging cameras, the list is seemingly endless and limited only by the ingenuity of mankind.
- [982] There should be no restrictions on the reasonable and lawful use of any technology that a building certifier, inspector or competent person is able to use to assist in the performance of the certifying function. As was submitted by private certifier Neil Oliveri, technology should be embraced by building certifiers. The use of appropriate technology will drive productivity and produce better building outcomes. Subject to a very important qualification discussed below, Government has no place in restricting what technology should or should not be used during the performance of the certifying function.
- [983] In any event, the Review agrees with the submissions of Mr. Claude McKelvey that given the rapid rate of technological advancements, any attempt to introduce a guideline which prescribes the use of certain technologies or methods of using such technology will be outdated before it is even published.
- [984] In the premises, the Review does not consider that a separate guideline should be created which deals with the use of technology. However, the use of technology in inspections should be clarified in the guidelines produced by the chief executive for the inspection of class 1 and 10 buildings and class 2 to 9 buildings (collectively referred to as 'the Guidelines') as detailed in the Recommendations below.
- [985] Subject to a very important qualification, there should be no restrictions or impediments to the types of technology that a building certifier, inspector or competent person can utilise whilst performing the certifying function, which of course includes the carrying out of building inspections.

What is the definition of 'inspect'?

- [986] The term 'inspect' is defined in the Australian Concise Oxford Dictionary²¹⁵ as:

"Look closely into; examine officially"

What is the real problem?

- [987] Whilst Questions 3.3.1 and 3.3.2 in the Discussion Paper are quite broad, the intent of the question was aimed at addressing the issue of the appropriateness of what is described as 'virtual inspections' or 'remote inspections'. That is, where a person other than the building certifier or competent person becomes the eyes and ears of the certifier by using such methods as photography, videography or 'real-time' video by the use of third party proprietary software which is then either simultaneously or later provided to the building certifier. This technology is readily available for download on most smartphones and tablets. As can be gleaned from the extracts of the submissions above, the practice of conducting 'virtual inspections' through photography, videography or 'real-time' video via third party software like 'Facetime', 'Skype' or 'Viber' appears to becoming more wide-spread.
- [988] The question is, should the use of this technology be permitted to replace a physical inspection of the building work in some instances, or at all?

Efficacy of 'virtual inspections'

- [989] A number of submissions were received which call into question the efficacy of relying upon either photographs, videos whether recorded or in 'real-time', when the person on site using such equipment is not the building certifier, inspector or competent person charged with the responsibility of inspecting the work.
- [990] A building certifier reviewing such data whether subsequently or in real-time cannot be adequately appraised of the entire work being inspected. Such an approach does not for instance counter the possibility of fraudulent conduct by the person on site. That is, how can a building certifier really know whether the site being photographed or filmed is the actual subject site? How can the building certifier know he or she is 'getting the full picture'? Is the camera operator, who could for instance be the builder or

²¹⁵ Seventh Edition Oxford University Press, Melbourne 1987

tradesperson, able to keep anything untoward from the building certifier's view?

- [991] These are all valid questions. Even if, as has been suggested, the building certifier was able to send an independent person to conduct the 'walk-around' with the camera, smart phone or tablet and even if that person were able to be directed by the building certifier in 'real-time', the Review is not persuaded that the means of delivering these images would be sufficiently able to demonstrate that the works comply with the building development approval in any adequate way when compared with a physical inspection by the certifier.

Very important qualification

- [992] The very important qualification referred to in paragraphs [982] and [985] above, is this:

The use of technology during building inspections should only be used as an aid to assist the process of undertaking a physical inspection of building work by a building certifier, authorised inspector of the appropriate licence category or a competent person inspecting an aspect of building work.

Interim certificate

- [993] The review does not accept the suggestion that a similar system for interim certificates could be utilised for 'remote inspections'. Section 104 of the *Building Act 1975* enables a certificate of classification to be given to a building which because of the remoteness of its location, it is not practicable for it to be inspected for the purpose of determining whether it has been substantially completed. However, ultimately, the final inspection must be conducted no later than 6 months after the interim certificate is given²¹⁶. This type of interim process is not appropriate in circumstances where a decision must be made whether the works are fit to proceed to the next stage of building. If it were permitted, building work that does not comply with the building development approval is likely to be covered up. This would not lead to better building outcomes.
- [994] The Review accepts that in remote and rural areas of Queensland there is some attraction to allow some dispensation in the form of 'virtual inspections', but this proposal has ultimately been rejected on the following bases:

²¹⁶ See s.104(5) of the *Building Act 1975*

- The chances of being able to pick up an adequate 4G network signal sufficient to provide any form of adequate video imagery in remote or rural Queensland is unlikely;
- However, more importantly, even if such network capabilities existed, the Review remains dissatisfied that the medium would provide the ability for the building certifier to be appraised of the integrity of the whole of the works to be inspected;
- The possibility of fraudulent or dishonest conduct cannot be discounted. For that reason the concept of a 'special builder's licence' ought not be entertained;
- The owners of buildings in remote, rural and regional Queensland have just as much right to expect that the building works for which they have contracted are compliant with the relevant regulations and codes as an owner in South East Queensland;
- Whilst it may be somewhat unpalatable for remote, rural and regional property owners, the Review accepts the submissions of Ross Rippingale that most owners would accept that there are additional costs involved in transporting materials and the provision of labour in places distant from significant population areas;
- With the ability to be able to use other building certifiers, inspectors, competent persons and cadets, there is no reasonable justification for a building certifier to argue that they cannot attend site. If none of these options are available to the building certifier, they can either choose not to accept the engagement, or charge accordingly for the time spent travelling to and from the site.

Merit in the use of photography or videography in limited circumstances

[995] The Review accepts that in limited circumstances, a building certifier should be able to rely upon photography or videography taken by a person other than the building certifier, inspector or competent person (authorised person), but only where:

- It relates to a minor part or minor aspect of building work which is incomplete or defective; and
- It has been previously inspected by an authorised person; and
- The building work if properly completed or rectified is reasonably capable of identification using the medium of photography or videography; and
- In the reasonable opinion of the building certifier, a further physical inspection is not warranted; and
- All photography or videography relied upon, must be permanently recorded and must be retained either

electronically or in hard copy with the building development approval.

Permitted example

- [996] Belinda is a building inspector-restricted, acting on the instructions of a building certifier. She inspects a house frame under construction and identifies that the tie-down is deficient in that a number of cyclone rods do not have nuts and washes and some strapping has been inadequately fastened. Belinda advises the builder that she is not passing the frame in its current state because of the tie-down deficiencies. If approved by the building certifier to do so, Belinda advises the builder to rectify the tie-down and take digital photos of the work once rectified and that the building certifier will provide the frame stage inspection certificate once Belinda has received the digital photos and has satisfied the building certifier that the frame stage has been properly completed.

Non-permitted example

- [997] Ben the building certifier thinks he is too busy to leave his Chermside office to do a footing inspection on the construction of a townhouse development in Caboolture. He 'authorises' Bob the builder to do a live Skype chat on his iPad so that from the comfort of his office, he can check the depth and cleanliness of the footings and that the appropriate trench cages are on stirrups, appropriately tied and placed.

Breach of the Guidelines

- [998] A breach of the Guidelines should attract a loss of demerit points and in some cases disciplinary action should be instigated by the QBCC.

Question 3.3.1 and 3.3.2: Recommendations

[999]

82.	The use of technology in inspections should be clarified in the guidelines produced by the chief executive for the inspection of class 1 and 10 buildings and class 2 to 9 buildings.
83.	The Guidelines produced by the chief executive in relation to the inspection of class 1 and 10 buildings and class 2 to 9 buildings should be amended to reflect the following recommendations:

	<p>(a) Subject to paragraph (b), building certifiers, are entitled to utilise whatever reasonable and lawful technology that is at their disposal to assist them in the performance of the certifying function.</p> <p>(b) However, the use of technology during building inspections should only be used as an aid to assist the process of undertaking a physical inspection of building work by a building certifier, authorised Inspector of the appropriate licence category or a competent person inspecting an aspect of building work.</p> <p>(c) A building certifier may only rely upon photography or videography provided by a person not referred to in paragraph (b) if:</p> <ul style="list-style-type: none"> (i) It relates to a minor part or minor aspect of building work which is incomplete or defective; and (ii) It has been previously inspected by an authorised person referred to in paragraph (b); and (iii) The building work if properly completed or rectified is reasonably capable of identification using the medium of photography or videography; and (iv) In the reasonable opinion of the building certifier, a further physical inspection is not warranted; and (v) All photography or videography relied upon, must be permanently recorded and must be retained either electronically or in hard copy with the building development approval. <p>A breach of the Guidelines should attract a loss of demerit points and in some cases disciplinary action should be instigated by the QBCC.</p>
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Question 3.4.1: Which is your preferred option for improving the use of certificates of classification?
Option 3.4(a): Require the class of building to be included on the approval
Option 3.4(b): Replace certificate of classification with an 'occupancy permit' or similar
Option 3.4(c): Require additional information on certificate of classification (or occupancy permit), for example the maximum number of occupants for a building
Other

Background

[1000] For class 1a buildings and class 10 buildings and structures, there is no requirement under the building legislation to issue a certificate of classification on completion of the work. However a building certifier must provide the owner with a final inspection certificate for the work and a copy of any other inspection documentation for inspection of the building work generally within 5 business days after the final inspection.

[1001] For class 2-9 buildings, the building legislation requires a building certifier to issue the building owner with a certificate of classification as soon as practicable after the building work has been substantially completed.

[1002] There is no requirement in the building legislation for a certifier to record the particular classification of a building at the time of approval.

[1003] The Discussion Paper raises the prospect of amending the building legislation to:

- Record the classification of a building at the beginning of the approval process to provide some certainty to the applicant and referral agencies that the building has been classified in accordance with the approval;
- Replace the term 'certificate of classification' with 'certificate of occupancy' or similar to align with other jurisdictions and to better describe the purpose of the certificate;
- Require additional information to be included on the 'certificate of occupancy' for buildings approved through deemed-to-satisfy or alternative solutions, such as the maximum number of building occupants, particularly in relation to buildings used for public events.

Feedback outcomes

[1004] Of the written submissions and completed surveys responding to Question 3.4.1:

- (a) 26% of submitters supported amending the building legislation to require the class of building to be included on the approval;
- (b) 14% of submitters supported amending the name of the certificate of classification to 'occupancy permit' or similar;
- (c) 20% considered that additional information should be included on the 'occupancy permit';
- (d) 24% of submitters had other suggestions which usually incorporated a combination of two or more of these options; and
- (e) 16% of submitters did not address the question.

[1005] It should be noted that the three main options provided are not mutually exclusive. As a number of submitters provided multiple positive responses to the various options, the above statistics are not considered an accurate representation of the feedback received.

Submissions in relation to including the building classification on the approval

Submissions in support

Provide clarity

[1006] Local Government building compliance officer Anna Sissman considered that this amendment would provide clarity on occasions where one building certifier has been engaged to complete the work of another.

Benchmark for industry best practice

[1007] AIBS also supported this proposal²¹⁷ arguing that a number of its members already nominate the classification on the decision notice. It suggested that mandating its requirement would set the benchmark for industry best practice.

²¹⁷ Similar submissions were made by the HIA

Already required pursuant to s.335(3)(b) of the Sustainable Planning Act 2009.

- [1008] Gladstone Regional Council stated that it already incorporates the class of the building on its Decision Notice pursuant to s.335(3)(b) of the *Sustainable Planning Act 2009*.

Ensures consistency and continuity

- [1009] Brisbane City Council supported a requirement that the classification of a building be included on the Decision Notice arguing that it “*ensures consistency and continuity for ensuring compliance at the building assessment, approval and certification stages of building work*”.

Approval should also state version of the NCC

- [1010] Private certifier Ross Rippingale suggested it was ‘strange’ that this requirement be legislated when good practice would dictate that it should be done anyway. He did however suggest that the approval should also state the version of the NCC to which the project has been assessed. He considered that this was important given that from 2015, the NCC is to be amended only every three years.

Submissions against

Not necessary because it is already a requirement of s.335(3)(b) of SPA

- [1011] Some submitters argued that because s.335(3)(b) of the *Sustainable Planning Act 2009* requires the Decision Notice to list the building classification, that it is not necessary to amend the *Building Act 1975*.

Not necessary because it is already being done

- [1012] Private certifier Gordon Heelan argued that he already identifies the class of building on the approval notice and therefore it should not be made mandatory.

Intent can be achieved by other means

- [1013] Private certifier Neil Oliveri did not regard the proposed legislative amendment as necessary. Rather he considered that the same outcome could be achieved by changing the Form 18 (Notice of engagement to landowner) to include an ‘existing classification’ and ‘proposed (assessment) classification’ section. He also argued that

the requirements of the Form 6 Decision Notice should also include the classification of the building and details about the type of building construction required and the volume of the NCC used as part of the assessment.

Submissions in relation to replacing the certificate of classification with an ‘occupancy permit’ or similar

Submissions in support

Generally

[1014] The Australian Institute of Architects supported this proposed amendment but gave no reasons in support thereof.

[1015] A number of other submitters supported the change of name in addition to the other suggested amendments²¹⁸.

Submissions against

How would this impact on building certifiers’ professional indemnity insurance?

[1016] Private certifier Claude McKelvey was concerned about what repercussions might follow from any changes to the certificate of classification, particularly in relation to unintended consequences impacting on certifiers’ professional indemnity insurance.

Insufficient justification for change

[1017] HIA argued that it could see no justification for a change from the current terminology of ‘certificate of classification’.

[1018] Neil Oliveri also argued that in his view, the proposed change was for ‘change’s sake’ and that it would only serve to confuse the industry which has just recently become accustomed to the certificate of classification.

[1019] Ross Rippingale considered that the term should be left as is, asking why Queensland should conform to the other states. He was not alone in expressing that view.

²¹⁸ See for example the submissions of Brisbane City Council, Logan City Council, Liz Woollard and numerous survey responses

Submissions in relation to requiring additional information to be included on an 'occupancy permit'

Submissions in support

Common sense to mandate the process

[1020] Mr. Neil Oliveri considered this proposal as 'common sense'. Whilst he regarded that the current certificate of classification is already able to include details of occupant density and alternate building solutions, he considered that it was worthwhile mandating the process.

[1021] HIA supported amending the building legislation to require additional information to be included on certificates of classification for public buildings.

QFES wants more information

[1022] QFES suggested that building owners and occupiers are sometimes unaware of the maximum permitted population permitted inside a building. It strongly supported the mandatory inclusion of maximum permitted population on the certificate of classification and further argued that this information should be provided for each room in a building. QFES also suggested that all installed fire safety installations, both deemed-to-satisfy and alternative solutions, including their design, installation and maintenance standards be required for inclusion on the certificate of classification.

Submissions against

[1023] Private certifier Claude McKelvey argued that placing deemed-to-satisfy restrictions on the certificate of classification can be a complicated matter.

[1024] Private certifier Gordon Heelan argued that he already provides additional information on the certificate of classification which has been approved through deemed-to-satisfy or alternative solutions.

Submissions in regard to the implementation of other reforms

[1025] A number of submitters argued that two or more of the options offered in the Discussion Paper should be implemented. Private certifier Liz Woollard suggested that:

- The certificate of occupancy should be replaced with an 'occupancy permit'; and
- The class of building should be included on the approval; and
- Any alternative solution should be required to be recorded on the occupancy permit; and
- The occupancy permit should be required to record the maximum number of occupants for a building.

[1026] Logan City Council described the proposal to identify the class of building on the Decision Notice as *"imperative for the building certification process and future management of the building by the owner."* It also supported replacing the term 'certificate of classification' with 'occupancy permit' because it provides enhanced industry and building owner understanding of its purpose under the building legislation.

Introduce a 'Certificate of Final Inspection'

[1027] In a response to the survey, one submitter argued for the introduction of a 'Certificate of Final Inspection' for class 2-9 buildings where 'substantial completion' is not achieved in a multi-tenanted building such as a shopping centre, where one builder may be contracted to construct the shell of the centre, and other builders will perform the fitout. The submitter suggested that such a certificate is available in Victoria.

Occupancy permit does not ensure compliance with all conditions

[1028] In another response to the survey, concerns were raised which were similar to those expressed by Claude McKelvey. The submitter was at pains to point out that the 'occupancy permit' must not be taken to be a verification of compliance of the development with *all* relevant legislation required to occupy the building. The submitter argued that Queensland regulators should not follow the path adopted in New South Wales where the Principal Certifying Authority (PCA) is required to ensure compliance with *all* development consent conditions prior to issuing the 'occupation certificate'.

Consideration

[1029] The examination of these issues has been an interesting insight into human behaviour. Where one person of the same profession considers that a particular way of conducting one's professional affairs is so important that it should be mandated in legislation, another whilst acknowledging that importance, considers that it

should not be mandated, because he or she is already performing that function.

Option (a): Include the building classification on the approval

[1030] The Review accepts that s.335(3)(b) of the *Sustainable Planning Act 2009* already requires that the classification of a building must be stated on the Decision Notice. Section 335(3)(b) provides:

(3) *Also, if the application is a building development application, the decision notice must—*

(a) ...

(b) *if the development involves building work that is building, repairing or altering a building—state the classification or proposed classification of the building or parts of the building under the BCA.*

[1031] However, the Review has not been able to locate a similar provision in the Draft Planning Bill, although it may be contained in the yet to be released Regulation.

[1032] It is appropriate that the Decision Notice records the building classification. The Review accepts the submissions that the inclusion of the building classification on the Decision Notice would provide greater certainty for building owners, referral agencies and building certifiers that the completed building is constructed in accordance with its original classification.

[1033] I also agree with the submissions of Mr. Ross Rippingale and Mr. Neil Oliveri that there is merit in requiring the Decision Notice to state the relevant version of the NCC by which the building was assessed.

[1034] These two reforms will provide an appropriate benchmark for industry best practice by providing better more reliable documentation and greater accountability by ensuring that the completed building is constructed in accordance with its original classification and design.

[1035] Given the overlap between the relevant provisions of the *Building Act 1975* and the planning legislation, it is appropriate that these requirements be contained in the Draft Planning Bill or its Regulation and Chapter 5 of the *Building Act 1975*.

Option (b): Rename the certificate of classification

[1036] The statistics favouring the renaming of the certificate of classification were by all accounts quite low being in the order of

14%. However, as previously stated, this figure does not take into account responses and submissions which favoured multiple options. As previously stated, the 'options' provided in the Discussion Paper for Question 3.4.1 were not mutually exclusive.

- [1037] The Review accepts that there is little merit in changing the term 'certificate of classification' to simply conform with similar terms used in other jurisdictions. However, there are other benefits in doing so. Many building owners would not understand what a 'certificate of classification' is.
- [1038] The Review does not accept the submission that the suggested amendment is a change for change's sake. The term 'certificate of classification' is somewhat counterintuitive. It suggests the certification of the assessment of the class of a building, that is, the assessment performed at the front end of the approval stage, rather than when the building work has reached substantial completion²¹⁹. As to when building work for class 2-9 buildings may be considered to have reached substantial completion, see s.101 of the *Building Act 1975* which provides:

101 Meaning of substantially completed

- (1) A building has been **substantially completed** when—
- (a) all wet areas are waterproof as required under the building assessment provisions; and
 - (b) reticulated water is connected to and provided throughout the building; and
 - (c) all sanitary installations are installed as required under the building assessment provisions; and
 - (d) either—
 - (i) the local government has issued a compliance certificate under the *Plumbing and Drainage Act 2002* stating the plumbing or drainage work for the building has been completed under that Act; or
 - (ii) notice of notifiable work carried out for the building has, on the completion of that work, been given to the Plumbing Industry Council under the *Plumbing and Drainage Act 2002*, section 87; and
 - (e) all fire safety installations are operational and installed as required under the building assessment provisions; and
 - (f) all health and safety matters relating to the building comply with the building assessment provisions; and
 - (g) electricity supply is connected to the building to the extent necessary for it to be used under the BCA classification sought; and
 - (h) the building is weatherproof as required under the building assessment provisions; and
 - (i) the building is structurally adequate as required under the building assessment provisions; and
 - (j) all means of access and egress to the building comply with the building

²¹⁹ See s.102(1)(a)(i) of the *Building Act 1975*

assessment provisions; and
(k) *if the relevant development approval includes conditions advised or required by a referral agency and the conditions are about the building work for the building—the conditions have been complied with.*

(2) *In this section—*

building *includes alterations to all or part of an existing building.*

[1039] The Review has paid particular attention to the concerns raised by Mr. McKelvey who suggested that a change to the term could impact upon the costs of a building certifier's professional indemnity insurance. The Review is conscious of those concerns and keen to ensure that any of the Recommendations from this report do not unnecessarily increase the costs of doing business for building certifiers.

[1040] Mr. McKelvey appears to have drawn upon the concerns raised in the Maltabarow Report regarding amendments to the *Environmental Planning and Assessment Act 1979 (NSW)*²²⁰ which came into effect on 1 March 2013. These amendments required certifiers when considering whether to issue the 'occupation certificate' at the completion stage to apply the 'not inconsistent' test to compliance with the then BCA and consent conditions. Maltabarow suggests that "*this change has significantly widened the scope of certification and increased liability, with consequences for the cost and availability of Public Indemnity (PI) (sic) insurance.*"²²¹

[1041] The Discussion Paper does not suggest a broadening of the responsibilities of the building certifier. It simply suggests that the term 'certificate of classification' be replaced with another term which more accurately reflects its intended meaning. There is no suggestion that the term 'substantially completed' as defined in s.101 of the *Building Act 1975* would be amended to broaden the scope of what a building certifier must consider before he or she must be satisfied that a certificate should be issued.

[1042] For these reasons, the concerns raised by Mr. McKelvey are not warranted.

[1043] Table 45 of the Discussion Paper identifies various terminology used for 'certificates of classification' throughout the country. That Table is reproduced below.

²²⁰ See s.109H

²²¹ George Maltabarow, *Building Certification and Regulation – Serving a new planning system for NSW*, May 2013 at 14-15

Table 8 - Terminology used in other jurisdictions that is equivalent to Queensland's certificate of classification.

State/Territory	System
Australian Capital Territory	Certificates of occupancy are required for lawful occupation of buildings. Can also be "certificates of occupancy or use" for buildings or structures that are not occupied, such as retaining walls or industrial plant.
New South Wales	Occupation certificates are required for lawful occupation of buildings.
Northern Territory	Occupancy certificates are required for lawful occupation of buildings.
South Australia	Certificates of occupancy are required for all class 2 to class 9 buildings only.
Tasmania	Occupancy permits are required for lawful occupation of buildings.
Victoria	Occupancy permits are required for lawful occupation of buildings (except for Class 10). Certificates of final inspection are required for buildings or structures that are not occupied, such as pools, retaining walls or sheds. The Occupancy Permit states that building's class.
Western Australia	Occupancy permits are required for all class 2 to class 9 buildings only.

[1044] The Review is not wedded to one particular term over another. However, the term 'certificate of occupancy' would be a more meaningful and readily identifiable term to building owners and for that reason the Review considers it appropriate.

Option (c): Additional information to be included on the 'certificate of occupancy'

Maximum number of people in a building

[1045] The existing certificate of classification (Form 11) already provides at Item 5 for the identification of the maximum number of people permitted in a building. It also enables the maximum number of people permitted in part of a building to be listed. There is therefore, no requirement to amend the Form 11 in this regard.

[1046] However, for the sake of the health and safety of building occupants, particularly in relation to fire safety, s.103 of the *Building Act 1975* should be amended to require the certificate of occupancy to provide a mandatory statement regarding the maximum number of people that may occupy a building. As was submitted by Brisbane City Council, this calculation could be determined under any building assessment provision including development codes in a planning scheme²²². However the Review does not consider it necessary for s.103 of the *Building Act 1975* to mandate the identification of the maximum number of people that may occupy any one particular room or part of a building. The Review considers that such a requirement could become unmanageable, particularly in larger public buildings where there are often movable walls and partitions.

Installed fire safety installations

[1047] The Review has considered the submission of QFES that the certificate of occupancy should include the details of all installed fire safety installations, both deemed-to-satisfy and alternative solutions, including the design, installation and maintenance standards.

[1048] Section 103(f) of the *Building Act 1975* seems to adequately cater for the identification of alternative solutions on the certificate of classification. Section 103(e) however is more restrictive in relation to deemed-to-satisfy requirements. These provisions provide:

103 Certificate requirements

A certificate of classification must-

(a) ...
...

(e) *if the development uses a building solution under the BCA or QDC and the solution—*

(i) restricts the use or occupation of the building—state the restriction; or

(ii) requires a management procedure relating to systems or procedures—state the management procedure; and

(f) *if the development uses alternative solutions—state the materials, systems, methods of building, management procedures, specifications and other things required under the alternative solutions.*

²²² See for example the Dwelling House Code and Rooming Accommodation Code in the *Brisbane City Plan 2014*, where both prescribe maximum occupancy numbers as acceptable outcomes for self-assessable development

- [1049] Section 103(e) of the *Building Act 1975* sufficiently deals with the issue raised by QFES. If a fire safety installation is based on a deemed-to-satisfy requirement which does not restrict the use or occupation of the building, or require a management procedure, there is little utility in requiring it to be included on the certificate of occupancy. In fact, it could be argued that it is in everyone's best interests that the certificate of occupancy be kept as simple as possible. If QFES' submission were accepted, the Form 11 might end up looking like a phone book.
- [1050] Otherwise, if the fire safety installation is based on an alternative solution, s.103(f) of the *Building Act 1975* requires that the certificate must "*state the materials, systems, methods of building, management procedures, specifications and other things required under the alternative solutions.*"
- [1051] Other than the amendment suggested in paragraph [1046], the Review does not consider that s.103 needs further amending.

Other inclusions

Builder's contact details

- [1052] In a previous submission to Building Codes Queensland in 2008, AIBS recommended a number of changes to the certificate of classification (Form 11). The Review has considered those suggestions and is satisfied that the inclusion of the builder's details on the Form 11 is an appropriate one.
- [1053] The Government has identified in its Ten Point action plan the need to ensure that all industry participants are held more accountable. Listing the name, licence number and contact details of the builder is another way of ensuring that the builder will be held accountable in the event of any problems in the future. This is particularly important where the building has been sold to subsequent owners.

Introduce a 'Certificate of Final Inspection'

- [1054] It was suggested that Queensland should introduce a 'Certificate of Final Inspection' for class 2-9 buildings similar to that available in Victoria. A 'Certificate of Final Inspection' is provided in s.38 of the *Building Act 1993* (Vic) which states:

38 Certificate of final inspection

- (1) *The relevant building surveyor must issue a certificate of final inspection on completion of the inspection following the final mandatory notification stage of building work if—*
- (a) *an occupancy permit is not required for the building work; and*

- (b) all directions given under this Part in respect of the building work have been complied with.
- (2) A certificate of final inspection is not evidence that the building or building work concerned complies with this Act or the building regulations. [Emphasis added]

[1055] It is difficult to ascertain from the brevity of the submission, but it is unclear how a similar certificate would work in practice in Queensland where pursuant to s.102 of the *Building Act 1975*, a building certifier must issue a certificate of classification as soon as practicable, if after having inspected the work, is satisfied that the works have reached substantial completion or has given written consent for the occupation of part of the building before all of it has been substantially completed. Section 105 of the *Building Act 1975* also enables the building certifier to issue certificates of classification progressively when work is being completed in stages.

[1056] Presently, in instances like the one submitted where a shopping centre is completed by one contractor and the fit outs are completed by another, a certificate of classification would be issued for the construction of the building and then later certificates of classification would be issued for the various tenancies once fitted out. The Review does not consider any changes are warranted to s.105 of the *Building Act 1975*.

Question 3.4.1 : Recommendations

[1057]

The use of certificate of classification would be improved by the adopting the following recommendations:

84.	<p>Consistent with s.335(3)(b) of the <i>Sustainable Planning Act 2009</i>, the building certifier should record the classification of the building on the Decision Notice. The Decision Notice should also state the version of the National Construction Code by which the building has been assessed.</p> <p>Given the overlap between the relevant provisions of the <i>Building Act 1975</i> and the planning legislation, it is appropriate that these requirements be contained in the Draft Planning Bill or its Regulation and Chapter 5 of the <i>Building Act 1975</i>.</p>
85.	<p>Rename the certificate of classification (Form 11) to that of a “Certificate of Occupancy” to promote greater clarity of the purpose of the certificate amongst building owners, the industry and the general public. It also aligns more</p>

	<p>closely with the terminology used in other jurisdictions.</p> <p>This will require amendments to various provisions within the <i>Building Act 1975</i>.</p>
86.	<p>The maximum number of people able to occupy a building should be listed as a requirement pursuant to s.103 of the <i>Building Act 1975</i>. (The Review notes that this is already listed in Item 5 of Form 11).</p>
87.	<p>Whilst renaming the current certificate of classification Form 11, Government should take the opportunity to liaise with stakeholders to identify any further amendments to the Form 11 that are considered desirable to promote safety, accountability, efficiency, reduce unnecessary red tape and compliance costs on the industry. For example, it is suggested that:</p> <p>(a) The details of the builder and QBCC licence number should be recorded; and</p> <p>(b) Reference to the 'Building Code of Australia' should be amended to the 'National Construction Code'.</p>

3.5 Certificates for buildings without records or approvals

Question 3.5.1: Which is your preferred option for clarifying when certificates of classification should be given for pre-1998 buildings?

Option 3.5(a): Legislative amendments to clarify minimum technical requirements for older buildings;

Option 3.5(b): Guidelines to clarify minimum technical requirements for older buildings;

Other

Question 3.5.2: Do you support allowing a ‘final’ certificate to be issued for a single detached house or shed independently of a building development approval?

Background

[1058] Given the interrelatedness between these two issues, it is appropriate that they be considered together.

[1059] The building legislation commenced on 1 April 1976 as a uniform statewide law governing the construction of all buildings and structures. Prior to the introduction of the building legislation, the local laws of each local government governed the system of building control.

[1060] Buildings constructed before the commencement of the building legislation are not required to have a certificate of classification before they can be legally occupied, however it is not uncommon for a certificate of classification to be required in the event of the sale of the building or for insurance purposes.

[1061] Currently, an owner may apply to the local government for a certificate of classification for class 2-9 buildings constructed before 30 April 1998 (the commencement of the system of private certification), even if the building did not previously have a building approval²²³. There is no ability for an owner to obtain an equivalent certificate for class 1a and 10 buildings and structures (a final inspection certificate), independently from a building development approval²²⁴.

²²³ See s.123 of the *Building Act 1975*

²²⁴ See ss.98 - 100 of the *Building Act 1975*

- [1062] The *Building Act 1975* provides little assistance to local government when considering whether to issue a certificate of classification to a class 2-9 building built before 30 April 1998. In other words, the building legislation provides no detail about what technical standards the building must meet before a certificate of classification should be issued.
- [1063] Given the higher than usual risks associated with approving existing buildings, local governments have expressed concerns that they are exposed to legal liability because of the lack of legislative direction about the technical standards by which these buildings should be assessed.
- [1064] The Discussion Paper provides two alternatives to assist local governments when determining whether to issue a certificate of classification on a class 2-9 building constructed before 30 April 1998:
- Amend the building legislation to clarify the minimum technical requirements applicable; or
 - Provide guidelines about the minimum technical requirements.
- [1065] The Discussion Paper also queries whether the building legislation should be amended to allow the issuing of a final certificate for detached houses, garages and sheds when the building development approval has lapsed and even in instances where no building development approval had been obtained. This would allow for the ability to 'finalise' class 1a and 10 buildings and bring them into line with the law in respect to class 2-9 buildings.

Feedback outcomes

- [1066] Of the written submissions and completed surveys responding to Question 3.5.1, 34% of submitters supported clarifying the minimum technical requirements applicable in determining whether to issue a certificate of classification for buildings built prior to 30 April 1998 by way of legislation, whilst 35% of submitters supported the implementation of a new guideline, 11% had other suggestions on how to resolve the question and an unusually high 20% of submitters did not address it.
- [1067] Of the written submissions and completed surveys responding to Question 3.5.2, 36% of submitters supported allowing a 'final' certificate to be issued for class 1a and class 10 buildings and structures independently of a building development approval, whilst 34% were opposed, 10% had other suggestions on how to resolve the question and once again a rather high 20% of submitters did not address it.

[1068] Question 3.5.1 will be considered first.

Certificates of classification for class 2-9 pre 1998 buildings

Relevant legislative provisions

[1069] Section 123 of the Building Act 1975 provides:

123 Certificate of classification for particular buildings built before 30 April 1998

- (1) This section applies to a building if it was built before 30 April 1998.*
- (2) The owner of the building may apply to the local government for a local government building certifier to give the owner a certificate of classification for the building.*
- (3) The application must be written and include enough information about the building's use to allow the local government building certifier to comply with the certificate requirements.*
- (4) If the application complies with subsection (3), the local government building certifier must ensure the owner is given the certificate of classification that complies with the certificate requirements.*

Support for legislative amendments to clarify when certificates should be given for pre-1998 buildings

Amendments would provide certainty and clarity

[1070] It was argued on behalf of Cairns Regional Council that amending the *Building Act 1975* to include minimum technical requirements for the assessment of illegal buildings would provide much needed certainty and clarity compared with the current environment where it was alleged that the risks associated with issuing certificates of classification for these buildings was 'enormous'.

New building work on a pre-1998 building with certificate of classification

[1071] Private certifier Claude McKelvey suggested that the best way of dealing with this issue was to provide assistance to local governments by amending the *Building Act 1975*. However, he also argued that the biggest issue private certifiers faced with buildings constructed prior to 30 April 1998 that did not have a certificate of classification was how an application should be assessed for new work to be constructed in or on an old building.

Guideline not enough

[1072] Local government certifier Laurence Eves suggested that a guideline was not enough to clarify the uncertainty surrounding this issue. He argued that certifiers need assuredness when making these decisions. He suggested that the legislation should prescribe relevant BCA clauses or sections that need to be satisfied prior to a certificate of classification being issued.

[1073] Private certifier Styles Magwood similarly suggested that setting out the technical requirements in guidelines was not an appropriate way of dealing with the problem. He suggested that guidelines:

- Would “*unwittingly conflict with the Act and either would not work or would cause considerable confusion*”;
- Were becoming prolific in recent years; and
- Need to be readily accessible from one webpage produced by DH&PW.

Amend Building Act 1975 to expressly prohibit retrospective approvals and create new process for illegal building work

[1074] It was argued on behalf of Brisbane City Council that because the *Building Act 1975* does not currently provide any assistance on the assessment and approval of buildings constructed without an approval, it adopts a risk-based approach to balance the interests of building owners and the broader interests of the community. However, it was suggested that preferably, the *Building Act 1975* should be amended to expressly prohibit retrospective approvals. It was suggested that rather than issue a certificate on such a building, a new type of certification could be made which would differentiate it from one that had been through the appropriate processes²²⁵. It was argued that this “*would allow the market and the community to determine the penalty (through the sale price) for buildings constructed either without a building approval or without having all the mandatory stages inspected in accordance with the building approval.*”

Private certifiers should be able to issue certificates of classification for pre-1998 buildings

[1075] Logan City Council suggested that if the *Building Act 1975* were amended to set ‘minimum requirements’ for assessing a pre-1998

²²⁵ Similar submissions regarding the importance of differentiating buildings that had been through the appropriate processes and those that hadn’t were made by Logan City Council

building, then there was no reason why private certifiers could not also perform this work.

Support for a guideline to clarify when certificates should be given for pre-1998 buildings

Previous local laws not now readily identifiable

[1076] AIBS argued that many of the local laws that existed prior to the introduction of the building legislation are not now readily identifiable. As a result, it suggested that there was a real need to assist local government in determining if these buildings are considered adequate. It suggested that the best way to provide this assistance to local government was by way of introducing a guideline.

Lack of guidance results in significant inconsistency

[1077] HIA suggested that the lack of guidance currently provided in the *Building Act 1975* results in significant inconsistency between various local governments and how they assess building work that does not have a certificate of classification. It also suggested that this lack of guidance created uncertainty as to what standards should be applied to these buildings. It considered that the best way of dealing with these issues was to provide local government certifiers with direction by way of introducing a guideline specifying minimum technical standards.

Support for other reforms

'Statutory guidelines'?

[1078] LGAQ had 'a bet each way' arguing that the most effective method of resolving this issue is through regulating minimum technical requirements for buildings that do not have a relevant record of approval or certificate of classification. It suggested that the most appropriate way of achieving this aim "*was via legislation or 'statutory' guidelines*"²²⁶.

²²⁶ Similarly, Lockyer Valley Regional Council considered the objective could be attained through either legislative amendments or the creation of a guideline

‘Problem, what problem?’

[1079] Private certifier Gordon Heelan did not understand what the fuss was about. In his written submissions, he said:

“Oh please, what is the issue, Read the legislation. We issue C of Cs now for older buildings. The problem really seems to be the certifier does not really know what he is doing. What happened to peer review and talking to other certifiers?”

Issuing of final certificates on class 1a and 10 buildings

Relevant legislative provisions

[1080] Class 1a buildings and class 10 buildings and structures do not require a certificate of classification, but rather ‘a final certificate of inspection’²²⁷. However, unlike class 2-9 buildings, a class 1a building or class 10 building or structure can be occupied or used without a final inspection certificate²²⁸. The relevant provisions of the *Building Act 1975* which deal with the issuing of a ‘final certificate of inspection’ are extracted below.

98 Application of pt 1

This part applies to a building certifier for a building development approval who is a local government building certifier or a private certifier (class A), if the building is—

- (a) a single detached class 1a building; or*
- (b) a class 10 building or structure.*

99 Obligation to give owner inspection documentation on final inspection

- (1) This section applies if at the inspection of the final stage of building work, the building certifier is satisfied, on an inspection carried out under best industry practice, that the work complies with the building development approval.*

Note—

There is a right of appeal to a building and development dispute resolution committee against a decision by a building certifier about inspection of building work the subject of a building development approval. See section 124 and the Planning Act, section 532.

- (2) The building certifier must ensure the owner of the building is, within the required period, given—*

²²⁷ See ss.98-99 of the *Building Act 1975*

²²⁸ See s.114 of the *Building Act 1975*

- (a) a final inspection certificate for the building work; and
- (b) a copy of any other inspection documentation for inspection of the building work.

Maximum penalty—40 penalty units.

(3) *In this section—*

required period means the period that ends 5 business days after—

(a) if the inspection documentation includes any certificates relied on by the building certifier—the certifier accepts the certificates; or

(b) otherwise—all of the building work is inspected.

Submissions in support of legislative amendments allowing a ‘final’ certificate to be issued on class 1a buildings and class 10 buildings and structures independently of a building development approval

[1081] AIBS were satisfied that a final certificate could be issued in respect to a class 1a building or class 10 building or structure provided it was based on an earlier building development approval where the work may have been completed but the approval had lapsed. However:

- Where an inspection of the building revealed that further work was required to achieve compliance with the earlier building development approval, AIBS suggested that a new approval should be required; and
- AIBS did not support the approval of illegally erected buildings or structures. However, in subsequent discussions with the author of the submissions prepared on behalf of AIBS, Mr. Mark Catchpole informed the Review that AIBS’ opposition to issuing final certificates independently of a building development approval on class 1 and 10 buildings was based on the understanding that building certifiers may be required to ‘rubber stamp’ the building, that is without any proper analysis of whether the building or structure was fit for purpose and built in accordance with the codes and standards of its time²²⁹.

Submissions opposed

[1082] The general thrust of those submissions which opposed the ability to obtain a final inspection certificate independently of a building development approval was that it would detract from the building control system which requires building development approvals to

²²⁹ Teleconference on 15 October 2014

be sought before the work is commenced and all mandatory inspections to be performed during construction. The concerns centred around if the process were made too easy, why would people ‘do the right thing’ in the first place²³⁰.

- [1083] A number of survey responses opposed the suggestion on the basis that it was asking building certifiers to assume too much liability for things that they do not know and more than likely are incapable of knowing.

Support for other reforms

Opposed but if it is permitted, final certificates should only be provided by Local Government

- [1084] Mr. Claude McKelvey argued that there were ‘inherent problems’ in demonstrating that a building would meet the technical requirements. He argued that if an owner of a class 1a building or class 10 building or structure does want to obtain a final certificate independently of a building development approval, the owner should only be able to do so with the local government²³¹.

Qualified certificate

- [1085] Local government certifier Laurence Eves suggested that because a certifier cannot reasonably be expected to sign off on all of the stages for which he or she has not been able to inspect, a certifier should be able to issue a different form of final inspection certificate which qualifies the certification. Mr. Eves suggested that the form should say:

“The building appears to be structurally sound and would seem to satisfy the construction requirements at the time it was constructed and as such may be occupied.”

Status report scheme

- [1086] Private certifier Liz Woollard opposed the issuing of a final inspection certificate independently of a building development approval. She argued for the introduction of a scheme which requires a ‘status report’ at the contract stage of the purchase of a building. The ‘status report’ would show what building work (if any) had been approved and what had been finalised. For work not yet finalised, she argued there should be a requirement to obtain a

²³⁰ See for example the submissions of Logan City Council, Mackay Regional Council, Neil Oliveri and Robert Davies

²³¹ Similar submissions were made in responses to the survey

compliance inspection and report from a local government building surveyor prior to settlement of the contract. The compliance inspection performed by local government would determine if the Council will:

- Issue a notice to repair, demolish or rebuild; or
- Take no action and close the file.

Ms. Woollard suggested that this scheme would encourage more people to ensure that building work is approved and finalised to avoid problems at the point of sale and beyond.

Consideration

[1087] Currently, s.123 of the *Building Act 1975* enables only a local government to issue a certificate of classification for building work constructed prior to 30 April 1998.

[1088] However, s.112 of the *Building Act 1975* entitles either local government or a private certifier to issue a certificate of classification or change the use of a building constructed prior to 14 December 1993 where no assessable building work occurs.

[1089] A number of private certifiers have explained during the course of the Review that they ‘work around’ the exclusionary provisions contained in s.123 of the *Building Act 1975* which prevents the involvement of private certifiers, by assessing the classification of a building under s.112 of the *Building Act 1975*. The provisions contained in s.112 of the *Building Act 1975* afford greater assistance to the certifier in the assessment of technical standards the building must meet. It is under s.112 of the *Building Act 1975* which it is assumed Mr. Heelan suggests there are no difficulties in issuing a certificate of classification where one did not previously exist.

[1090] Section 112 of the Building Act 1975 provides:

Concessional approval for particular existing buildings

- (1) *This section applies only to a building in existence before 14 December 1993.*
- (2) *A building certifier who is either of the following may approve a BCA classification or use change for the building or part of the building without the building or part as changed having to comply with the building assessment provisions, other than the BCA, parts E1 and E4—*
 - (a) *a local government building certifier;*
 - (b) *a private certifier (class A).*
- (3) *However, the change may be approved only if the building certifier considers that the building or part—*
 - (a) *will be structurally sound and capable of withstanding the*

- loadings likely to arise from its use under any new BCA classification or use; and*
- (b) will reasonably provide for—*
- (i) the safety of persons in the building if there is a fire, including, for example, means of egress; and*
 - (ii) the prevention and suppression of fire; and*
 - (iii) the prevention of the spread of fire.*
- (4) Also, if the building contains a special fire service the building certifier must not approve the change unless the certifier has first received from QFRS a report on the suitability of the service.*
- (5) The approval may impose the conditions the building certifier considers necessary about any of the matters mentioned in—*
- (a) the BCA, part E1 or E4; or*
 - (b) subsection (3).*

Liz Woollard's status report scheme

[1091] The Review does not accept the submissions of Ms Woollard that the Government should introduce a 'status report scheme' or any variation to it. No data has been provided by any party during this Review about the extent of illegal building work and the impact that it has upon the community that would warrant this type of Government intervention. The proposed scheme would significantly impact on the rights of individuals from entering into or completing a contract to purchase a building. The Review considers that adequate arrangements can be made under existing commercial arrangements for purchasers of buildings to satisfy themselves that the work has been appropriately constructed and that all approvals are in place and have been finalised. In addition, the proposed scheme is likely to cause significant additional resource issues for local governments.

Prohibit retrospective approvals?

[1092] The Review does not agree with Brisbane City Council's approach of establishing what would in effect become a two-tiered property system, where buildings which have a certificate of classification are considered to be of superior value than those of a different 'lesser' classification. If it can be established that the building is safe for occupation and complies with the codes or standards applicable when it was built²³², why should the building not be able to receive a certificate of classification? Whilst not an economist, the Review considers that the implementation of the Brisbane City Council submission could result in potentially significant property

²³² Subject to the building complying with BCA parts E1 (fire fighting equipment) and E4 (Emergency lighting, exit signs and warning systems)

devaluations and could result in disastrous financial outcomes for building owners and their financiers.

Section 123 Building Act 1975 inadequate

[1093] Having considered the various submissions, the Review accepts that the provisions contained in s.123 of the *Building Act 1975* are inadequate and require amendment to provide more detailed information about the technical requirements that must be considered when deciding whether to issue a certificate of classification for pre-1998 buildings.

[1094] However, there is another model that the Review recommends.

Single certificate of occupancy model

[1095] The following model assumes the adoption of Recommendation 85 (renaming of the certificate of classification to 'certificate of occupancy').

[1096] There are significant opportunities for red tape reduction by supporting a single certificate model for buildings and combining, as far as practicable, all relevant considerations of the current mechanisms for issuing a certificate for all classes of buildings.

[1097] The *Building Act 1975* should be amended to allow a person to request a certificate of occupancy that is not tied exclusively to a building development approval. This would allow either a private certifier or a local government certifier to issue a certificate of occupancy for a building at any time. This single system would address new buildings, existing buildings and changes to classification or use.

[1098] In order for a building certifier to issue the certificate of occupancy, the certifier would have to be satisfied that the building complies with technical requirements that would be prescribed in Chapter 5 of the *Building Act 1975* such as:

In considering whether to issue a certificate of occupancy, the certifier must decide whether the building is safe for occupation, having regard to:

- *When the building was built;*
- *The use (and proposed use, if applicable) of the building;*
- *If it can reasonably be established, whether the building generally complies with the requirements, including the health and amenity requirements and/or use that applied under an*

approval or would have ordinarily applied at the time of construction of the building;

- *Whether the building is structurally sound and capable of withstanding the loadings reasonably expected to arise from its use;*
- *Considering BCA parts E1 (fire fighting equipment) and E4 (Emergency lighting, exit signs and warning systems) whether the building will reasonably provide for the:*
 - *Safety of persons in the building if there is a fire, including, for example, means of egress; and*
 - *Prevention and suppression of fire; and*
 - *Prevention of the spread of fire.*

Same certificate of occupancy for class 1a and 10 buildings

[1099] Finally, a single certificate model could also capture class 1a buildings and class 10 buildings and structures. There has for a number of years been a desire to differentiate between the finalisation of class 1a and 10 buildings and class 2-9 buildings so as to enable homeowners to take possession and occupy a house before it is finalised. However, as currently exists under s.114 of the *Building Act 1975*, there could still be restrictions on the use of particular buildings. The ability to occupy a house without a certificate of occupancy could therefore be maintained, while the use of other buildings without such a certificate could still be prohibited.

[1100] Replacing the final inspection certificate with the same single certificate of occupancy (despite there being no mandatory requirement to have such a certificate prior to occupying a house) could also help to raise awareness of the certificate and encourage more owners to obtain it once the work is completed.

Involvement of private certifiers

[1101] Building certifiers, as small business people should be encouraged to look for new markets and new ways of delivering their expert services. Whilst the Review appreciates that some private certifiers may not want to provide certification services for older buildings that either do not have a certificate of classification or final inspection certificate, there is likely to be a lucrative market for those that do.

Single certificate of occupancy model does NOT 'regularise' illegal building work

- [1102] The single certificate of occupancy would not permit illegal building work. In this respect, the owner of the building is always required to abide by the planning legislation which requires building development approvals for assessable work²³³. A development offence will continue to exist where an owner does not obtain necessary development approvals and the issuance of a certificate of occupancy will not negate the commission of the development offence.
- [1103] The same enforcement options for local government in relation to development offences under the planning legislation should continue to exist, including the ability for a local government to require demolition of an illegal building under certain circumstances²³⁴.
- [1104] A new simplified process for issuing certificates would allow consumers to obtain a level of assurance that an existing building is safe for occupation, including at the time a property is sold or leased.

Questions 3.5.1 and 3.5.2: Recommendations

[1105]

88. In order to cut unnecessary red tape, develop a single certificate of occupancy model allowing a person to request a certificate of occupancy, that is not tied exclusively to a building development approval. This would allow either a private certifier or a local government certifier to issue a certificate of occupancy for any class of building at any time. This single system would address new buildings, existing buildings and changes to classification or use.

***Note:* This process would not permit illegal building work. The same enforcement options for local government in relation to development offences under the planning legislation should continue to exist.**

²³³ See s.578 of the *Sustainable Planning Act 2009*

²³⁴ See ss.590-592 of the *Sustainable Planning Act 2009*

89.	<p>In order for a local government certifier or a private certifier to issue the certificate of occupancy, the certifier would have to be satisfied that the building complies with the technical requirements that would be prescribed in Chapter 5 of the Building Act 1975.</p> <p>In considering whether to issue a certificate of occupancy, the certifier must decide whether the building is safe for occupation, having regard to the following technical requirements (where applicable):</p> <ul style="list-style-type: none"> (a) When the building was built; (b) The use (and proposed use, if applicable) of the building; (c) If it can reasonably be established, whether the building generally complies with the requirements, including the health and amenity requirements and/or use that applied under an approval or would have ordinarily applied at the time of construction of the building; (d) Whether the building is structurally sound and capable of withstanding the loadings reasonably expected to arise from its use; (e) Considering the relevant parts of the BCA, whether the building will reasonably provide for the: <ul style="list-style-type: none"> (i) Safety of persons in the building if there is a fire, including, for example, means of egress; and (ii) Prevention and suppression of fire; and (iii) Prevention of the spread of fire.
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4.0 Enforcement of building standards

Question 4.1.1: Do you support local governments taking over the enforcement processes for defective building work after a certifier has issued a show cause notice?

Background

[1106] The *Building Act 1975* provides for a range of different types of enforcement action that may be taken by building certifiers against builders and building owners. A private certifier (class A) may only take enforcement action against a builder or building owner for a breach of the *Building Act 1975* or the *Sustainable Planning Act 2009* on a matter for which he or she has been engaged (or an employee [class A] private certifier has been engaged)²³⁵, whilst local governments may take enforcement action, irrespective of whether or not they are the assessment manager.

[1107] Concerns have been raised, particularly by local governments, that private certifiers are reticent to commence enforcement action against builders and/or building owners. This may be for several reasons including:

- Private certifiers may be reluctant to 'bite the hands that feed them';
- Private certifiers generally practice in small or micro businesses. Most, if not all are unlikely to possess the financial capacity or skills necessary to mount enforcement action which may end up in the Courts; and
- Other than a fulfillment of a private certifier's statutory duty, there is no incentive for a private certifier to commence enforcement action against a builder and/or building owner.

[1108] On the other hand, local governments are also facing budgetary restraints and they themselves are becoming less able to shoulder the burden of taking enforcement action that may result in legal proceedings.

[1109] In circumstances where neither the private certifier, nor the local government commence enforcement action against the builder and/or the building owner, the community may be put at risk.

²³⁵ See s.48(1)(c) of the *Building Act 1975*

Feedback outcomes

- [1110] Of the written submissions and completed surveys responding to Question 4.1.1, 59% of submitters supported the proposal of local governments taking over the enforcement processes for defective building work after a certifier has issued a show cause notice, whilst 20% were opposed, 8% had other suggestions on how to resolve the question and 13% of submitters did not address it.

Support for change

- [1111] Submissions made on behalf of Brisbane City Council suggested that amendments be made to the *Building Act 1975* which would enable the private certifier to issue a direction to rectify to a builder where there is defective or non-compliant work, rather than the issuing of the existing show cause notice. A copy of the direction would also be provided to the owner and if the work was not rectified within the time permitted, the local government should be advised. Although it is not expressly stated, the implication is that the local government would then continue with appropriate enforcement action.
- [1112] AIBS supported the proposal. Submissions made on its behalf suggested that private certifiers are not in a financial position to support enforcement action, nor do they have access to affordable legal assistance.
- [1113] HIA argued in favour of the proposed changes. It argued that local governments were significantly better resourced than the vast majority of building certification businesses and they have a vested interest and a responsibility to participate in the enforcement process.
- [1114] Submissions made on behalf of Mackay Regional Council also argued in support of the proposal on the basis that local governments are better resourced to deal with enforcement action than private certifiers.

Support for status quo

- [1115] Cairns Regional Council did not support the proposal. Submissions made on its behalf referred to the '*Queensland building work enforcement guidelines – achieving compliance of building work with the provisions of the Building Act 1975 and the Integrated Planning Act 1997*'²³⁶. In its submissions, it was argued that private certifiers

²³⁶ <http://www.hpw.qld.gov.au/SiteCollectionDocuments/qld-building-work-enforcement-guidelines.pdf>

must be held to account and must comply with their obligations under the *Building Act 1975*²³⁷ as set out in accordance with the enforcement guidelines which in part, provide:

"If a person fails to comply with a notice served by a private certifier, the private certifier is required to refer the matter to the local government. However, it is not acceptable for a private certifier to just inform the local government and expect them to take further legal action. A private certifier has an obligation to resolve the problem. A private certifier's failure to act may constitute professional misconduct. The local government will decide what further action it may take in the matter. To ensure the public interest is protected, local governments are empowered to enforce the provisions of the Building Act 1975 or IPA where a private certifier has failed to act."

Support for other reforms

- [1116] Mr. Ain Kuru suggested that matters requiring enforcement action that are building related, that is, in relation to the construction of the building should be referred to the QBCC, whereas planning matters should be dealt with by local government²³⁸.
- [1117] AIB submissions argued against the proposal. However, it too suggested that the QBCC should assume the enforcement process rather than local government²³⁹. It argued that QBCC *"have the legislative powers, resources, corporate structure, penalty regime and ability to deal with show cause notices."*
- [1118] Submissions made on behalf of Cassowary Coast Regional Council argued that the current process adopted by many private certifiers, that is, purportedly doing nothing, was unacceptable. It argued that because private certifiers are remunerated for performing the certifying function, that requires them to initiate enforcement action when required. It queried why local governments and their rate payers should have to meet the costs of the enforcement process when councils had not received any fees²⁴⁰.

Incentivise private certifiers by enabling them to recover the costs associated with the enforcement process

- [1119] Private certifier Troy Ellerman suggested that private certifiers may be more willing to initiate enforcement processes if the legislation were amended to enable private certifiers to cost recover the enforcement and prosecution costs from offenders.

²³⁷ Similar submissions were made by local government certifier Laurence Eves

²³⁸ Similar submissions were made by Neil Oliveri

²³⁹ Similar submissions were made on behalf of Central Highlands Regional Council, Logan City Council, Scenic Rim Council, private certifier Russell Springall and were contained in a number of responses to the survey

²⁴⁰ Similar submissions were made on behalf of Goondiwindi Regional Council

Current enforcement process is 'flawed': QFES

- [1120] Submissions made on behalf of QFES argued in favour of local governments assuming the enforcement role after a private certifier has issued a show cause notice. However, QFES questioned how regularly private certifiers issue show cause notices in the first place. Given this uncertainty, it also questioned whether the stated objectives would be achieved if the enforcement action to be assumed by local government still relied upon a show cause notice being issued by the private certifier.
- [1121] QFES asserted that it regularly encounters situations where the private certifier should have taken enforcement action against either a builder and/or an owner, but failed to do so. It argued that private certifiers' failure to act in circumstances where buildings had been occupied prior to the certificate of classification was "*a very significant problem*" because the practice could result in the occupation of an unsafe building with potentially disastrous consequences if a fire were to occur. Similarly, it suggested that it had seen many instances where construction had commenced prior to a building development approval being issued.
- [1122] QFES argued that the current enforcement process is flawed and any revised process which relies upon a private certifier issuing a show cause notice may meet a similar fate. QFES acknowledged that private certifiers could face serious commercial ramifications for their future business prospects if they issued a show cause notice against their 'client'. That said, QFES did not have a solution for the perceived problem, rather it suggested that further consideration by relevant stakeholders should be entertained to determine the most appropriate enforcement model.

Consideration

What is 'enforcement action'?

- [1123] The term 'enforcement action' is defined in Schedule 2 of the *Building Act 1975* as:

Means the giving, under chapter 9, of a show cause notice and an enforcement notice and taking action under the Planning Act, chapter 7, part 3, divisions 2 and 3.

- [1124] A decision whether or not to take enforcement action against a builder or building owner is part of the building certifying function for which the private certifier receives a fee²⁴¹.

²⁴¹ See s.49(1)(c) of the *Building Act 1975*

[1125] The building legislation and the *Sustainable Planning Act 2009* provide multiple offences pursuant to which private certifiers must take enforcement action against an offending builder and/or building owner. For example:

- If a builder is given a non-compliance notice for failure to ensure a stage complies with the building development approval, and does not comply with that notice – s.35(1) of the *Building Regulations 2006*;
- Class 2-9 buildings cannot be occupied unless a certificate of classification has been issued – ss.114(2) and 117 of the *Building Act 1975*;
- Owners of a regulated pool must ensure it complies with the pool safety standard – s.246ATB of the *Building Act 1975*;
- A person must not contravene a development approval, including any condition in the approval – s.580 of the *Sustainable Planning Act 2009*;

Show cause notices

[1126] Show cause notices may be issued by a private certifier pursuant to s.247 of the *Building Act 1975* or s.588 of the *Sustainable Planning Act 2009* depending on the nature of the offence. A show cause notice is the pre-cursor to an enforcement notice. It invites the builder or building owner to show cause why an enforcement notice should not be given to the person.

[1127] No records are kept by the QBCC or any other government body in respect to the number of show cause notices that have been issued by private certifiers. However, pursuant to s.35(4)(a) of the *Building Regulation 2006*, a private certifier must advise the QBCC if a builder does not comply with an enforcement notice. The Manager of the Certification Unit of the QBCC has advised the Review that the QBCC has not received advice from any certifiers pursuant to s.35(4)(a) of the *Building Regulation 2006*.

[1128] Based on this information and the anecdotal evidence provided, the Review is satisfied that private certifiers are reticent to take enforcement action against a builder and/or building owner, despite it being part of the building certifying function.

[1129] It is unclear whether the reasons for this failure or unwillingness of private certifiers to take enforcement action is driven purely by their desire not to 'bite the hands that feed them' or whether it is based on a lack of appropriate resources or a combination of the two factors.

Community expectations

- [1130] The community rightly has an expectation that all building certifiers must in performing building certifying functions, always act in the public interest²⁴². The community are entitled to expect that the buildings in which they enter and occupy will not adversely impact upon their health and safety.

Cost recovery

- [1131] The Review does not accept the suggestion made by Mr. Ellerman that if private certifiers were able to recover their costs, they maybe more inclined to initiate enforcement action. Private certifiers are not lawyers, therefore unless they engage lawyers to prosecute the enforcement action, they are unlikely to recover their costs. However, even if the legislation were amended to enable them to recover their costs, it is unlikely that it would enable a full cost-recovery. The Review considers that private certifiers do not and will not take enforcement action, in part, because it will cost them time and money and because it is likely to damage business relationships.

Who is best equipped to have the carriage of enforcement action?

- [1132] The Review accepts those submissions that private certifiers are simply not equipped or resourced to maintain enforcement action against a builder or building owner. That is one of the main reasons why the enforcement process is rarely, if ever, implemented²⁴³. That is however, no excuse why enforcement action cannot be initiated by a private certifier.
- [1133] The Review agrees with the submissions of Mr. Ain Kuru and others that similarly argued that matters relating to building and construction compliance should be dealt with by the QBCC and matters relating to planning compliance or other local government compliance issues, should be dealt with by the local government.
- [1134] As far as building matters are concerned, it is entirely appropriate that the QBCC, once notified of the alleged contravention, then deals with the matter. The QBCC licences builders and trade contractors. It can issue cautions, demerit points and infringement notices. The QBCC can suspend or even cancel a licence in serious matters. The QBCC has a legal department well versed and experienced in

²⁴² See ss.127(1) & 136(1) of the *Building Act 1975*

²⁴³ Peter Hope, *QBCC Building certification – A comparative analysis on the NSW penalty regime* September 2014, 3

prosecuting disciplinary matters. It is an obvious and sensible choice.

[1135] Similarly, in planning or local government compliance related matters, where there has been a breach by a builder or building owner it is appropriate, once notified of the alleged contravention that the local government continue with the enforcement process. Local governments have a duty of care to exercise their statutory powers to prevent loss or damage²⁴⁴. Whilst that duty is currently owed by both private certifiers and local governments, the duty is best exercised by the party with the best resources to prosecute the enforcement action to achieve the optimum outcome for the community. On the evidence before the Review, this duty is simply not being exercised by private certifiers.

[1136] However, this does not mean that private certifiers should be 'let off the hook'.

Greater accountability

[1137] In order for the contravention of a building related matter to come to the attention of the QBCC, or for a planning or local government related matter to come to the attention of the local government, in circumstances where the private certifier is the assessment manager, the private certifier should have a statutory duty to advise one or both bodies.

[1138] Accountability of building certifiers is a common theme throughout this report. The *Building Act 1975* and the *Building Regulation 2006* require building certifiers to undertake all manner of responsibilities yet the *Building Act 1975* expressly provides that if a building certifier fails to comply with a provision of the Act, the building certifier does not commit an offence under the Act unless there is a stated penalty provision for a failure to comply²⁴⁵. It should be an offence under the *Building Act 1975* for a building certifier if he or she fails to initiate enforcement action against either a building owner, builder or any other person, if required to do so by the *Building Act 1975* or *Building Regulation 2006* in circumstances where the private certifier has been found to have been aware of the contravention or ought reasonably have been aware of the contravention.

[1139] A failure to initiate enforcement action in these circumstances may be regarded as professional misconduct²⁴⁶. In serious cases, this

²⁴⁴ *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424

²⁴⁵ See s.132 of the Building Act 1975

²⁴⁶ See the definition of 'professional misconduct' in Schedule 2 of the Building Act 1975, clause (a)(iii)(A); and Item 3 of the Code of Conduct for building certifiers

could result in the building certifier having their licence suspended or even cancelled.

[1140] If the Government accepts these recommendations, private certifiers will have had one of their excuses for not taking enforcement action removed, namely that they are not properly equipped or resourced to take enforcement action. Bearing in mind the certifier's overriding obligation to the public interest, there is no other valid excuse open to the certifier. If a private certifier fails to act by putting his or her own commercial interests or those of his client over the best interests of the community, then the certifier has breached his or her most fundamental obligation under the Code of Conduct and they should suffer the consequences as a result.

Question 4.1.1: Recommendations

[1141]

90.	Where a matter relates to building and construction compliance issues, after serving a show cause notice on the offending party, a private certifier should be able to refer the matter to the QBCC to continue the enforcement action.
91.	Where a matter relates to planning compliance or other local government compliance issues, after serving a show cause notice on the offending party, a private certifier should be able to refer the matter to local government to continue the enforcement action.
92.	In the event that a building certifier fails to issue a show cause notice to the builder and/or building owner and thereby commence the enforcement action in circumstances where the private certifier has been found to have been aware of the contravention or ought reasonably have been aware of the contravention, the building certifier should be considered to have committed an offence under the building legislation. Such acts or omissions should be regarded as professional misconduct. In serious cases, this could result in the building certifier having their licence suspended or even cancelled.

Question 4.2.1: Which is your preferred option for improving the pool safety management plan framework?

Option 4.2(a): Simplify the application process?

Option 4.2(b): Extend the currency period for a pool safety management plan?

Option 4.2(c): Repeal pool safety management plans and create a new category of exemption for pools in class 3 buildings?

Option 4.2(d): A combination of (a) and (b)?

Other

Background

[1142] Currently, swimming pool safety is regulated by Chapter 8 of the *Building Act 1975*²⁴⁷ and the pool safety standard which is found in QDC, part MP3.4²⁴⁸. QDC MP3.4 also references AS 1926.1&2-2007 which prescribes additional technical requirements for swimming pool barriers²⁴⁹.

[1143] The purpose of the pool safety standard is to help reduce the incidence of pool-related immersion injuries and drowning deaths for children aged five years and under²⁵⁰.

[1144] Chapter 8, Division 6 of the *Building Act 1975* requires the owner of a swimming pool that is situated on common property in a class 3 building or on land adjacent to a class 3 building to apply to have a pool safety management plan, unless a pool safety certificate²⁵¹ is in effect for the pool²⁵².

[1145] A class 3 building is defined in part A3.2 of the BCA as:

Class 3: *a residential building, other than a building of Class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons, including –*
(a) a boarding-house, guest house, hostel, lodging-house or backpackers accommodation; or
(b) a residential part of an hotel or motel; or
(c) a residential part of a school; or
(d) accommodation for the aged, children, or people with disabilities; or

²⁴⁷ However, see Recommendation 103

²⁴⁸ See s.231D(1) of the *Building Act 1975*

²⁴⁹ Although I note that the most current version of AS 1926.1 is now AS 1926.1-2012

²⁵⁰ See *Class 3 buildings – Pool safety management plan guideline, Version 1*, 10 May 2011, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/SwimmingPoolSafetyManagmentPlanGuideline.pdf>; MP 3.4, 2

²⁵¹ See s.246AA of the *Building Act 1975*

²⁵² See ss.245J & 245K of the *Building Act 1975*

- (e) a residential part of a health-care building which accommodates members of staff; or
(f) a residential part of a detention centre.

[1146] A pool safety management plan allows the use of alternative ‘pool safety measures’ to provide an equivalent or greater degree of safety as the pool safety standard²⁵³. The following are examples of alternative pool safety measures that might be employed in a pool safety management plan:

- Lifeguard supervision;
- CCTV footage;
- Appropriate signage;
- Pool alarms;
- Staff training; and
- Lockable covers (used after hours).

[1147] Where owners elect to use a pool safety management plan to comply, applications with the appropriate fee must be made to the chief executive of the Department of Housing and Public Works and they must be made annually²⁵⁴. However, it is understood that this responsibility is proposed to be transferred to the QBCC along with pool safety inspector licensing and compliance.

[1148] A decision on whether to approve the pool safety management plan must be made within 20 business days after receiving it²⁵⁵. If the chief executive is satisfied that the pool safety measures no longer appropriately provide for the safety of young children in and around the pool, the chief executive may cancel the approval for the pool management plan or require it to be amended²⁵⁶. Appeals are made to a building and development dispute resolution committee pursuant to s.245S of the *Building Act 1975*²⁵⁷.

[1149] Since the commencement of the current pool safety laws, there has been limited uptake of pool safety management plans. The reasons proffered in the Discussion Paper for the limited utilisation include:

- The applications can be time consuming to develop;
- There is often ongoing consultation required between the Department and the applicant which often exceeds the 20 business day time to make the decision;
- The plans can be costly to implement;

²⁵³ See s.245M(3) of the *Building Act 1975* and *Class 3 buildings – Pool safety management plan guideline, Version 1*, 10 May 2011, 8 and Table 1

²⁵⁴ See s.245P of the *Building Act 1975*

²⁵⁵ See s.245O(1) of the *Building Act 1975*

²⁵⁶ See s.245Q of the *Building Act 1975*

²⁵⁷ See also s.526(b) of the *Sustainable Planning Act 2009*.

- The pool safety standard currently does not allow pool barriers to be purpose built to an approved pool safety management plan, requiring pool owners to rely on an alternative solution or variation in order to partially enclose a pool.

Feedback outcomes

[1150] Of the written submissions and completed surveys responding to Question 4.2.1:

- (a) 32% of submitters supported simplifying the application process for pool safety management plans;
- (b) 8% of submitters supported extending the currency period;
- (c) 11% of submitters supported repealing pool safety management plans and replacing them with a new form of exemption;
- (d) 15% of submitters supported a combination of options (a) and (b);
- (e) 7% of submitters had other suggestions; and
- (f) 27% did not address the question.

(a) Simplifying the application process

[1151] AIBS supported a simplifying of the application process, suggesting that it is a good example of red tape reduction.

(b) Extending the currency period until change of ownership or the conditions under which the plan was approved change.

[1152] Cairns Regional Council did not support this option or option (c). It considered the extension of the pool safety management plan as unacceptable if it meant that there were no annual inspections being conducted to ensure continued compliance of the pool safety management plan.

[1153] Local government certifier Laurence Eves did not support the indefinite extension of currency periods for pool safety management plans, however he suggested that the period could reasonably be extended to 3 years.

(c) Repealing pool safety management plans and replacing them with a new category of exemption issued by local government

[1154] AIBS did not support the repealing of pool safety management plans. It considered that this would present an unacceptable risk to

young children. AIBS argued against any amendments to the *Building Act 1975* which would enable a pool owner to make an application to the local government to exempt it from the pool safety standard as they can currently do on the grounds of disability²⁵⁸ or impracticality²⁵⁹. AIBS argued that class 3 buildings were “*proven to be a high risk area*”.

[1155] Gladstone Regional Council did not support option (c). In its written submissions it was argued that providing a new exemption to class 3 building owners would result in more non-compliant pools and greater numbers of pool immersions.

[1156] Local government certifier Laurence Eves argued strongly against option (c). He suggested that exemptions from pool safety legislation are the ‘*thin edge of the wedge*’.

[1157] Lockyer Valley Regional Council argued that the creation of local government approved exemptions would place unnecessary risks on councils²⁶⁰.

(d) Combination of options (a) and (b)

[1158] HIA supported a combination of options (a) and (b). It suggested that simplifying the application process and extending the currency period would achieve greater flexibility in the preparation of the plan achieved, whilst ensuring that the issue of pool safety was maintained.

Support for other reforms

[1159] AIBS suggested that pool safety management plans should be retained but as a red tape reduction measure, the need for an annual application should be removed. In place of the annual application, AIBS suggested that the pool could be inspected annually and a certificate issued if satisfied that the plan remains appropriate.

Consideration

[1160] This question produced the highest rate of non-responses of all questions considered during the Review. This suggests a certain degree of apathy by many stakeholders towards pool safety management plans.

²⁵⁸ See s.235 of the *Building Act 1975*

²⁵⁹ See s.245 of the *Building Act 1975*

²⁶⁰ Similar submissions were provided by Logan City Council

Option (c) - unacceptable

[1161] The removal of the requirement for a pool safety management plan and replacing it with a new category of local government determined exemption [option (c)] is fraught with a number of difficulties:

- (i) Given the risk-averse nature of local governments, the Review is not persuaded that the discretion to exempt owners of pools associated with class 3 buildings from the pool safety standard would be exercised very often, if at all. Some may say that is not such a bad thing, but if the exemption is very rarely used, there is little point in having it;
- (ii) That notwithstanding, as detailed in Annexure B, only 18 out of 77 local governments are now directly providing building certification services. The Review is concerned that many local governments would not have the specialist resources to be able to competently assess applications for exemptions. Without competent assessment, it is likely that mistakes will be made. The Review agrees with many submitters that this is not an area where there is a high degree of tolerance for the making of mistakes;
- (iii) In any event, the Review doubts whether local governments would want to assume the liability in granting exemptions.

Option (a) - will reduce red tape

[1162] In an effort to reduce red tape and to reduce the number of pools associated with class 3 buildings which are non-compliant, the Review would prefer to see the application process for pool safety management plans made simpler and more transparent.

[1163] Presently, pursuant to s.2450 of the *Building Act 1975*, the chief executive must decide whether to approve a pool safety management plan within 20 business days after the application is received. The Discussion Paper suggests that it is not uncommon for this period to expire whilst the Department may have sought additional information from an applicant. Extending this period or providing an ability for the Department to obtain an extension to the 20 business days by consent, may promote inefficiencies within the Department or within the QBCC if it ultimately takes control of this function.

[1164] However, the applicant is likely to have expended time and money in the preparation of the application and rather than refusing the application because it cannot be made within time, there should be some ability in extenuating circumstances to extend the time to make the decision, but only if the Department is awaiting additional

material from the applicant. In these circumstances, the Department would be afforded a further 5 business days to make the decision after having received any additional material requested by the Department.

- [1165] In order to reduce the number of instances where the Department is required to seek further submissions or additional information from the applicant, the current guidelines should be amended to incorporate specific examples of alternative safety measures and when they could be used.

A variation of option (b) will strike the balance between reducing costs and red tape and ensuring appropriate standards are maintained

- [1166] Rather than having to reapply for an approval of a pool safety management plan every 12 months as required under s.245P of the *Building Act 1975*, a plan should remain valid for up to three years, unless the property is sold or leased to another entity, or if the conditions under which the plan was approved have changed.
- [1167] Appropriate measures would be required to ensure that the pool is re-inspected by a qualified person at the expiration of the 3-year term.
- [1168] Upon successful re-inspection and the payment of a prescribed fee, the pool safety management plan should then be renewed.
- [1169] Pools associated with class 3 buildings should be subject to targeted auditing by the Department (or the QBCC) to ensure that they comply with either the pool safety standard or the approved pool safety management plan.

Question 4.2.1: Recommendations

[1170]

93.	<p>In an effort to reduce red tape and to reduce the number of non-compliant pools associated with class 3 buildings, the application process for pool safety management plans should be made simpler and more transparent by:</p> <p>(a) Subject to paragraph (b), requiring the Department (or QBCC) to make a decision whether or not to grant the application as soon as practicable but no later than 20 business days after receiving the application;</p> <p>(b) In the event that the Department requests additional information from the applicant, the Department should be granted an extension of a further 5 business days to make the decision after receiving the information;</p>
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	<p>(c) Reducing the number of instances where the Department is required to seek further submissions or additional information from an applicant, by amending the current guidelines to incorporate specific examples of alternative safety measures and when they could be used.</p>
94.	<p>In an effort to reduce red tape and to reduce the costs associated with maintaining and renewing a pool safety management plan:</p> <p>(a) Rather than having to reapply for an approval of a plan every 12 months, a plan should remain valid for up to three years, unless the property is sold or leased to another entity, or if the conditions under which the plan was approved have changed;</p> <p>(b) The pool owner should be required to have the pool inspected to ensure that it is compliant with the plan at the expiration of the three-year period. The persons able to perform such inspections would be:</p> <p>(i) A building certifier (Level 1 or 2) who is also a licensed pool safety inspector; or</p> <p>(ii) A building certifier (Level 1 or 2) in the employ of the QBCC for a regulated fee (assuming that the QBCC assumes the functions of assessing applications for pool safety management plans and the auditing, licensing and compliance of pool safety inspectors).</p> <p>(c) If satisfied that the pool does comply with the pool safety management plan, the building certifier must provide a certificate to the owner and a copy of that certificate should be provided to the Department (or the QBCC) together with a re-application fee and the process would be repeated.</p> <p>(d) To counter the possibility that the extension of the pool safety management plan may result in illegal pools not being identified for inordinate periods, the Department (or QBCC) should conduct random, targeted auditing of pools associated with class 3 buildings.</p>

Question 4.3.1: Which is your preferred option for providing greater oversight of energy assessors?
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Option 4.3(a): Mandatory accreditation
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Option 4.3(b): New licensing requirement
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Other

Background

[1171] Since 1 May 2010, the QDC 4.1- *Sustainable buildings* has required all new class 1 buildings and enclosed garages attached to class 1 buildings to have a minimum energy efficiency rating of '6 stars'. This requirement applies to new houses and additions and alterations to those existing.

[1172] In a similar fashion, new multi-unit residential buildings and renovations to individual units (class 2) are required to achieve a minimum 5-star rating.

[1173] The two typical methods available to be used to comply with the QDC 4.1 to achieve a 6-star rated house are²⁶¹:

- **Elemental (deemed-to-satisfy):** where an architect or building designer follows the more prescriptive design requirements set out in the NCC, Volume 2 (section 3.12) subject to Queensland specific variations; and
- **Software:** where a house energy assessor uses approved software under the Nationwide House Energy Rating Scheme (NatHERS), these being BERS Pro, AccuRate or FirstRate5. This software is used to model the design and produce a star-rating certificate.

[1174] It is the second of these methods which is the subject of Question 4.3.1.

[1175] Currently in Queensland, there is no oversight of energy assessors, other than the requirement that a building certifier has a discretion whether to accept the energy assessor as a competent person²⁶². To operate in Queensland, a house energy assessor must only successfully complete a four (4) day training course to enable them to use the proprietary software.

[1176] A report undertaken by the Commonwealth Department of Industry in February 2014 ('the NatHERS Report') has raised a

²⁶¹ BCQ Publication, *6-star energy efficiency rating for new houses and townhouses*, 2;

<http://www.hpw.qld.gov.au/SiteCollectionDocuments/SixStarEnergyEfficiencyRatingFactSheet.pdf>

²⁶² See s.18 of the Building Regulation 2006

number of concerns about the quality of house energy assessments, specifically in relation to their consistency and accuracy²⁶³. The NatHERS Report identified that only one in five assessors accurately assessed the correct star-rating for a sample house design. It also identified differences in the star-rating assessments when the three different types of software were used²⁶⁴.

[1177] The NatHERS Report identified a high level of error in star-rating assessments, irrespective whether assessors were accredited or not. That notwithstanding, the NatHERS Report recommended, among other things, the mandatory accreditation of assessors and referred to the requirement that all energy assessors complete the Certificate IV in NatHERS Assessment (CPP41212) by 1 July 2015²⁶⁵. Completion of this course is not currently mandatory in Queensland.

[1178] Interestingly, the NatHERS Report identified that whilst Queensland dwelling approvals made up 18.5% of all dwelling approvals in the 12 months to July 2013, only 7.7% of the nation's energy assessors reside in Queensland²⁶⁶. This would suggest that either Queensland based energy assessors are very busy and/or assessors from outside of the State are performing a significant number of energy assessments.

Table 9

State	Assessors	Dwelling Approvals
Australian Capital Territory	2.3%	2.7%
New South Wales	27.0%	24.7%
Northern Territory	0.9%	1.4%
Queensland	7.7%	18.5%
South Australia	5.7%	5.6%
Tasmania	3.7%	1.1%
Victoria	34.1%	30.3%
Western Australia	18.8%	15.7%

[1179] The introduction of formal oversight of energy assessors would, it is suggested, produce greater accountability, provide minimum professional standards, independent auditing, quality assurance processes, a CPD regime and technical support with the ultimate objective of obtaining greater accuracy in the preparation of star-rating assessments.

²⁶³ Wayne Floyd, *NatHERS Benchmark Study*, February 2014, -

<http://www.nathers.gov.au/sites/prod.nathers.gov.au/files/files/pdf/research/benchmark-study-report.pdf>

²⁶⁴ *id.*, 28

²⁶⁵ *id.*, 8

²⁶⁶ *id.*, 48

[1180] The two alternatives provided in the Discussion Paper are:

- **Introduction of mandatory accreditation:** which would require energy assessors to become accredited with an approved assessor accrediting organisation (either through the Association of Building Sustainability Assessors [ABSA] or Building Designers Association of Victoria [BDAV]) both of which already have a nationally based accreditation system approved under a NatHERS protocol; or
- **Introduction of a new QBCC licence class:** which would require house energy assessors to be licensed with the QBCC to align with the licensing of building certifiers, builders, trade contractors and other building professionals such as building designers.

Feedback outcomes

[1181] Of the written submissions and completed surveys responding to Question 4.3.1, 44% of submitters supported the proposal of introducing mandatory accreditation, whilst 26% suggested the introduction of a new licensing requirement, 11% had other suggestions on how to resolve the question and 19% of submitters did not address it.

Support for mandatory accreditation

[1182] Private certifier Claude McKelvey argued that mandatory accreditation was more closely aligned with the competent person criteria. He suggested that as QBCC licensing would not assess competency, it would not inspire building certifiers with the confidence they need to determine they are a competent person.

[1183] Mr. Clyde Anderson argued that Accredited Assessor Organisations provide their members with regular newsletters and seminars on the latest requirements and industry standards for the data that is required to be input into the software used by energy assessors. He also suggested that if Queensland does not adopt the Certificate IV NatHERS Assessment, which he is at pains to point out, is the National Qualification for energy assessors, ABSA would be able to provide a certificate upon successful completion of the 'former ABSA assessor exam'. This certificate could be provided to building certifiers to demonstrate competency in the use of NatHERS approved software. In a salutary warning he states:

"If licensing has no teeth, it will not significantly change the current state of poor energy assessments in Queensland."

[1184] Mr. Anderson also rejected the utility of the existing four-day short course attended by many energy assessors who work in Queensland.
He said:

“As I have conducted training on some of these courses, I can state that the assessment is superficial and there is no evidence retained by the trainer after students leave the classroom. The certificate of Attendance is no guarantee the student remembers to apply the rules in the correct way. Many students have seen the software for the first time at the course and struggle with the basic concepts of inputting data correctly. There was no assessment in the short course and any test must be sought by the student separately (fee for service).”

Support for QBCC licensing

[1185] Local government building compliance officer Anna Sissman preferred the QBCC licensing option²⁶⁷. She considered that this would verify competency and provide confidence to certifiers that the energy assessor was appropriately qualified.

[1186] Gladstone Regional Council agreed. It argued that licensing would ensure that energy assessors are trained and licensed properly and kept up to date “with ever changing legislation”.

Support for other reforms

[1187] In his written submissions, Mr. Rodger Hills who was at the time, CEO of ABSA supported both options but not surprisingly, preferred the introduction of mandatory accreditation. He argued that an accredited energy assessor would give peace of mind to a building certifier when determining whether the energy assessor is appropriately qualified. He also suggested that accredited energy assessors would enjoy the benefits of having professional indemnity insurance, ongoing CPD and consumers would receive better advice. However importantly, he identified a key factor in the success of either option was the adoption of the Certificate IV in NatHERS Assessment as the only valid qualification for house energy assessors.

[1188] Surprisingly, AIBS did not support either option. AIBS regarded the introduction of mandatory accreditation or licensing as an unnecessary increase to red tape²⁶⁸. It also considered that mandatory accreditation and licensing were duplicitous.

²⁶⁷ The Australian Institute of Architects also supported this option, as did the HIA

²⁶⁸ Similar submissions were made by local government certifier Laurence Eves

- [1189] Local government contract building certifier Jason Burger suggested that energy assessors should be both accredited and licensed²⁶⁹. He considered that accreditation would be helpful to ensure that the assessor is kept up to date with changes to materials and regulations.
- [1190] Building designer Joanne Galea in a spirited defence of building designers and the qualifications they hold, argued vociferously that building designers should be free to use the deemed-to-satisfy provisions of the BCA. She rejected the proposition that the Certificate IV in NatHERS Assessment should be the only recognised qualification to enable the assessment of energy efficiency of buildings, when as she put it, the scope of that course is undermining her four year bachelors degree qualification.
- [1191] In a similar vein, another building designer or architect in a survey response suggested that energy assessment should only be done by building designers and architects. The survey stated:

“Non-complying energy assessments by non-building qualified assessors bring them into providing design advice for which they are not licenced. Open building designers should automatically be accredited subject to completion of the software training seminar. This should not be a new profession that impacts on building design by persons not licenced in building design. If so it makes a mockery of the requirement to be required to hold a building design licence.”

Consideration

- [1192] It is hardly surprising that the statistics for the responses to this question reveal that almost twice as many submitters preferred mandatory accreditation to QBCC licensing. Many of the submitters were after all, building certifiers who are involved in a similar debate to the present issue with respect to the QBCC being responsible for assessing the qualification and experience requirements of building certifiers (Question 1.4.2).
- [1193] As demonstrated by the NatHERS Report, there are problems with the training and outcomes delivered by energy assessors throughout the country. The NatHERS Report demonstrates that the level of accuracy of those undertaking the assessments was problematic whether they were accredited or not. Clearly, on the strength of the evidence in the report (20% of assessments accurately provided the correct star rating) accreditation is not delivering the level of quality assurance as some would suggest. A number of submissions pilloried the lack of regulation in

²⁶⁹ Similar submissions were made by private certifier Neil Oliveri

Queensland, yet it appears that other jurisdictions that have accreditation procedures are having similar difficulties.

- [1194] The issue of the competence of energy assessors must be approached in a holistic way. Energy assessors should be licensed by the Government regulator, the QBCC and they ought also be subject to mandatory CPD along with all builders and trade contractors (See Recommendations 41 and 42).
- [1195] The Review also considers that persons who do not hold particular qualifications such as a degree in architecture or similar, or who are not QBCC licensed building designers, should be required to complete the Certificate IV in NatHERS Assessment as a minimum education qualification to be eligible to obtain a QBCC licence as a house energy assessor.
- [1196] The Review is not aware that Government is entertaining amending an architect or licensed building designer's entitlement to follow the more prescriptive design requirements set out in the NCC, Volume 2 (section 3.12).

Question 4.3.1: Recommendation

[1197]

95.	Introduce a new QBCC licence class for house energy assessors which requires as a minimum, successful completion of a nationally recognised Certificate IV in NatHERS Assessment (CPP41212). A grace period will be required to enable those currently working as energy assessors to transition to the new qualification.
96.	House energy assessors should also be required to comply with the phased-in mandatory CPD program required for all QBCC licensees (Refer Recommendations 41 and 42).
97.	Licensees already holding the licence classes of building design-low rise, building design-medium rise and building design-open or any other person who would satisfy the technical and experience requirements to obtain those licences ought not have to obtain the house energy assessor licence to carry out that scope of work. NOTE: This exemption should only apply if the design licence qualifications contain energy assessment competencies which are at least the equivalent of the Certificate IV in Energy Efficiency & Assessment referred to in Recommendation 95.

Question 4.4.1: Which is your preferred option for improving the framework for self-assessable government building work?

Option 4.4(a): Align processes with those for assessable building work

Option 4.4(b): Create a guideline for self-assessable building work

Other

Background

[1198] Pursuant to s.21(2) of the *Building Act 1975*, building work is declared to be self-assessable for the *Sustainable Planning Act 2009* if it:

- (a) Is prescribed under a regulation; and
- (b) Complies with all relevant building codes and standards.

[1199] Pursuant to s.232(1)(a) of the *Sustainable Planning Act 2009* and s.9(1)(a) and Schedule 3, Part 2, Item 1 of the *Sustainable Planning Regulation 2009*, building work carried out by or on behalf of the State, a public sector entity or a local government, other than building work declared under the *Building Act 1975* to be exempt development, is self-assessable development.

[1200] Pursuant to s.21(3) of the *Building Act 1975*, building work that is self-assessable development under the *Sustainable Planning Act 2009* or s.21(2) is self-assessable building work.

[1201] There are no requirements for the State, a public sector entity or local governments to follow the legislative processes relating to obtaining development permits, mandatory inspections and certification, however self-assessable development must comply with applicable codes and standards such as fire safety standards, relevant local laws, local planning instruments, the BCA and the QDC²⁷⁰.

[1202] A 'public sector entity' is defined in Schedule 3 of the *Sustainable Planning Act 2009* as:

public sector entity—

1 Public sector entity means—

- (a) a department or part of a department; or
- (b) an agency, authority, commission, corporation, instrumentality, office, or other entity, established under an Act for a public or State purpose.

2 Public sector entity includes—

²⁷⁰ See s.236 of the *Sustainable Planning Act 2009* and s.30 of the *Building Act 1975*

- (a) a government owned corporation; and
- (b) other than for chapter 8, a distributor-retailer; and
- (c) a rail government entity under the Transport Infrastructure Act 1994.

- [1203] There are a significant number of buildings and structures that would fall under the definition of self-assessable building work. The State and local government and public sector entities are not required to ensure that the processes of determining that self-assessable building work complies with the building assessment provisions, nor are they required to provide relevant authorities with information that otherwise would be required if the building were constructed in the private sector.
- [1204] The purpose of regulating these processes is to establish a consistent approach to approvals, inspections and record keeping for the public benefit. Whilst many government entities do keep their own records, without a uniform approach to the assessment and documentation of self-assessable work, problems may arise about the safety of self-assessable work and if the asset is ever sold off to the private sector, difficulties may arise occupying a building where there is no certificate of classification²⁷¹.
- [1205] The two alternatives put forward in the Discussion Paper to resolve this issue are:
- Amend the *Building Act 1975* so that similar assessment and inspection requirements for self-assessable building work carried out for or on behalf of the State, a public sector entity or local government is the same as is required for assessable building work; or
 - Create a guideline establishing the requirements for the assessment and inspection processes of self-assessable building work to replicate those of assessable building work.

Feedback outcomes

- [1206] Of the written submissions and completed surveys responding to Question 4.4.1, 52% of submitters supported the proposal of amending the building legislation to provide uniformity, whilst 22% preferred the establishment of a guideline, 8% had other suggestions on how to resolve the question and 18% of submitters did not address it.

²⁷¹ See s.114 of the *Building Act 1975*

Support for amending the building legislation

Government project management is not what it used to be

[1207] Private certifier Claude McKelvey argued that internal government project management is not as robust as it once was since governments tend to outsource much of their project delivery services.

[1208] One council building certifier in support of amending the legislation, submitted that:

“As a certifier some of the worst work I have seen is State or Local Govt work. It is often the case that Govt. tenders the work out anyway and any person with a license could undertake that work be it good bad or otherwise. Inspections by Govt. entities are not always as professional as they should be and many Govt. projects in the housing industry have firewalls and the like that need to be right.

Govt work should be treated the same as any other project and should always be inspected and certified by a certifier.”

No certificate of classification

[1209] In addition, Mr. McKelvey suggested that when governments do sell off buildings built under the self-assessable process, no certificate of classification exists. This then requires a retrospective application for a certificate of classification with all the resultant difficulties which then arise as referred to when considering Question 3.5.1 of the Discussion Paper.

[1210] Another local government employee in response to the survey said that in his 12 years working for both state and local governments, he has identified the absence of certificates of classification on government owned buildings as a “*major issue which requires alignment with private work*”.

Alignment would provide clear and consistent outcomes

[1211] Central Highlands Regional Council supported amending the building legislation to align the processes to provide clear and consistent assessment and inspection requirements for all building work. In its submissions it was argued that the creation of a guideline would only further confuse the building industry because it would provide a two-tiered system which is unlikely to provide sufficient benefit to warrant the change.

Most government projects use a certifier anyway

- [1212] A building contractor suggested that in his view, most government projects do use a building certifier despite the work being self-assessable, but the building certifier was only acting in an advisory manner. That notwithstanding, the building contractor suggested that government should be required to have building work that is constructed on its behalf, assessed and inspected in the same way as assessable building work.

Implementation by regulation

- [1213] An anonymous local government employee preferred aligning the processes by the creation of a regulation, rather than a guideline.

No justification for status quo

- [1214] HIA argued that it could see no justification for building work being undertaken by or on behalf of government being removed from the assessment and inspection processes that apply to assessable building work.

Support for creating a guideline

Government work should remain self-assessable

- [1215] Private certifier Claude Baker disagreed with the concept of requiring governments and public sector entities to comply with the IDAS system. He considered that building work carried out by or on behalf of the Crown should remain self-assessable and exempt from the IDAS processes. However, he did support the introduction of a guideline identifying procedures for self-assessable work.
- [1216] Cairns Regional Council whilst rejecting the suggestion to amend the building legislation, was “*not opposed to*” the introduction of a guideline.

Support for other reforms

Equitable approach

- [1217] AIBS supported both initiatives. AIBS’ submissions suggested that to align the requirements for self-assessable building work with those of assessable building work would create an equitable

approach to the way building work is documented and recorded for future use.

Local governments unable to ensure enforcement and compliance

- [1218] The LGAQ in its written submissions suggested that it had received anecdotal evidence that local governments had indicated that they are unable to effectively ensure enforcement and compliance of government building work. The LGAQ did not oppose either option raised in the Discussion Paper, but considered that it may be more suitable to provide in a regulation that a certificate of classification for government building work is required.

Pros and cons of either option

- [1219] Similarly, Lockyer Valley Regional Council suggested that there were benefits and disadvantages in either option. It acknowledged that either way, there would be an increase in information that local government would be required to provide to a building certifier and that the process of requiring inspections is likely to slow construction. However, it did acknowledge that local governments would have the benefit of knowing that the building work complies with the relevant regulations.

Consideration

- [1220] The Review agrees with the submissions of Claude McKelvey that whilst there may have once been justification for the removal of government building work from the assessment and inspection requirements regulated by the building legislation, that justification has dissipated in this era of a lean public service, the outsourcing of what was once considered traditional government functions and the privatisation or ‘recycling’ of government assets.
- [1221] The Review agrees with those submissions that called for government buildings to be required to have certificates of classification, or if Recommendation 85 is accepted, certificates of occupancy. This is especially pertinent as governments seek to free up capital for public infrastructure projects and reduce public debt by the sale or lease of government owned assets to the private sector as was recently foreshadowed by the State Government as part of its ‘Strong Choices’ plan²⁷².
- [1222] In all of the submissions and survey responses, there were very few submissions that spoke against the proposal that would see an

²⁷² The Final Plan the strongest and smartest choice, <http://www.strongchoices.qld.gov.au>

alignment of the assessment and inspection processes. The only real issue of debate was how that was best achieved.

[1223] As was suggested by Central Highlands Regional Council amending the building legislation to align Government processes with those for assessable building work would provide clear and consistent assessment and inspection requirements for all building work. The creation of a guideline would only serve to confuse the industry because it would provide a two-tiered system which would lead to inevitable inconsistent outcomes.

[1224] The necessary changes should be implemented in Chapter 4 and Chapter 5 of the *Building Act 1975* to expressly require the alignment of the assessment and inspection requirements for building work carried out for or on behalf of the State, a public sector entity or local government to those currently in effect for assessable building work.

Question 4.4.1: Recommendation

[1225]

98.	The <i>Building Act 1975</i> should be amended to align assessment and inspection processes for building work conducted for or on behalf of the State, public sector entities or local governments with that of assessable building work.
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5.0 Miscellaneous

Question 5.1.1: In your opinion is the current building certification system working well in rural and regional Queensland?

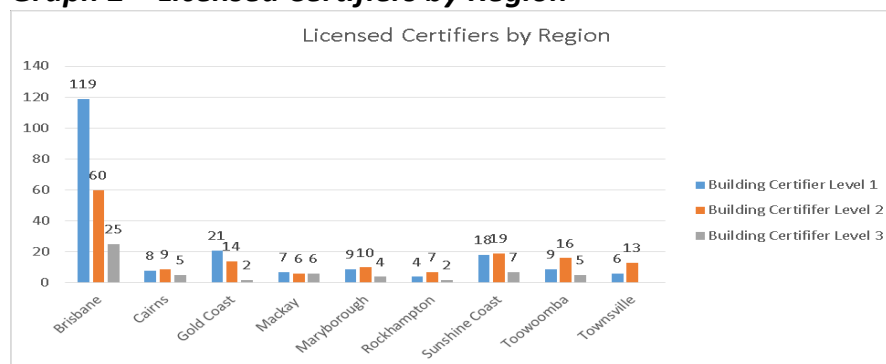
Background

- [1226] Queensland is the most de-centralised state in Australia, having a number of large population bases outside of its capital city²⁷³. Given its size and the number of people living outside the SE corner, it is important that the system of building control adequately provides for all Queenslanders whether they reside in Brisbane, Cairns or Bedourie. It is therefore appropriate that the scope of this question be broadened to take into consideration those areas of Queensland that are considered 'remote'.
- [1227] The tyrannies of distance and contra economies of scale create inherent challenges for the delivery of government services in rural and remote and to a lesser extent, regional Queensland. These challenges are amplified in respect to the delivery of a traditional government service such as building control under a dual public/private certification system.
- [1228] During the Review, roadshows and individual interviews were conducted at various regional centres throughout Queensland²⁷⁴. Some stakeholders travelled significant distances to have an opportunity to have their say. I am most grateful for their valuable contribution both in attending the roadshow sessions and in the preparation of written submissions and in responding to the survey.
- [1229] Figures provided by the QBCC in Graph 2 reveal the geographical location of building certifiers across the State.

²⁷³ *Economic Directions Statement Queensland Airports 2013-2023*, Department of State Development, Infrastructure and Planning, 5 - <http://www.dsdiqld.gov.au/resources/report/economic-directions-statement-qld-airports.pdf>

²⁷⁴ For a full list of the locations visited, see paragraph [39]

Graph 2 – Licensed Certifiers by Region



[1230] The examination of how the current system of building certification is serving all Queenslanders ought not be restricted to simply reviewing how services are delivered in the areas outside the SE corner but whether the dual public/private system is delivering appropriate benefits for all stakeholders.

[1231] During the course of the Review, numerous complaints were received from private certifiers that local governments were ‘cross-subsidising’ the costs of providing certification services through their ratepayers at the expense of private certifiers. A number of private certifiers in various locations across the State explained that some local governments charged more for council search fees requested by a private certifier than the council charged to provide the entire building certification function for one of its rate payers.

Feedback outcomes

[1232] Of the written submissions and completed surveys responding to Question 5.1.1, 26% of submitters considered that the current building certification system was working well in rural and regional Queensland, whilst 27% did not, 15% made other suggestions and 32% of submitters did not address the question.

[1233] In some instances, to protect the identity of a submitter, I have not referred to the person by name.

Current building certification system is serving rural and regional Queensland well

[1234] Even though 75 submitters (26%) considered that the public/private certification system was working well, many had suggestions of how the system could be improved.

Have licence will travel, but ‘direct supervision’ of cadets needs addressing

[1235] Private Certifier Gordon Heelan suggested that rural and regional areas were generally well catered for by private certifiers, many of whom are willing to drive up to 4 hours to perform a building inspection, provided they were remunerated accordingly. However, Mr. Heelan did suggest that there needs to be a tightening of the rules in respect to the ‘direct supervision’²⁷⁵ of cadets to ensure that they are in fact under appropriate supervision by at least a qualified building certifier (level 2) in the same office.

‘Exceptionally low fees’ driven by anti-competitive conduct of local governments causing a ‘race to the bottom’

[1236] AIBS suggested that the dual public/private system of building certification is working well throughout Queensland. It also suggested that local governments were primarily servicing rural and regional Queensland adequately. However, AIBS noted the following important concerns:

- Exceptionally low fees are charged by local government, perhaps even below cost;
- Some local governments have been exposed to ACCC complaints and found to be running their building departments at a loss and recovering the balance of their budget from other cost centres;
- Local governments are supposed to be complying with national competition guidelines;
- The inequity in fee scales is causing a ‘race to the bottom’ effect on private certifiers who are trying to compete with local government building departments;
- There is not a level playing field for private certification to effectively compete in these areas which may be seen to be fostering below standard certification functions;
- Private certifier fees for archival lodgement in some cases are higher than the local government fee for the entire approval; and
- The effect of low certification fees being further driven down by ‘untenable competition’ will cause further pressure on the quality of services provided by both the public and private sectors.

[1237] Further to those concerns, AIBS suggested the following improvements to the public/private system of certification in Queensland:

²⁷⁵ See s.23A of the *Building Regulation 2006*

- The fees charged by local government should be legislated to be calculated at 'true cost' within the cost centres of providing the service;
- It strongly urged the State Government to reinforce local government understanding of their obligations to comply with the 'National Competition Guidelines'. AIBS argued that failure to ensure a 'level playing field' would only cause further pressure to be applied to the certification industry which in turn may lead to further increases in non-compliance; and
- An improvement on building certification would be to remove the downward pressures imposed by local government on fees and charges.

Current building certification system is not serving rural and regional Queensland well.

Quality of certification services is sub-standard in rural and regional Queensland

- [1238] A submitter argued that in rural and regional Queensland, the quality of building and certification work was generally poor. He considered that this was because most certifiers working in these areas were sole practitioners who are "*less up to date and skilled*". He conceded that there were problems in the certification profession throughout the State, but most notably in rural areas.

Local government services are not cost effective and cannot compete with private certifiers

- [1239] A local government employee gave a different perspective to the argument that local governments were anti-competitive and responsible for driving down the cost of building certification. In a survey response, the local government employee wrote:

"Currently, small councils in rural and regional areas are required to comply with the Local Government Act 2009 (LGA), which requires councils to apply the Code of Competitive Conduct to all building certifying business activities. Additionally, most rural councils typically determine the fees on providing these services as the same price across the total shire (for political reasons). This means that the total fee for a dwelling development approval and inspections anywhere in a rural shire typically causes the operational cost in major towns to be greater than the cost to undertake the activities (due to the additional cost of providing inspections in the more remote locations). Moreover, the rural shire that I work in as a Building Certifier has no private building certifiers based within it due to the small size of the construction industry. This causes surrounding private certifiers form (sic) large market places only to compete for work in the major

townships. The problem with this outcome is that now council's building certifying services may not be cost effective or competitive in the major townships (where most of the work exists) and raises the question from council's political members, why should council offer this service?"

All information available to local councils should be made available to private certifiers to level the playing field

- [1240] A private certifier who had considerable experience working in local government raised concerns about the inherent tension between the services that are delivered by local governments 'in-house' compared with those able to be delivered by private certifiers, who often must rely upon the information provided to them by what is in effect their main competitor. The private certifier considered this as a "*huge disadvantage*" for private certifiers. He called for all information available to council officers being made available to private certifiers.

Suggestions for improvement

FIFO certifiers

- [1241] A private certifier in a survey response suggested that the State Government should contract private certifiers to fly-in and fly-out of remote areas to certify building work on an as needed basis. It was also suggested that in remote areas, inspections could be performed by either the 'State Certifier' or local government engineers.

Technology concessions required

- [1242] A number of submissions were received which advocated for amendments to the building legislation to allow for 'technology concessions' for certification services performed in rural and regional Queensland. This would permit inspections to be performed with the use of technology rather than physical inspections.
- [1243] A private certifier suggested that regional Queensland was serviced adequately by the current system, however he considered that remote areas suffer due to the cost of inspections and the limited availability of competent persons. He also suggested that in remote areas, technology should be able to be used rather than conducting physical inspections.

Greater say for regional, rural and remote practitioners

- [1244] A private certifier in response to the survey suggested that building certifiers who work in rural and regional Queensland should have a greater opportunity to provide feedback to the QBCC about the challenges experienced by them and they should be given an opportunity to receive updates regarding industry developments.

More 'boots on the ground'

- [1245] One local government employee suggested that what is needed is "more boots on the ground". He argued that some building certifiers can "charge whatever they want" because no one else can or will get to the site. He pressed for a greater intake of university placements to attract more students to the profession.

Abolish private certification

- [1246] Another local government employee advocated for the abolition of private certification altogether and a return to the former local government certification delivery model. He argued that since the introduction of private certification there has been no effective building control system and that will remain for as long as the private certifier is paid by the builder. This issue has already been addressed at Recommendation 1. It is not necessary that it be considered further.

Mandatory minimum certification fees

- [1247] Numerous submissions were received advocating for the introduction of mandatory minimum certification fees that reflect the responsibility and professional expertise of building certifiers. It was argued that this would encourage more entrants into the profession and would encourage higher quality services.

Use local experienced builders where there are no certifiers

- [1248] A private building and pest inspector suggested that the role of a building certifier should be able to be performed by local experienced builders within regional areas where certifiers are not available, provided that the builder has no connection with the building being certified.

'Fourth level inspector' will help

- [1249] Local government contract building certifier Jason Burger who is engaged to perform building certification services for multiple regional councils suggested that the introduction of the 'fourth level inspector' would assist in the certification of buildings in regional, rural and remote Queensland.

Consideration

- [1250] Many of the issues raised by submitters have been considered at least in part in the preceding sections of this report. Where these issues have already been considered, the Review will simply refer to the sections and recommendations in the report which deal with them.
- [1251] It should be noted that many claims and counterclaims were made by various stakeholders regarding the benefits and disadvantages of the current public/private certification system. Although it must be said that no one particular segment of the industry provided any physical evidence to support their respective claims.
- [1252] It is very difficult to judge the accuracy and veracity of the competing interests when much of the evidence is anecdotal. In the absence of reliable evidence the Review has wherever possible attempted to locate statistics from the QBCC, the Australian Bureau of Statistics or other reputable sources. Largely however, the Review was left with the unsubstantiated claims of the competing interests of two discrete camps, private certifiers and local government certifiers.

'Direct supervision' of cadets needs addressing

- [1253] The Review accepts that the supervision of cadets needs addressing. This issue has already been examined (refer to Recommendations 48 and 71)

'Exceptionally low fees' driven by anti-competitive conduct of local governments causing a 'race to the bottom' and mandatory minimum certification fees

- [1254] During the course of the Review, many private certifiers spoke about the 'race to the bottom' in respect to their fees. A number of private certifiers privately expressed their grave concerns about their ability to remain financially viable in the immediate future. The Review noted in some areas, particularly certain locations within outerlying Brisbane and SE Queensland that the mood of a

number of private certifiers was surprisingly less optimistic than their counterparts outside major metropolitan areas.

- [1255] The issue of local governments acting in an anti-competitive manner has been the source of discussions since the introduction of private certification in 1998. It has also been the subject of commentary in previous reviews.
- [1256] In the Policy Statement entitled *National Competition Policy and Queensland Local Government July 1996* the Queensland Government defined “competitive neutrality” as the principal underpinned by the National Competition Policy which requires the removal of advantages (and disadvantages) that significant Government businesses derive from their Government ownership and which prevent them from operating on a competitively neutral basis²⁷⁶.
- [1257] National Competition Policy requires that, subject to a public benefit test, significant Government business activities should be either corporatised or placed on a ‘level playing field’ basis in some other way such that major competitive advantages for their public ownership are removed²⁷⁷. However it is important to recognise that where competitive neutrality is applied, it will not interfere with the capacity of a local government to subsidise the provision of goods or services to particular groups provided that where a Community Service Obligation payment is made, the level of payment is readily identified in public accounts²⁷⁸.
- [1258] In a report entitled *Public Benefit Test – The Queensland Building Act and Associated Regulations – Final Report*²⁷⁹ prepared for the Queensland Department of Local Government and Planning, consultants were engaged (‘the consultants’) to undertake a Public Benefit Test (PBT) of certain restrictions to competition in the *Building Act 1975* and the *Building Regulation 2006*. The consultants examined the costs and benefits of the restrictions to competition and alternative means of meeting the objectives of the building legislation. The consultants found among other things that:
- There are important competitive neutrality issues that had not been effectively addressed by a significant number of local governments including some larger local governments;

²⁷⁶ <http://www.treasury.qld.gov.au/office/knowledge/docs/ncp/ncp-local-govt.pdf>, 17

²⁷⁷ *id.*, 18

²⁷⁸ *id.*, 19

²⁷⁹ John Fallon, see:

<http://ncp.ncc.gov.au/docs/0ld%20Building%20Act%201975%20and%20associated%20Regulations.%20PBT%20report.%20May%202002.pdf>, 20 May 2002

- The regulatory system gave rise to an unavoidable and potentially serious conflict of interest which not only adversely affects competition between local government certifiers and private certifiers, over time it has the potential to undermine building standards;
- Some private certifiers pointed to situations where local government had engaged in unnecessary and unfair delaying tactics when dealing with private certifiers. It was alleged by some private certifiers that the clients of local government certifiers were given priority over those of private certifiers.

[1259] The consultants provided two options in dealing with these issues:

- Option 1: Entailed maintaining the current public/private certification system with enhancements including:
 - Improved guidelines for local governments to ensure compliance with full cost pricing and competitive neutrality principles;
 - Private certifiers to have access to an independent and effective complaints mechanism in relation to full cost pricing and competitive neutrality issues;
 - Powers of an independent reviewer or similar means to ensure that full cost pricing and competitive neutrality issues are effectively resolved.
- Option 2: Only private certifiers would be permitted to provide certification services except in remote locations.

[1260] In the report entitled *National Competition Policy Review of the Building Act 1975, 2003*²⁸⁰, the authors ('the Review Committee') referred to the findings of the consultants in the *Public Benefit Test – The Queensland Building Act and Associated Regulations – Final Report*, in respect to the conflicts of interest between local governments providing building certification services in competition with private certifiers.

[1261] The Review Committee considered that the 'competitive neutrality problem' was overstated by the consultants being based on the anecdotal evidence provided largely by some private certifiers. The Review Committee commented at p.8:

"...this does not mean that there are no issues to be addressed. The question is whether the level of the problem is sufficient in all council areas to warrant abandoning the current arrangements altogether and moving to a private sector only model. The Review Committee believes this is not the case and that it is possible to put in place effective arrangements to address the conflict of interest and competitive neutrality issues."

²⁸⁰ See: <http://ncp.ncc.gov.au/docs/Qld%20Building%20Act%201975%2C%20Review%20report%202003.pdf> , 6

[1262] The Review Committee noted that the Department of Local Government and Planning (as it was then known) already published comprehensive guidelines to assist local governments in the application of full cost pricing to local government businesses which adopt competitive neutrality principles. The Review Committee recommended that the Department examine these guidelines in consultation with local governments and representatives of private certifiers with a view to amending them.

[1263] The Review Committee also agreed with the consultants' recommendation that an independent complaints mechanism be implemented over a staged period to enable local governments to develop and implement competitively neutral arrangements.

[1264] The Review Committee did not support the establishment of an independent reviewer to ensure the competitive neutrality issues are effectively resolved.

[1265] Since the release of the report entitled *National Competition Policy Review of the Building Act 1975, 2003*, amendments have been made to both the *Local Government Act 2009*²⁸¹ and the *Local Government Regulations 2012* which make it mandatory for certain councils to apply the Code of Competitive Conduct to their building certification services (if they have them). The application of the Code of Competitive Conduct requires local governments, amongst other things, to adopt full cost pricing²⁸² and also ensure that competitive neutrality complaints processes apply to the supply of local government certification services²⁸³. However, compliance with the Code of Competitive Conduct is only mandatory for the following local governments²⁸⁴:

- Bundaberg Regional Council
- Cairns Regional Council
- Douglas Shire Council
- Fraser Coast Regional Council
- Gladstone Regional Council
- Gold Coast City Council
- Gympie Regional Council
- Ipswich City Council
- Livingstone Shire Council
- Logan City Council
- Mackay Regional Council

²⁸¹ See s.47(3) of the *Local Government Act 2009*

²⁸² See s.33(1) of the *Local Government Regulation 2012*

²⁸³ See s.48(1) of the *Local Government Act 2009*

²⁸⁴ See s.47(4)(b) of the *Local Government Act 2009* and s.38 of the *Local Government Regulation 2012*. The Review notes that this list has been expanded since previous iterations of the *Regulation*

- Mareeba Shire Council
- Moreton Bay Regional Council
- Noosa Shire Council
- Redland City Council
- Rockhampton Regional Council
- Scenic Rim Regional Council
- Sunshine Coast Regional Council
- Tablelands Regional Council
- Toowoomba Regional Council
- Townsville City Council
- Whitsunday Regional Council.

[1266] Section 51(3) of the *City of Brisbane Act 2010* also requires the Brisbane City Council to comply with the Code of Competitive Conduct.

[1267] All of the remaining 55 local governments are excluded from having to comply with the Code of Competitive Conduct. It is not clear on what bases these remaining councils were excluded from mandatory compliance with the code, however it seems likely that the decision was based on a public benefit test identifying either the lack of private certifiers working in these locations and/or the significant costs that would be borne by ratepayers requiring certification services if they were based on a full pricing model.

[1268] Complaints about any of the aforementioned local governments' failure to comply with their competitive neutrality obligations can be made to the local government or the Queensland Competition Authority (QCA) which may act as referee²⁸⁵. If the QCA conducts an investigation and it decides the complainant suffers a competitive disadvantage, it must provide a report giving recommendations and its reasons²⁸⁶. The local government must decide by resolution whether to implement the recommendations made by the QCA and must state its reasons for doing so. If the certification services are provided by a corporate entity, the entity must implement the recommendations as soon as possible²⁸⁷.

[1269] Enquiries made with the QCA reveal that since these amendments were introduced in 2009 requiring mandatory compliance with the Code of Competitive Conduct, not one complaint has been made about a local government listed in s.38 of the *Local Government Regulation 2009*.

[1270] There are a number of competing issues at play here. First and foremost is the consideration that building owners in regional, rural and remote Queensland have the ability to have their

²⁸⁵ See ss.45(1) and 46 of the *Local Government Regulation 2012*

²⁸⁶ See s.52(5) of the *Local Government Regulation 2012*

²⁸⁷ See s.55(5) of the *Local Government Regulation 2012*

buildings assessed and inspected according to the building legislation. The second consideration is how that is most appropriately achieved. That is, should that process be conducted under the existing public/private model or a derivative?

[1271] To complicate matters, consideration must be had to the fact that in some of these areas, particularly in remote parts of Queensland, private building certifiers do not generally provide their services. Therefore, this requires the local government to step in and in some cases be the sole provider of certification services. As one local government employee explained, there is often political pressure placed on local government building certification services to provide a service delivery model subsidised by rate payers, otherwise the costs of local government certification in some remote areas would be exorbitant. It is important to recognise that this community service obligation is not inconsistent with the principles of the National Competition Policy.

[1272] Local government contract building certifier Jason Burger advised that he conducts building certification services for numerous councils, in circumstances where one council would not have sufficient work for him to perform. He advised that this system seems to work well, but if not for the willingness of local governments to subsidise, the costs of providing certification services would be prohibitive.

[1273] Twelve years on from the release of the report entitled *Public Benefit Test – The Queensland Building Act and Associated Regulations – Final Report*, there is still no physical evidence that supports the claims and allegations made by some private certifiers that local governments are not acting in accordance with the principles of competitive neutrality. This should be distinguished from a local government's entitlement to subsidise the costs of providing certification services when it is not in the public interest to charge on a full cost recovery basis.

[1274] Given that there have been no complaints made to the QCA against local governments for an alleged failure to comply with the Code of Competitive Conduct, the Review is not convinced that Government should intervene by legislating further competitive neutrality requirements on local governments, particularly where that may impact significantly on the costs of certification services in rural and remote Queensland.

'Race to the bottom'

[1275] The Review has previously described at paragraph [275] how during individual interviews many private certifiers spoke about the fees they charged and whilst the vast majority thought they

were worth more money the private certifiers who seemed most content with the success of their business had made a conscious decision not to join "*the race to the bottom*". Many private certifiers however seemed to think that the only way they can compete was based on price.

- [1276] The Review is more convinced that downward pressure on certifier fees is caused more from within the private certification ranks than local government. This 'race to the bottom' has been exacerbated by the willingness of some private certifiers to partake in the 'virtual inspection' process rejected in Recommendation 83. In what has been difficult economic times for much of the building industry since the Global Financial Crisis, there has also been a preponderance of some certifiers to cut their fees to suit the times. The difficulty for all stakeholders is that this downward pressure on certification fees may result in a lower expectation of service delivery by the provider.

Mandatory minimum certification fees

- [1277] The Review received a significant number of submissions calling for the Government set a mandatory minimum scale of fees. Many building certifiers saw this form of Government intervention as a form of panacea to some of the challenges they face.
- [1278] However, the Review does not accept that the best interests of the community or the industry would be well served by such Government intervention. The Review is satisfied that a number of building certifiers have made a conscious decision to 'cut corners'. Whether that is as a result of the downward pressure on certifier prices, or whether such conduct has caused the downward pressure on prices is a 'chicken and the egg' argument. The point is that a small number of certifiers are not doing as the building legislation requires them to do, particularly in respect to physical inspections. The extent of non-compliance with the requirements of the *Building Act 1975*, illustrated by the number of complaints received and determined by the QBCC and QCAT over the past five years is set out in Annexure E.
- [1279] If Government were to intervene by placing an artificial 'floor' under certification fees, all that would result is that the building certifiers who are presently not doing 'the right thing' would most likely receive a pay rise and would maintain their current course of conduct. Giving a person in these circumstances a government mandated pay rise will not lead to a 'road to Damascus' type epiphany nor will it lead to better outcomes in terms of the quality of their output.

Quality of certification services is sub-standard in rural and regional Queensland

[1280] This submission was an isolated one, but one worthy of consideration nonetheless, albeit it very briefly. The submitter provided no evidence or justification to support the contention. It was certainly not consistent with the exchanges of information between the Review and building certifiers throughout the State. In fact, the Review found the building certifiers and cadets in the regional parts of Queensland professional, proactive in their business outlook, very receptive to the Review and eager to be part of the process.

[1281] In fact to the extent that it is helpful, Table 7 at paragraph [877] above suggests that the problems experienced during the Mackay audits were predominantly caused by 'out of town' certifiers and builders, rather than by local regional ones. The Review is informed by the Certification Unit of the QBCC that many of the 'out of town' certifiers who were subject to the Mackay audit were based in South East Queensland.

All information available to local councils should be made available to private certifiers to level the playing field

[1282] The Review accepts this submission. The issue has been considered above and is the subject of Recommendations 49-53.

FIFO certifiers

[1283] If the Recommendations of this Review are accepted, the public/private certification model will not warrant State Government intervention of the sort proposed, namely by providing fly-in-fly-out certifiers from more densely populated areas. As discussed in the reasons above, the combination of local governments working in rural and remote Queensland, together with a number of private certifiers who are prepared to travel significant distances to perform inspections and the introduction of the 'fourth level inspector' (Recommendations 16 - 18)²⁸⁸ should cater sufficiently well for the anticipated certification needs of the State.

Greater say for regional, rural and remote practitioners

[1284] This submission has some merit. Practitioners who work in less densely populated parts of the State can, by virtue of their

²⁸⁸ This will also provide additional employment opportunities for experienced builders provided they meet the required qualifications

geographical location feel more removed from their city based colleagues and from those that regulate them. However, feelings of isolation may be ameliorated to some extent by regular attendance at compulsory CPD events held throughout the State or by attending online if those facilities are available.

[1285] The Review considers that a position for at least one building certifier representative from each of the following areas outside South East Queensland should be created to attend meetings of the Building Industry Consultative Group chaired by Building Codes Queensland to ensure that a ‘regional’ certifier’s perspective is heard by Government:

- One building certifier from far north Queensland;
- One building certifier from central Queensland; and
- One building certifier from south-west Queensland.

More ‘boots on the ground’

[1286] The following Recommendations will deliver more and better qualified ‘boots on the ground’ to help building certifiers during the inspection stages of the building certifying function:

- The introduction of the ‘fourth level inspector’ (Recommendations 16 – 18);
- The more appropriate use of competent persons (Recommendation 71);
- The more appropriate use and supervision of cadet certifiers (Recommendations 48 and 71);
- Adopting a whole of government approach to attract more young people into the certification industry (Recommendation 119)

Question 5.1.1: Recommendation

[1287]

99.	<p>The building certification needs of regional Queensland communities are adequately catered for by the dual public/private certification system in Queensland.</p> <p>Additionally, the building certification needs of rural and remote Queensland communities will be better catered for by the combination of:</p> <ul style="list-style-type: none"> (a) Continued local government services; (b) The private certifiers who are prepared to travel significant distances to perform inspections; (c) The introduction of the ‘fourth level inspector’ (Recommendations 16 - 18); (d) The more appropriate use of competent persons
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	<p>(Recommendation 71); and</p> <p>(e) Better defined roles and responsibilities for cadet certifiers (Recommendations 48 and 71).</p>
100.	The Review does not consider that the Government should intervene by legislating further competitive neutrality requirements on local governments, particularly where that may impact significantly on the costs of building certification services in rural and remote Queensland.
101.	Government should not intervene in the amounts charged by building certifiers by introducing a mandatory minimum scale of certification fees.
102.	<p>To ensure that regional, rural and remote building certifiers have their say on issues which impact upon them, a position for at least one building certifier representative from each of the following regions outside South East Queensland should be created to enable attendance at the meetings of the Building Industry Consultative Group, chaired by Building Codes Queensland:</p> <p>(a) One building certifier from far north Queensland;</p> <p>(b) One building certifier from central Queensland; and</p> <p>(c) One building certifier from southwest Queensland.</p>

Question 5.2.1: Do you support the relocation of the provisions in the *Building Act 1975* that relate to licensing and disciplinary action of building certifiers to the *Queensland Building and Construction Commission Act 1991*?

Background

[1288] The background behind this issue is self-evident.

Feedback outcomes

[1289] Of the written submissions and completed surveys responding to Question 5.2.1, 44% of submitters supported the proposal of relocating the provisions in the *Building Act 1975* that relate to licensing and disciplinary action of building certifiers to the *Queensland Building and Construction Commission Act 1991*, whilst 23% were opposed, 4% had other suggestions on how to resolve the question and 29% of submitters did not address it.

Consideration

[1290] Put simply, the *Building Act 1975* and the *Building Regulations 2006* should regulate the system of building control in this State. The Act that establishes the QBCC that regulates and licenses builders, trade contractors and building professionals such as building designers and fire protection specialists should also regulate the licensing and discipline of building certifiers and pool safety inspectors.

[1291] The issue of the relocation of licensing and disciplinary provisions relating to building certifiers from Chapter 6 of the *Building Act* to Part 11 (proposed) of the *Queensland Building and Construction Commission Act 1991* has already been considered and is the subject of Recommendation 15. It is not necessary to traverse this issue again.

[1292] For the same reasons, the provisions relating to the licensing and discipline of pool safety inspectors contained in Chapter 8, Parts 5 to 8 of the *Building Act 1975* and any related provisions contained within the *Building Regulation 2006*, should be relocated to become proposed Part 12 of the *Queensland Building and Construction Commission Act 1991* and Schedule 2 of the *Queensland Building and Construction Commission Regulation 2003*.

Question 5.2.1: Recommendations

[1293]

103.	The provisions relating to the licensing and discipline of pool safety inspectors contained in Chapter 8, Parts 5 to 8 of the <i>Building Act 1975</i> and any related provisions contained within the <i>Building Regulation 2006</i>, should be relocated to become Part 12 of the <i>Queensland Building and Construction Commission Act 1991</i> and Schedule 2 of the <i>Queensland Building and Construction Commission Regulation 2003</i>.
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6.0 Further Recommendations

[1294] The Discussion Paper and the survey called for further comments or suggestions for improving the building legislation and the system of building control in Queensland. The following further issues and recommendations arise out of a combination of the additional suggestions for improvement and those of the author arising out of the Review process.

[1295] When dealing with these additional issues, consideration must be had of the discussions which precede this section. The Review has attempted to keep the examination of these additional issues as brief as possible.

6.1.1 Swimming pool safety

[1296] The regulation of swimming pools has long been a feature of the *Building Act 1975*. However when compared with its earlier iterations prescribed in the *Standard Building By-Laws 1991*, the provisions which now regulate swimming pools have taken on 'phone book like' proportions. What were once half a dozen or so pages, now span over 124 pages in the *Building Act 1975* reprint current as at 1 July 2014.

[1297] Chapter 8 of the *Building Act 1975* currently regulates swimming pool safety. It deals with all manner of things with respect to the construction, maintenance and inspection of regulated pools and fences, including:

- Compliance with exemptions from the pool safety standard;
- The reporting requirements for pool immersion incidents;
- Pool safety management plans for class 3 buildings;
- Dividing fences which act as pool barriers and disputes in relation thereto;
- Inspections of regulated pools;
- Functions of local government with respect to regulated pools;
- Pool safety certificates;
- Appeals;
- The creation of a register of regulated pools;
- Offences in relation to regulated pools;
- Pool safety inspectors, their licensing and related disciplinary provisions;
- The establishment of the Pool Safety Council.

Consideration

[1298] The time has come to remove Chapter 8 from the *Building Act 1975* and subject to Recommendation 103, the provisions contained in Chapter 8 should be relocated into a stand-alone regulation similar to the *Building Fire Regulation 2008*. The establishment of the proposed *Building Swimming Pool Safety Regulation 2015* would have the following benefits:

- Provide for a more simple, compartmentalised *Building Act 1975* consistent with its intended purpose, namely to provide for a standardised system of building control throughout the State;
- Provide a mechanism to more readily amend provisions through subordinate legislation relating to swimming pool safety in a constantly changing environment; and
- Subject to the retention of QDC MP3.4, provide a single regulatory instrument containing all provisions relating to swimming pool safety.

[1299] Similarly, Part 6 Subdivision 4A and various other swimming pool related provisions contained within the *Building Regulation 2006* should also be relocated to the proposed *Building Swimming Pool Safety Regulation 2015*.

[1300] It is understood that the QBCC is likely to assume the responsibilities of the Pool Safety Council currently contained in Chapter 8, Part 9 of the *Building Act 1975*. In the premises, Chapter 8, Part 9 would not require relocation to the proposed *Building Swimming Pool Safety Regulation 2015*, however appropriate provision will need to be made for the licensing and disciplining of pool safety inspectors within the QBCC Act (See Recommendation 103).

6.1.1 Recommendation

[1301]

104.	Subject to Recommendation 103, the provisions relating to swimming pool safety contained in Chapter 8 of the <i>Building Act 1975</i> and any related provisions contained within the <i>Building Regulation 2006</i>, should be relocated to the proposed <i>Building Swimming Pool Regulation 2015</i>.
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6.1.2 Minimum standard of design documentation

[1302] The Review received a number of submissions which called for a return to a minimum standard of design documentation to be submitted with a building development application. The argument was a simple one which relied on the theory 'garbage in = garbage out'.

[1303] The *Building Act 1975* previously contained minimum standards for the supply of design documentation in the *Standard Building Law* (Repealed). Section 2.4(1) provided:

Information required

(1) *Except for building work in relation to the demolition of a building or other structure and except where it is otherwise agreed by the appropriate building officer, the following information must be lodged with each application for approval to the carrying out of building work—*

(a) drawings showing—

- (i) the plan at each floor level, elevations, sections and dimensions of the building or other structure drawn to a scale of not less than 1:100; and*
- (ii) the sizes and locations of structural members to a scale of not less than 1:100; and*
- (iii) any other details required by the appropriate building officer drawn to a scale of not less than 1:20; and*
- (iv) where the application relates to a Class 1 or 10 building—the heights of the building in relation to the natural ground surface; and*

(b) specifications—

- (i) describing materials to be used in the construction; and*
- (ii) where not indicated on the drawings referred to in paragraph (a), providing any other information necessary to show that the building work would, if carried out in accordance with the specifications and drawings, comply with this Law; and*
- (iii) describing the method of drainage, sewerage and water supply; and*
- (iv) stating whether the materials will be new or second-hand and, if second-hand materials are to be used, giving particulars as required by the appropriate building officer; and*

(c) a plan of the allotment to a scale of not less than 1:200 showing—

- (i) the boundaries and dimensions of the allotment and any relevant easements; and*
- (ii) the position and dimensions of the building or other structure and its relationship to the boundaries of the allotment and any existing building or other structure on the same or adjoining allotments with details of the purposes for which*

- any other buildings or other structures on the same allotment are used or intended to be used; and*
- (iii) the levels of the allotment and of the floors of the building or other structure in relation to the adjacent ground and to any street or drainage channel, and to any drain maintained by the local government, on or adjacent to the allotment; and*
 - (iv) any fences, including swimming pool fencing, already erected or to be erected on the allotment or on the boundaries of the allotment; and*
 - (v) the location of the nearest fire hydrant situated on a road or on the allotment; and*
- (d) reports, and such calculations of stress and other technical details of or relating to the building work, as may be required by the appropriate building officer; and*
 - (e) where more than 1 professional discipline is involved in the design of the building or structure, the name of the person, being a member of 1 of those disciplines, who has agreed to be responsible for the coordination of the preparation of the plans and specifications relating to the building work in so far as the Act or this Law apply to that work; and*
 - (f) plans and specifications of all work associated with the building work that is required to comply with the requirements of the town planning scheme in force in the area in which the allotment is located; and*
 - (g) plans and specifications of all work associated with the building work that is required to comply with the requirements of local government local laws in force in the area in which the allotment is located; and*
 - (h) any other information that the appropriate building officer may reasonably require.*
- (2)** *In addition to the matters referred to in subsection (1), a list of the required fire safety installations and a list of the required special fire services mentioned in appendix 6 must be lodged with each application that relates to a building classified in the range Class 2 to Class 9 and, where the local government so requests, there must also be lodged a certificate from a registered professional engineer, or from some other person or body approved by the local government for the purpose, stating that the design of the special fire services is in accordance with this Law.*
- (3)** *In the case of a proposed alteration to an existing building or other existing structure, the drawings must clearly indicate the location of the proposed alterations in relation to that building or other structure.*
- (4)** *In the case of building work that relates to the demolition or removal of a building or other structure, the following information and documents must be lodged with each application except where it is otherwise agreed by the appropriate building officer—*
- (a) an outline and a description of the building or other structure to be demolished or removed;*
 - (b) a plan of the allotment showing the location of the building or other structure in relation to the boundaries of the allotment, any*

other buildings or structures on the allotment, and any roads, including any footpaths or crossings, bounding the allotment;

- (c) *where only a part of the building or other structure is to be demolished or removed—computations or other information showing that the remainder of the building or other structure will comply with the provisions of this Law either as it remains after the proposed demolition or removal takes place or after other work (of a specified kind) is carried out.*

(5) *The local government may determine the number of copies of the information referred to in this section that are to be submitted with each application for approval to carry out building work.*

[1304] These minimum standards were considered redundant when the then QBSA began licensing building designers. The school of thought was that licensed building designers should be capable of determining what should and what shouldn't be provided in their designs and so in the early 1990's the minimum design standards were removed from the building legislation.

[1305] A number of certifiers have expressed concerns during the roadshows that if the plans for a building are poorly drafted or there is incomplete design documentation, the chances of the works being constructed defectively or not in accordance with the plans and specifications are increased.

[1306] Submissions made on behalf of the Sunshine Coast Council suggested that defects at the design stage are passed onto the building development application adding a burden to private certifiers and local government. It was argued that:

"While building designers meet the requirements of their clients, their role in the regulatory system is to provide design and documentation that is technically compliant with building standards, local laws and planning schemes. This tends to be under-emphasised."

[1307] Concerns have been raised by a number of certifiers that without a minimum standard of design documentation, the quality of building design is diminishing.

[1308] In a survey response, a private certifier submitted:

"The main problems in the industry that I experience is the lack of knowledge shown by draftsman, Architects etc when drawing plans and giving reference to local authority planning schemes, building code requirements etc. I receive plans every week from clients that do not address these issues, then have to inform the client to go back to the draftsman, architect to amend the plans which they are charged for."

Consideration

- [1309] There is merit in the submission that there should be a return to a minimum standard of design documentation expected for a building development application. This design documentation however, need not be quite so prescriptive as that previously contained in the *Standard Building Law* (repealed).
- [1310] After appropriate consultation, a guideline should be created to assist building designers and building certifiers to determine an appropriate minimum standard that ought to be provided.

6.1.2 Recommendation

[1311]

105.	To provide better building outcomes, a minimum standard of design documentation should be established in a guideline produced by the chief executive. The guideline should be produced in consultation with industry stakeholders. However it is recommended that Government consider inserting into the guideline various provisions previously contained within s.2.4(1) of the <i>Standard Building Law</i> (repealed).
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6.1.3 Local Planning Instruments

[1312] Another common complaint received during the Review was that some local government planning schemes attempt to circumvent the *Building Act 1975* by including provisions about building work. This is prohibited pursuant to s.78A of the *Sustainable Planning Act 2009* which provides:

(1) *A local planning instrument must not include provisions about building work, to the extent the building work is regulated under the building assessment provisions, unless permitted under the Building Act.*

Note— The Building Act, sections 31, 32 and 33 provide for matters about the relationship between local planning instruments and that Act for particular building work.

(2) *To the extent a local planning instrument does not comply with subsection (1), the local planning instrument has no effect.*

(3) *In this section— **building assessment provisions** does not include IDAS or a provision of a local planning instrument.*

[1313] Private certifiers and some builders argued that a number of local governments take little notice of s.78A of the *Sustainable Planning Act 2009* and seek to exert pressure on building owners, builders and private certifiers, when they have no lawful entitlement to do so.

Consideration

[1314] The Review agrees with the submissions and suggests that the *Sustainable Planning Act 2009* be amended or the Draft Planning Bill provide for the Minister for State Development, Infrastructure and Planning to have the power to require a local government to remove an offending provision from its planning scheme.

6.1.3 Recommendation

[1315]

106.	Section 78A of the <i>Sustainable Planning Act 2009</i> prohibits the inclusion of provisions regarding building work in a local planning instrument. To the extent that a local planning instrument does contain such a provision, the local planning instrument has no effect. It is recommended that the Minister for State Development, Infrastructure and Planning should have the ability to require a local government to remove such provisions from the local planning instrument.
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6.1.4 Accountability of building and construction industry stakeholders

[1316] The Transport, Housing and Local Government Committee Report No.14 into the Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012 made a number of recommendations regarding raising the accountability of building certifiers in this State.

[1317] Relevantly, the Committee recommended:

Recommendation 14

The Committee recommends that the Minister for Housing and Public Works investigate ways in which to improve the building certification system in Queensland to ensure private certifiers are held accountable where they approve illegal or defective works, and to ensure the works are rectified.

Recommendation 15

The Committee recommends that the Minister for Housing and Public Works investigate ways in which licensees who construct and certifiers who approve unlawful or defective work (for example where a building is structurally unsound or built partially outside the property boundary) can be made responsible for rectification of the works.

Recommendation 37

The Committee recommends that the new building authority:

- *Retain the current audit regimes (i.e. licence and financial audits) with a view to increasing the numbers and effectiveness of these regimes and*
- *Implement a new audit regime to check routinely for compliance with building standards and codes.*

[1318] Upon receiving the Committee's recommendations, the Minister for Housing and Public Works formed a panel of experts to provide advice on the implementation of the Committee's recommendations. Based on that advice, the Government produced a report entitled "*Queensland Government Response to the Transport, Housing and Local Government Committee Report No.14 Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012*" which contained a 'Ten Point action plan'. Item 9 of the Ten Point action plan provided:

“Review the role of private certifiers with emphasis on probity, conflicts of interest, quality and an appropriate penalty regime for failure to perform

The Implementation Committee will examine the process of appointing private certifiers to clearly define their roles and responsibilities. The Implementation Committee will also consider restructuring the current domestic building inspection requirements with a view to a more effective and accountable system that will reduce defects and disputes without adding to cost.”

- [1319] The Government formed the Implementation Committee which had begun its work on implementing Item 9 of the Ten Point action plan (among other things) when the issues sparking the Mackay audits surfaced in February 2014. This ultimately led to the Government calling this Review.

Consideration

- [1320] During this Review, many building certifiers complained that as a profession, they had become the “whipping boy” of the building and construction industry. Many building certifiers considered that they bore an inequitable responsibility for the performance of those in the construction chain. Many called for the regulator’s attention to be turned on those that actually perform the defective works, rather than just ‘whacking’ the certifier who failed to identify them. A popular catch-cry amongst building certifiers was that they are not ‘inspectors’ or clerks of work, nor can it reasonably be expected that they would be on site ‘24/7’ to identify any possible defects performed during the construction process.
- [1321] With the increased threat of litigation and the non-stop development in legislation, regulations, standards and codes, it is little wonder that many building certifiers are feeling under pressure.
- [1322] A number of certifiers were keen to point out during the Review (and perhaps even impliedly threaten), that if Government made the role of the building certifier much tougher, it may face an exodus from their ranks. Whilst this ‘threat’ should not be discarded as mere hyperbole, the submissions and information provided during the Review demonstrates that a higher degree of accountability is required of building certifiers. In saying that, it is not suggested that building certifiers as a whole are not fulfilling their statutory obligations with diligence and professionalism. However, like any calling, there are those within the ranks of building certifiers who are cutting corners and who are putting the making of profits ahead of their overriding obligation to the public interest. There are also some building certifiers whose knowledge of their craft should be the attention of closer scrutiny by the QBCC.

Legislative amendments required

[1323] Currently building certification work is exempt from the definition of 'building work' as defined in Schedule 2 of the *Queensland Building and Construction Commission Act 1991* pursuant to s.5 and Item 34 of Schedule 1AA of the *Queensland Building and Construction Commission Regulation 2003*. The practical effect of this exemption is that the QBCC is presently not able to issue a direction to rectify or complete building work against a building certifier pursuant to s.72 of the *Queensland Building and Construction Commission Act 1991*.

[1324] Section 72 of the *Queensland Building and Construction Commission Act 1991* provides:

72 Power to require rectification of building work

- (1) If the commission is of the opinion that building work is defective or incomplete, the commission may direct the person who carried out the building work to rectify the building work within the period stated in the direction.*
- (2) In deciding whether to give a direction under subsection (1), the commission may take into consideration all the circumstances it considers are reasonably relevant, and in particular, is not limited to a consideration of the terms of, including the terms of any warranties included in, the contract for carrying out the building work.*
- (3) The period stated in the direction must be at least 28 days unless the commission is satisfied that, if the direction is not required to be complied with within a shorter period—*
 - (a) a substantial loss will be incurred by, or a significant hazard will be caused to the health or safety of, a person because of the defective building work; or*
 - (b) the defective building work will cause a significant hazard to public safety or the environment generally.*
- (4) Subject to subsection (3), the period stated in the direction must be a period the commission considers to be appropriate in the circumstances.*
- (5) For subsection (1), the person who carried out the building work is taken to include—*
 - (a) a licensed contractor whose licence card is imprinted on the contract for carrying out the building work; and*
 - (b) a licensed contractor whose name, licence number and address are stated on the contract; and*
 - (ba) a licensed contractor whose name is stated on the contract for carrying out the building work; and*
 - (bb) a licensed contractor whose name is stated on an insurance notification form for the building work; and*
 - (bc) a licensed contractor whose licence number is stated on the contract for carrying out the building work; and*
 - (bd) a licensed contractor whose licence number is stated on an*

- insurance notification form for the building work; and*
- (be) a licensed contractor whose PIN was used for putting in place, for the building work, insurance under the statutory insurance scheme; and*
 - (c) a building contractor by whom the building work was carried out; and*
 - (d) a person who, for profit or reward, carried out the building work; and*
 - (e) a person who, under the Domestic Building Contracts Act 2000, is a building contractor under a domestic building contract who managed the carrying out of the building work; and*
 - (f) a construction manager engaged under a construction management contract to provide building work services for the building work; and*
 - (g) a principal who was the contracting party for a building contract for building work for a building, or part of a building, intended for sale if—*
 - (i) the building, or part of a building, is not, and has never been, the principal place of residence of the principal; and*
 - (ii) the principal engages a building contractor or a construction manager to carry out the building work in a way, or using materials, likely to result in the work being defective or incomplete; and*
 - (iii) the principal knew, or ought to have known, that the way the work was to be carried out, or the materials to be used, was likely to result in the work being defective or incomplete; and*
Example where principal knew that work or materials were likely to result in defective or incomplete building work—
A principal may know materials are likely to result in work being defective because of advice received from a building contractor or construction manager.
 - (h) a person who was the nominee for a licensed contractor that is a company, for work carried out by the company while the person was the company's nominee.*
- (5AA) A direction to rectify may be given to more than 1 person for the same building work.*
- (5A) In subsection (2), a reference to a contract for carrying out building work includes a reference to a domestic building contract for managing the carrying out of building work.*
- (6) If in order to rectify building work it is necessary to do so, the direction may require that a building or part of a building be demolished and building work be recommenced.*
 - (7) If a direction is given under this section to a person who is not currently licensed to carry out the required work, the person must have the work carried out by a licensed contractor.*
 - (8) A direction cannot be given under this section more than 6 years and 3 months after the building work to which the direction relates was completed or left in an incomplete state unless the tribunal is satisfied, on application by the commission, that there is in the circumstances of a particular case sufficient reason for extending the time for giving a*

direction and extends the time accordingly.

- (9) *The fact that a direction is given under this section does not prevent disciplinary action in respect of the defective or incomplete building work.*
- (10) *A person who fails to rectify building work as required by a direction under this section is guilty of an offence. Maximum penalty—250 penalty units.*
- (11) *For the purposes of subsection (5)(c) and (d)—*
- (a) a person carries out building work whether the person—*
 - (i) carries it out personally; or*
 - (ii) directly or indirectly causes it to be carried out; and*
 - (b) a person is taken to carry out building work if the person provides advisory services, administration services, management services or supervisory services for the work.*
- (12) *In a prosecution for an offence against subsection (10), or in a proceeding for taking disciplinary action on the ground that a licensee has failed to comply with a direction to rectify*
- (13) *building work, it is a defence for a licensed contractor mentioned in subsection (5)(a) to prove that—*
- (a) the licensed contractor's licence card was imprinted on the contract for carrying out the building work without the contractor's authority; and*
 - (b) the licensed contractor took all reasonable steps to ensure that the licence card was imprinted on contracts only with the licensed contractor's authority.*
- (13A) *In a prosecution for an offence against subsection (10), or in a proceeding for taking disciplinary action on the ground that a licensee has failed to comply with a direction to rectify building work—*
- (a) it is a defence for a licensed contractor mentioned in subsection (5)(ba) to prove that the licensed contractor's name was stated on the contract for carrying out the building work without the licensed contractor's authority; and*
 - (b) it is a defence for a licensed contractor mentioned in subsection (5)(bb) to prove that the licensed contractor's name was stated on the insurance notification form for the building work without the licensed contractor's authority; and*
 - (c) it is a defence for a licensed contractor mentioned in subsection (5)(bc) to prove that the licensed contractor's licence number was stated on the contract for carrying out the building work without the licensed contractor's authority; and*
 - (d) it is a defence for a licensed contractor mentioned in subsection (5)(bd) to prove that the licensed contractor's licence number was stated on the insurance notification form for the building work without the licensed contractor's authority; and*
 - (e) it is a defence for a licensed contractor mentioned in subsection (5)(be) to prove that—*
 - (i) the licensed contractor's PIN was used for putting in place, for the building work, insurance under the statutory insurance scheme without the licensed contractor's authority; and*

- (ii) *the licensed contractor took all reasonable steps to ensure the licensed contractor's PIN was kept and used in accordance with the commission's requirements for the keeping and use of the PIN.*

(14) *The commission is not required to give a direction under this section to a person who carried out building work for the rectification of the building work if the commission is satisfied that, in the circumstances, it would be unfair to the person to give the direction.*

Example for subsection (14)—

The commission might decide not to give a direction for the rectification of building work because of the amount payable but unpaid under the contract for carrying out the building work.

- (15) *A direction given under this section need not be complied with if—*
- (a) *a proceeding for a review of the commission's decision is started in the tribunal; and*
 - (b) *the tribunal orders a stay of the decision.*

[1325] Section 72 of the *Queensland Building and Construction Commission Act 1991* is set for a significant overhaul in the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014*. Under the Bill, s.72 will be amended by clause 37 to provide, in part:

72 Power to require rectification of building work and remediation of consequential damage

- (1) *This section applies if the commission is of the opinion that—*
- (a) *building work is defective or incomplete; or*
 - (b) *consequential damage has been caused by, or as a consequence of, carrying out building work.*
- (2) *The commission may direct the person who carried out the building work to do the following within the period stated in the direction—*
- (a) *for building work that is defective or incomplete—rectify the building work;*
 - (b) *for consequential damage—remedy the damage.*
- (3) *In deciding whether to give the direction, the commission may take into consideration all the circumstances it considers are reasonably relevant and, in particular, is not limited to a consideration of the terms of the contract for carrying out the building work (including the terms of any warranties included in the contract).*
- (4) *The period stated in the direction must be at least 28 days unless the commission is satisfied that, if the direction is not required to be complied with within a shorter period—*
- (a) *a substantial loss will be incurred by, or a significant hazard will be caused to the health or safety of, a person because of the defective or incomplete building work or consequential damage; or*
 - (b) *the defective or incomplete building work, or consequential damage, will cause a significant hazard to public safety or the environment generally.*
- (5) *The commission is not required to give the direction if the commission is*

satisfied that, in the circumstances, it would be unfair to the person to give the direction.

Example for subsection (5)—

The commission might decide not to give a direction for the rectification of building work because an owner refuses to allow a building contractor to return to the owner's home or because an owner's failure to properly maintain a home has exacerbated the extent of defective building work carried out on the home.

- (6) The commission may, before it considers whether building work is defective or incomplete, require the consumer for the building work comply with a process established by the commission to attempt to resolve the matter with the person who carried out the work.*
- (7) In subsection (3), a reference to a contract for carrying out building work includes a reference to a domestic building contract for managing the carrying out of building work.*
- (8) To remove any doubt, it is declared that the commission may act under this section in relation to consequential damage whether or not an owner or occupier has made a request under section 71J.*

72A Powers and limitations of directions to rectify or remedy

- (1) A direction to rectify or remedy may be given to more than 1 person for the same building work.*
- (2) A direction to rectify or remedy may require that a building, or part of a building, be demolished and building work be recommenced if, in order to rectify building work, it is necessary to do so.*
- (3) If a direction to rectify or remedy is given to a person who is not currently licensed to carry out the required work, the person must have the work carried out by a licensed contractor.*
- (4) A direction to rectify or remedy cannot be given more than 6 years and 3 months after the building work to which the direction relates was completed or left in an incomplete state unless the tribunal is satisfied, on application by the commission, that there is in the circumstances of a particular case sufficient reason for extending the time for giving the direction and extends the time accordingly.*
- (5) The fact that a direction is given under section 72(2) does not prevent the commission from taking additional action against a person under this Act for the building work to which the direction relates.*

[1326] Whether the existing s.72 or that proposed in the Bill will apply, the current exemption of building certification work from the definition of 'building work' will need to be removed if building certifiers are to be held more accountable for their acts, errors and omissions.

[1327] I note that pursuant to s.211(4) of the *Building Act 1975*, QCAT is currently able to order that as a result of professional misconduct, a building certifier at his or her own cost, have the defective work rectified or completed by a person who is appropriately licensed, or pay the complainant or another person an amount sufficient to rectify or complete the work.

[1328] In keeping with the desire to treat all QBCC licensees in a similar way under the *Queensland Building and Construction Commission Act 1991* as far as that is possible, the QBCC should have the ability to similarly direct a building certifier without having to obtain an order from QCAT. The building certifier would be entitled to seek a review of the QBCC's decision to the Internal Review Unit and if that is unsuccessful, a further review may be made to QCAT²⁸⁹.

Apportionment of liability

[1329] If a direction to rectify or complete building work is given by the QBCC to a building certifier, it may be the case that a similar direction would be given to the builder, if the builder is responsible for the defective and/or incomplete work in the first instance.

[1330] Pursuant to s.72(5AA), the QBCC has had the ability to issue a direction against multiple parties since amendments were made to the *Queensland Building and Construction Commission Act 1991* in 2007²⁹⁰. It is proposed that this provision will continue in the amended provisions as s.72A(1)²⁹¹.

[1331] There is a dearth of authority on the issuing of directions to rectify or complete to multiple parties, although the matter was briefly considered in *Barry v Queensland Building Services Authority and Ors* [2012] QCAT 264 at [77] – [78] per Member Thomas Cowen. The Manager of the QBCC's legal services unit informed the Review that s.72(5AA) has been used sparingly in the past, but it has been used.

[1332] Difficulties may arise in circumstances where the QBCC is considering whether to issue directions to both the builder and the certifier in relation to the same defects and/or incomplete work. The first issue will be whether there needs to be an apportionment of liability between the two responsible parties and the second issue is whether the QBCC is adequately equipped to make that assessment.

[1333] The Manager of the QBCC's legal services unit has informed the Review that when directions have been issued to multiple parties in the past, the QBCC has not apportioned liability between the parties, but has left that up to the parties to negotiate between themselves. This is perhaps an acknowledgment that the

²⁸⁹ See s.86(1)(e) of the *Queensland Building and Construction Commission Act 1991* – See also the proposed amendments to this provision in clause 43 of the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014*

²⁹⁰ See s.51 of the *Queensland Building Services Authority and Other Legislation Amendment Act 2007* (no. 47 of 2007)

²⁹¹ See clause 37 of *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* as it relates to the proposed s.72A(1)

apportionment of liability between parties is not a decision that can reasonably be made without a hearing of the merits of the matter and not one that the QBCC is equipped to make.

[1334] At first blush the QBCC's approach to issue identical directions to multiple parties without apportioning liability appears haphazard. However, given the limitations in which it must work, it is an approach that could continue to be used when considering whether to issue directions against a builder and certifier and even against a trade contractor as well.

[1335] Depending upon the value and extent of the rectification/completion costs, in circumstances where a builder and a building certifier were issued with directions by the QBCC, if past experiences of the QBCC are anything to go by, it is likely that the two parties would negotiate an outcome between themselves, or one or both of them would review the decision to issue the directions. The question then arises whether QCAT has the jurisdiction to apportion liability between parties in a review of a decision of the QBCC to issue directions to rectify and/or complete to multiple parties. It is doubtful that it does.

[1336] Pursuant to s.19 of the *Queensland Civil and Administrative Tribunal Act 2009*, in exercising its review jurisdiction, QCAT 'stands in the shoes' of the QBCC and has all of its functions as decision maker. Without an express entitlement to enable the QBCC to apportion liability between the parties pursuant to s.72A of the *Queensland Building and Construction Commission Act 1991*, it is doubtful whether QCAT could make that apportionment. In the premises, s.72A of the *Queensland Building and Construction Commission Act 1991* should be amended to enable, but not require, the QBCC to make an apportionment of liability when issuing directions to multiple parties.

[1337] Despite this amendment however, the Review considers that the QBCC is not well placed to make that decision, and the sole purpose in recommending that s.72A be amended, is to enable QCAT if called upon in a review of the QBCC's decision, to make an apportionment after a hearing of the evidence.

Trade subcontractor impunity

[1338] Many building certifiers expressed their frustrations during the course of the roadshows and in individual consultations regarding the seeming State sponsored impunity that trade subcontractors have enjoyed under the *Queensland Building and Construction Commission Act 1991* and the *Queensland Building and Construction Commission Regulation 2003* and the previous 'policy' of the QBSA

that a builder is responsible for the acts and omissions of his or her subcontractors.

- [1339] This issue has been discussed for many years where industry groups like the HIA and MBA have lobbied for reform.
- [1340] *McNab Constructions Australia Pty Ltd v QBSA* [2010] QCA 380 stands as authority for the proposition that the head contractor is generally responsible for the actions of his or her subcontractor²⁹².
- [1341] Does the position in *McNab* make for good policy however?
- [1342] The Review considers that building certifiers should not be the sole focus of increased accountability. A greater degree of accountability should be expected of all building and construction industry stakeholders, not just building certifiers or builders. Builders rely heavily upon the skills and knowledge of their subcontractors. Importantly, they rely on the fact that their subcontractors are licensed by the QBCC. In fact it is a requirement that they only contract with appropriately licensed subcontractors²⁹³.
- [1343] Whilst builders have an obligation to supervise the works performed by their subcontractors²⁹⁴, just like building certifiers, many builders do not just simply work on one building site. This is not to suggest that builders should be exonerated of their contractual or statutory responsibilities, far from it. The Review is however suggesting that if a subcontractor was responsible for defective work, they should be held at least partly accountable for it. Presently, they operate in an environment of almost total impunity. Currently, apart from a general willingness to 'do the right thing', the only factor that ensures a subcontractor's accountability is his or her willingness to be considered for the next job.
- [1344] The proposed amendments contained in clause 37 of *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* as they relate to s.72 are much broader and far less prescriptive than the existing provisions, however, s.72 should expressly make provision to counteract the effect of *McNab* so that subcontractors responsible for performing defective and/or incomplete work may also be issued with directions from the QBCC.

²⁹² *Barry v QBSA & Ors* [2011] QCAT 451 at [7] per Member Susan Gardiner

²⁹³ See s.51B of the *Queensland Building and Construction Commission Act 1991*

²⁹⁴ See s.43 of the *Queensland Building and Construction Commission Act 1991*

6.1.4 Recommendations

[1345]

107.	<p>Unless otherwise indicated, the following recommendations assume the passage of the proposed amendments contained within the <i>Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014</i> as they pertain to existing s.72 of the <i>Queensland Building and Construction Commission Act 1991</i>.</p> <p>Further to recommendations 14, 15 and 37 of the Transport, Housing and Local Government Committee Report No.14 into the Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012 and Item 9 of the Government's Ten Point action plan, to ensure that building certifiers are held properly accountable for approving unlawful, defective or incomplete building work, it is recommended that:</p> <ul style="list-style-type: none">(a) Building certification work be removed as an exemption from the definition of "building work" from s.5 and Item 34 of Schedule 1AA of the <i>Queensland Building and Construction Commission Regulations 2003</i>, thereby among other things enabling directions to be made against a building certifier by the QBCC requiring the rectification of defective building work and/or the completion of incomplete building work pursuant to s.72(2) of the <i>Queensland Building and Construction Commission Act 1991</i>;(b) Section 72A(1) of the <i>Queensland Building and Construction Commission Act 1991</i> should be amended to provide that the QBCC may apportion liability between 2 or more parties involved in the provision of defective and/or incomplete building work;(c) Section 71I(2)(b) of the <i>Queensland Building and Construction Commission Act 1991</i> should be amended to expressly include that for the purposes of s.71I(1)(h) and (i), a person carries out building work by:<ul style="list-style-type: none">(i) the provision of building certification services; or(ii) the carrying out of building work under a subcontract;(d) To further promote accountability in the building industry, in addition to taking disciplinary action against licensed builders and building certifiers, the QBCC should actively pursue, issue directions to rectify defective and incomplete building work and commence disciplinary action against trade subcontractors believed to be responsible for the carrying out of defective building work.
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6.1.5 Waterproofing

- [1346] The issue of waterproofing was considered above in Question 3.2.1 in the context of whether additional mandatory inspections should be introduced.
- [1347] At Recommendation 76, the Review considered that it was not desirable to introduce a mandatory inspection for the waterproofing of wet areas or external decks given the difficulties that can be encountered in properly assessing the correct application of waterproofing membranes by anyone other than the applicator.
- [1348] In his written submissions, private certifier Neil Oliveri suggested that only licensed water proofers or builders should be allowed to install any waterproofing. He strongly advocated for the removal of the \$3,300.00 'incidental work allowance' currently able to be used by water proofers for small projects.

Consideration

- [1349] The definition of 'building work' is defined in Schedule 2 of the *Queensland Building and Construction Commission Act 1991*. The definition refers to s.5 of the *Queensland Building and Construction Commission Regulation 2003* which in turns refers to Schedule 1AA of the Regulation to define work "that is not building work".
- [1350] Item 2 of Schedule 1AA of the *Queensland Building and Construction Commission Regulation 2003* provides that the following is not building work:

2 Work of a value of \$3300 or less

Work of a value of \$3300 or less, unless—

- (a) subject to section 33(2) of this schedule, the work is within the scope of work of a fire protection licence; or*
 - (b) the work is within the scope of work of a licence provided for in schedule 2, part 11–14, 18, 19, 33, 48 or 52; or**
 - (c) the work is within the scope of work of another licence provided for in schedule 2, and is carried out by a licensee as part of a contract for building work of which the total value is more than \$3300; or*
 - (d) the work is within the scope of work of a licence provided for in schedule 2, part 35 and the value of the work is more than \$1100.*
- [Emphasis added]

- [1351] Therefore, pursuant to Item 2(b) of Schedule 1AA of the *Queensland Building and Construction Commission Regulation 2003* work performed within the following scope of licence classes must be

performed by appropriately licensed persons irrespective of the value of the work performed:

- Building design-low rise licence (Part 11);
- Building design-medium rise licence (Part 12);
- Building design-open licence (Part 13);
- Plumbing and drainage licence (Part 18);
- Drainage licence (Part 19);
- Gasfitting licence (Part 33);
- Site Classifier licence (Part 48); and
- Termite Management-chemical licence (Part 52)

[1352] Mr. Oliveri's submission would see the licence class of 'Waterproofing' (Part 56) added to Item 2(b) of Schedule 1AA of the *Queensland Building and Construction Commission Regulation 2003*.

[1353] The value of waterproofing on the construction of an average new home is likely to be well below the sum of \$3,300.00, yet the costs of a failed waterproofing membrane can amount to many times that. This means that people who may not be qualified, or at least do not hold the appropriate QBCC licence class may be performing waterproofing work, particularly on housing projects where their costs would be expected to be less than \$3,300.00.

[1354] The introduction of mandatory inspections by a building certifier at the completion of waterproofing work would produce minimal benefits. It would increase the cost of building and is likely to shift the balance of risk from the waterproofer who actually did the work, to the building certifier who really would have no idea if the work had been done properly. This is patently inequitable from the building certifier's perspective.

[1355] Requiring all waterproofing to be done, irrespective of the value of the work, by a licensed waterproofer, would give some control to the QBCC over those performing this work and if Recommendation 107(d) is implemented, the QBCC will be able to direct a waterproofer in the case of defective workmanship, hence providing greater accountability and oversight.

[1356] To eliminate or close any potential 'loopholes' regard will need to be had to persons holding a wall and floor tiling licence (Part 55) who are permitted to apply waterproofing for wall and floor tiling. If a person as part of performing wall and floor tiling work, also performs the waterproofing, that person should also be required, irrespective of the value of the work to either hold a licence for wall and floor tiling (Part 55) or a waterproofing licence (Part 56). Care will however need to be exercised that the above amendments do not include wall and floor tiling in Item 2(b) of Schedule 1AA of the

Queensland Building and Construction Commission Regulation 2003
if the work being undertaken does not include waterproofing.

6.1.5 Recommendation

[1357]

108.	The application of waterproofing membranes to wet areas and decks should only be performed by suitably licensed QBCC licensees, regardless of the value of the work performed. The licence class of waterproofing (Part 56) and to the extent that waterproofing work is performed as part of wall and floor tiling work (Part 55), these licence classes should be added to Item 2(b) of Schedule 1AA of the <i>Queensland Building and Construction Commission Regulation 2003</i>.
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6.1.6 Limitation of liability in relation to building work

[1358] A common complaint amongst building certifiers, particularly private certifiers is the issue of their ongoing civil liability. This was raised during almost every roadshow throughout the State. It is an issue which is causing building certifiers significant concern, particularly as we become a more litigious society. Many private certifiers suggested that this was one of the most significant problems facing the profession and is likely to be one of the major contributing factors leading to low interest in the profession and the premature departure of those already in it.

[1359] The concerns involving building certifiers' liability are at least three-fold:

- First was the common concern that building certifiers are having to pay what they regard to be excessively high professional indemnity insurance costs;
- Secondly, building certifiers are unable to obtain affordable 'run-off' professional indemnity insurance; and
- Thirdly, and perhaps most significantly, many building certifier's lamented their indeterminate liability for claims made against them arising out of performing their certifying function.

Consideration

Professional indemnity Insurance - costs

[1360] Private certifiers and pool safety inspectors are required to hold professional indemnity insurance to the minimum value of \$1,000,000.00²⁹⁵. It is worth noting that this minimum has not changed since the inception of private certification on 30 April 1998²⁹⁶, which poses the question as to whether the amount remains adequate some 16 years later.

[1361] A number of private certifiers implored the Review to consider their premium costs when examining issues for reform²⁹⁷. It was claimed that premiums in Queensland and in other jurisdictions have risen as a result of previous reviews into private certification.

[1362] During the course of the Review, discussions were held with a representative of one insurance company involved in insuring allied building professionals but not building certifiers. The Review was informed that the insurance provider had made a conscious

²⁹⁵ See s.163 of the *Building Act 1975* and ss. 52 and 16B of the *Building Regulation 2006*

²⁹⁶ See s.129(2)(a) of the *Standard Building Regulation 1993* (repealed)

²⁹⁷ See for example the submissions of Claude McKelvey

decision not to offer insurance products to building certifiers because their risk was perceived to be too high, in part because of the perceived conflict of interest between certifiers and builders. Its decision was also explained on the basis that when things go wrong with building certifiers, the consequences can be disastrous.

[1363] The Review also spoke with a representative from two insurance brokerage firms. The first broker advised that ‘run off’ insurance cover was still able to be purchased, but at a premium. He advised that the main difficulties in providing professional indemnity insurance for private certifiers are:

- The pool of private certifiers is very small²⁹⁸;
- If there are a number of competitors in the market, that makes that pool even smaller for each insurer, which compounds the risk;
- No matter how careful a building certifier is, they can never really be fully appraised of how the building has been built; and
- The building certifier’s indeterminate liability.

[1364] The first broker also suggested that the QBCC could provide a hybrid type of Queensland Home Warranty Scheme to insure building certifiers if it wanted to ensure continuity of coverage for building certifiers.

[1365] The second broker had significant experience in arranging professional indemnity insurance for certifiers. He informed the Review that the costs of a \$1M policy for certifiers was in the order of “a few thousand dollars”, dependent upon claims history. The second broker also advised that he considered the current \$1M minimum ‘grossly inadequate’ and that the minimum should be raised to \$5M, but in so doing, he estimated that premiums would double.

[1366] The second broker advised that just prior to the announcement of the Review, one of the two main suppliers of insurance products for building certifiers had withdrawn from the market and the other main insurer had announced that it intended to “*double their premiums*”. The second broker advised that barring a calamity, he did not consider that the sector would be placed in a position where it was uninsurable. He said that the insurance market is relatively fluid with insurers entering and exiting the market on a not-infrequent basis according to their ever-changing appetite for risk. Looking to the future, the second broker divined that insurance costs are likely to continue to rise and that certifiers who have adverse claims history are unlikely to be able to get coverage in the future.

²⁹⁸ There are 371 building certifiers who are ‘endorsed’ out of 407 in total – see Table 5 above

- [1367] The second broker also informed the Review that in the past, governments have made changes to the building legislation which have impacted upon insurers' risk. He strongly recommended that any changes that may be made as a result of this Review be put out to consultation with the insurance sector before being implemented.
- [1368] Whilst many of the Recommendations seek to hold building certifiers and other industry stakeholders more accountable, they ought not of themselves result in an increase in professional indemnity insurance premiums. Theoretically at least, if all building certifiers are held more accountable, this should result in a greater degree of compliance which should result in less disputes and less insurance claims. Additionally, the advent of the fourth level inspector will see an increase in the number of persons requiring insurance, which should see a greater spreading of the risk associated with performing the certifying function.
- [1369] The Review accepts though that the current minimum level of indemnity insurance is inadequate and that any raising of that minimum will increase insurance premiums.
- [1370] For as long as insurance is able to be obtained in the competitive private sector, the Review does not recommend that a hybrid Queensland Home Warranty Scheme be established to insure building certifiers.
- [1371] The Review urges the Government to consult widely with the industry and insurers before implementing the Recommendations and if there are concerns that one or more of them will result in unnecessary premium increases, that should be a relevant consideration for the Government in its deliberations.

Professional indemnity Insurance – 'run off' cover

- [1372] At the commencement of private certification in 1998, s.129 of the *Standard Building Regulation 1993* required a private certifier to have professional indemnity insurance that met certain requirements. Those requirements are substantially unchanged to those that are now contained in s.52(1) of the *Building Regulation 2006* with one notable exception. When private certification commenced, s.129(2)(g) of the *Standard Building Regulation 1993* required a private certifier's professional indemnity insurance policy to have:

(g) a run-off provision continuing the indemnity for 10 years after the private certifier ceases to be accredited as a private certifier.

- [1373] This ‘run-off’ provision was removed from the *Standard Building Regulation 1993* in September 2002²⁹⁹ meaning that, subject to the terms of their policies, building certifiers are only covered for claims made whilst the certifier remains insured.
- [1374] A number of submitters suggested that subsection (2)(g) was removed from the building legislation at the behest of insurance companies who, it is alleged threatened to withdraw their coverage if the provision remained.
- [1375] AIBS argued that certifiers cannot afford cover for 10 years after retirement or leaving the profession, so they are simply not purchasing it, leaving them and their families exposed to litigation. AIBS also urged the Review to consider recommending a limitation of action provision limiting certifier’s liability to 10 years. AIBS suggested that this change would “*dramatically improve the desirability of industry practitioners to enter the building certification profession*”. This issue will be addressed below.
- [1376] Whilst it may be of little comfort to some, there are no real answers in respect to the issue of the removal of subsection (2)(g) from the building legislation. According to the first insurance broker ‘run-off’ cover is still able to be purchased, albeit at a premium. It appears that private certifiers are left with 4 alternatives:
- Pay the ‘run-off’ premiums;
 - Self-insure;
 - Ensure that they obtain competent independent legal and financial advice in the structuring of their assets;
 - Leave the profession.

Limitation of Actions

- [1377] For building contracts and contracts for professional services such as those provided by a building certifier, an action may be brought for breach of contract within 6 years from the date on which the cause of action arose, that is 6 years from when the breach occurred³⁰⁰. The breach would occur for example, at the time the building certifier failed to ensure that the footings were prepared and constructed in accordance with the design. Naturally only a person who was a party to the contract may sue on the performance of that contract (this is known as the ‘privity of contract’ doctrine). Generally, because the builder ordinarily engages the building certifier, only the builder would have a cause of action against the building certifier in contract, unless the certifier was engaged by the owner.

²⁹⁹ See Reprint No. 2D as in force on 13 September 2002

³⁰⁰ See s.10(1)(a) of the *Limitation of Actions Act 1974*

[1378] The situation is quite different however for a cause of action founded on a breach of duty (negligence), in which case there are not the same restrictions that apply to actions against third parties. What this means is that a building certifier owes a duty of care to those whom it is reasonably foreseeable might suffer physical injury or damage to their property as a result of the certifier's negligence. The building owner or subsequent owner may fall into this category³⁰¹.

[1379] An action in tort, other than in respect of personal injury or death must be commenced within six years of the date on which the cause of action arose³⁰².

[1380] In Australia where proof of damage is a necessary element of the tort of negligence, the cause of action is said to arise when the damage is suffered. The learned authors of the text *Construction Law in Australia*³⁰³ suggest that:

"In Australia, the cause of action in tort in relation to a defective structure generally accrues, and the limitation period commences to run, when the latent defect is discovered or becomes manifest; that is, is discoverable by reasonable diligence."³⁰⁴...

*The loss is not suffered when the plaintiff discovers or could on reasonable inquiry have discovered that **damage** was sustained³⁰⁵. Thus in *Bryan v Moloney*, the plaintiff purchaser's cause of action against the builder arose when the latent defect in the house (inadequate footings) first became manifest, which occurred when consequent damage to the fabric of the residence was sustained."*

[1381] However in a unanimous decision, the High Court recently held on 8 October 2014 in *Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288* [2014] HCA 36 that unless a plaintiff is able to demonstrate that the works are so defective that the building is uninhabitable, builders will not be found to have a duty of care to protect subsequent owners against pure economic loss arising from latent defects. However where a subsequent owner is able to demonstrate reliance upon the builder and the subsequent purchaser was in a 'position of vulnerability', the principle in *Bryan v Moloney* is likely to continue to apply. These same principles are also likely to apply for building certifiers.

[1382] From this brief examination it can be seen that a cause of action based in tort may survive long after a cause of action based on contract has become statute-barred.

³⁰¹ *Bryan v Moloney* (1995) 182 CLR 609

³⁰² See s.10(1)(a) of the *Limitation of Actions Act 1974*

³⁰³ Ian Bailey, *et al* Lawbook Co. 2011, Sydney Third Edition, 157

³⁰⁴ *Sherson & Associates Pty Ltd v Bailey* (2001) Aust Torts Reports 81-591; *Hawkins v Clayton* (1988) 164 CLR 539; *Bryan v Moloney* (1995) 182 CLR 609; *Christopoulos v Angelos* (1996) 41 NSWLR 700

³⁰⁵ *Hawkins v Clayton* (1988) 164 CLR 539

[1383] Most Australian jurisdictions have imposed a 10-year limitation upon claims relating to building work³⁰⁶. The only states not to have done so are Western Australia and Queensland.

[1384] The Victorian provision which seeks to limit claims relating to building work provides:

134 Limitation on time when building action may be brought

*Despite any thing to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.*

[1385] The following terms are defined for the relevant Division in s.129 of the *Building Act 1993* (Vic):

- **“building action** means an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work;
- **building work** includes the design, inspection and issuing of a permit in respect of building work.”

[1386] Section 109ZK of the *Environmental Planning and Assessment Act 1979* (NSW) also relevantly provides:

109ZK Limitation on time when building action or subdivision action may be brought

(1) Despite any Act or law to the contrary, a building action may not be brought in relation to any building work:

- (a) more than 10 years after the date on which the relevant final occupation certificate is issued, or*
- (b) in a case where no final occupation certificate is issued, more than 10 years after:*
 - (i) the last date on which the building work was inspected by a certifying authority, or*
 - (ii) if no such inspection has been conducted, the date on which that part of the building in relation to which the building work was carried out is first occupied or used.*

[1387] The following terms are defined for the relevant Part in s.109ZI of the *Environmental Planning and Assessment Act 1979* (NSW):

³⁰⁶ See s.142 of the *Building Act 2004* (ACT); s.109ZK of the *Environmental Planning and Assessment Act 1979* (NSW); s.160 *Building Act 1993* (NT); s.73 of the *Development Act 1993* (SA); s.255 of the *Building Act 2000* (Tas); s.134 of the *Building Act 1993* (Vic)

- **“building action** means an action (including a counter-claim) for loss or damage arising out of or concerning defective building work;
- **building work** includes the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of building work.”

[1388] It can be seen therefore that s.143 of the *Building Act 1993* (Vic) and s.109ZK of the *Environmental Planning and Assessment Act 1979* (NSW) do not only place a 10-year limitation period on claims against the builder of the work, they also include a limitation period for work performed by a building surveyor/certifier.

[1389] In Victoria, it was previously held that s.143 of the *Building Act 1993* (Vic) did not act to extend the limitation period for breaches of contract. In other words it was considered that for breaches of a building contract the six-year period provided in s.5(1) of the *Limitation of Actions Act 1958* (Vic) would apply. However, in the recent Victorian Court of Appeal decision of *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165 it was held that s.143 of the *Building Act 1993* (Vic) operated to extend the building owner’s contractual claim against its building surveyor to ten-years from the issue of the occupancy permit (or certificate of final inspection).

[1390] If Queensland introduced a similar provision, without an express exclusion, it is likely that the same result in *Brirek* would apply. However the Review considers that this would be a reasonable outcome as it would provide consistent limitation periods for building claims based in contract and in negligence.

[1391] The main disadvantage in implementing a similar 10-year limitation period in Queensland is that cases involving the identification of latent defects beyond this period will result in building owners being statute-barred from commencing proceedings against builders, certifiers and likely engineers, architects and other building professionals.

[1392] That notwithstanding, the 10-year limitation periods provided in every other state and territory of this country (with the exception of Western Australia) are sensible provisions. They afford building owners, builders and in the present case building certifiers with a degree of certainty which is non-existent in this State. If enacted, builders and building certifiers would be able to get on with business without the continual threat of ‘historical’ claims being made against them and importantly, they would be able to retire without the indeterminate threat of legal action ‘hanging over their heads’.

6.1.6 Recommendation

[1393]

109.	<p>The <i>Building Act 1975</i> should be amended to bar any building action being taken against a builder or building certifier in relation to any building work more than 10 years after:</p> <p>(a) The certificate of classification (or certificate of occupancy assuming Recommendation 85 is accepted) is issued in respect to class 2-9 buildings;</p> <p>(b) The final inspection certificate (or certificate of occupancy assuming Recommendation 88 is accepted) is issued in respect to detached class 1a and 10 buildings;</p> <p>(c) If neither paragraph (a) or (b) applies because a certificate was not issued, the date on which that part of the building in relation to which the building work was carried out was first occupied or used.</p>
110.	<p>In recognition that the minimum limit of indemnity insurance required by a private certifier has not increased since 1998, s.52(1)(a) of the <i>Building Regulation 2006</i> should be amended to provide that the minimum limit should be raised to the sum of \$2,000,000.00.</p> <p>Similarly, s.16B(1)(a) of the <i>Building Regulation 2006</i> should be amended to provide that the minimum limit of indemnity insurance required by a pool safety inspector should be raised to the sum of \$2,000,000.00.</p>

6.1.7 Guidelines

[1394] Section 258(1) of the *Building Act 1975* provides:

(1) The chief executive may make guidelines for matters within the scope of this Act to help compliance with this Act.

[1395] There appears to be some confusion about what ‘authority’ the guidelines have.

[1396] It has also been suggested by private certifier Styles Magwood that the guidelines should be contained within one easy to use website.

Consideration

Authority

[1397] Pursuant to s.133A of the *Building Act 1975*, a building certifier in performing a function under the *Building Act 1975*, including for example, a building certifying function “*must have regard to the guidelines made under section 258 that are relevant to performing the function*”. A similar provision applies to pool safety inspectors in s.246BF of the *Building Act 1975*.

[1398] In *Gerhardt v Queensland Building and Construction Commission* [2014] QCAT 139, Senior Member Stillgoe OAM said at [25]-[26] (footnotes omitted):

“[25] The Guidelines are delegated legislation. That is, the power to issue Guidelines comes from the Building Act. The general rule is that delegated legislation made under an Act cannot be taken into account when interpreting the Act itself. To put it another way, the tail can’t wag the dog. If the Building Act requires a certifier to make sure that a building complies with an earlier development approval, that obligation cannot be modified by delegated legislation.

*[26] Section 258 of the Building Act allows the Chief Executive to make guidelines to **help in compliance** (my emphasis) with the Act. Section 113A states that a building certifier must have regard to the guidelines that are relevant to the performance of the certifier’s particular function. It is clear that the Guidelines are intended to assist certifiers, not form a regulatory framework that is inconsistent with the Act. The Guidelines cannot modify obligations that exist in the superior legislation.”*

[1399] Respectfully, whilst I don’t agree with the learned Senior Member that guidelines are “*delegated legislation*” I do agree with the principle that the “*tail can’t wag the dog*”.

[1400] The Encyclopaedic Australian Legal Dictionary defines ‘delegated legislation’ as:

“Legislation made by a person or body other than parliament, under authority granted to that person or body by an Act of Parliament. Individually, delegated legislation has a variety of names, including ‘regulations’, ‘by-laws’, ‘rules’, ‘ordinances’, and ‘orders-in-council’. Collectively, they are variously termed ‘subordinate legislation’, ‘statutory rules’, ‘legislative instruments’, ‘statutory instruments’, and ‘subsidiary legislation’. The general rules of statutory interpretation apply to delegated legislation: Whittaker v Comcare (1998) 86 FCR 532 ; 28 AAR 55. Delegated legislation may also be of value in interpreting the parent legislation: Ward v CMr. of Police (1997) 151 ALR 604 ; 80 IR 1 . Delegated legislation has the force of the relevant empowering statute, but it must be within the legislative power of the delegator, and the delegation itself must not be so wide as to be uncertain or amount to an abdication of legislative power: Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan ((1931) 46 CLR 73 at 101, 120 ; [1931] HCA 34.”

[1401] The term ‘guideline’ is neither defined in the *Building Act 1975* or the *Building Regulation 2006*. It should be given its ordinary meaning. ‘Guideline’ is relevantly defined in the Macquarie Concise Dictionary³⁰⁷ as:

“A statement which defines policy or the area in which a policy is operative.”

[1402] It also relevantly defines the term ‘guide’ as:

“To lead, direct, or advise in any course or action.”

[1403] As expressly stated in s.258 of the *Building Act 1975*, albeit somewhat clumsily, the guidelines are designed to “*help compliance with*” the *Building Act 1975*. To the extent that there is any inconsistency between the guidelines and the *Building Act 1975* and/or the *Building Regulation 2006*, the guidelines must be read subject to that inconsistency because they do not have legislative force.

[1404] The term “*must have regard to*” in ss.133A and 246BF of the *Building Act 1975* has no special meaning. Used in its ordinary sense, it means that a building certifier *must consider the guidelines*, but ordinarily one would think the building certifier or pool safety inspector is not bound to follow them. The guidelines are not provisions of an Act of Parliament or contained within a Regulation. If the Legislature intended strict compliance with the contents of a guideline, presumably, it would have inserted the contents within the *Building Act 1975* or the *Building Regulation 2006*.

³⁰⁷ Macquarie Dictionary Publishers Pty Ltd, Sydney Sixth edition 2013

[1405] However, to complicate matters, Item 7 of the Code of Conduct for building certifiers states:

“7 A building certifier must abide by moral and ethical standards expected by the community

A building certifier, must when performing building certifying functions:

- Apply all relevant laws, regulations, safety standards and guidelines reasonably without favour
...”

[1406] It is questionable whether a breach of a guideline could reasonably be regarded as a failure to abide by “*moral and ethical standards expected by the community*” but that is another matter.

[1407] A failure to abide by the Code of Conduct may constitute unsatisfactory conduct or professional misconduct as those terms are defined in Schedule 2 of the *Building Act 1975*.

[1408] There is therefore a tension between the ordinary meaning of the words in ss.258 and 133A (and s.246BF) of the *Building Act 1975* and the provisions of the Code of Conduct. Whilst the Code must be read subject to the provisions of the *Building Act 1975*, the position should be clarified by either amending the provisions of the Act to make it clear that the guidelines must be complied with (which tends to be somewhat counterintuitive to the concept of a ‘guideline’) or by amending the Code of Conduct to remove the requirement that building certifiers “*must apply all guidelines*”.

[1409] If a decision is made to amend the Act to clarify that a guideline must be complied with, then consideration should be given to changing the name of ‘guideline’ to ‘direction’ or some other term that connotes the mandatory nature of compliance.

Access

[1410] The current guidelines that have been published by the chief executive are available to view at:

<http://www.hpw.qld.gov.au/aboutus/ReportsPublications/Guidelines/Pages/default.aspx>

[1411] There are several difficulties surrounding the public’s access to the guidelines produced by the chief executive.

[1412] Firstly, the way that the guidelines are published on the Department’s website does not provide for an historical search for earlier versions of a guideline which may or may not have been

superseded. This is particularly important if a building certifier is the subject of disciplinary proceedings for a breach of a guideline where the breach is an historical one. A building certifier and the QBCC should be able to easily identify relevant versions of a guideline in much the same way as the Office of Parliamentary Counsel provides access to repealed and previous versions of legislation.

[1413] Secondly, the website of the Department of Housing and Public Works is somewhat difficult to navigate. If Recommendation 116 is adopted by the Government, then all of the Department's guidelines as they relate to the *Building Act 1975* and the *Building Regulation 2006* should be relocated to the QBCC website and accessible from the one main page.

[1414] It is also important that once Government has implemented the numerous planned reforms to all of the various Acts and Regulations which regulate the building industry, that all the guidelines be reviewed for their relevancy and accuracy. Some guidelines are outdated by a number of years, in that they refer to repealed legislation³⁰⁸.

6.1.7 Recommendations

[1415]

111.	There is a tension between the ordinary meaning of the words in ss.258 and 133A (and s.246BF) of the <i>Building Act 1975</i> and the provisions of the Code of Conduct. Whilst the Code must be read subject to the provisions of the <i>Building Act 1975</i>, the position should be clarified by either amending the provisions of the Act to make it clear that the guidelines must be complied with (which tends to be somewhat counterintuitive to the concept of a 'guideline') or by amending the Code of Conduct to remove the requirement that building certifiers "<i>must apply all guidelines</i>".
112.	If a decision is made to amend the <i>Building Act 1975</i> to clarify that a guideline must be complied with, then consideration should be given to changing the name 'guideline' to 'direction' or some other term that connotes the mandatory nature of the compliance required.
113.	If Recommendation 116 is adopted by the Government, then all of the guidelines made by the chief executive pursuant to s.258(1) of the <i>Building Act 1975</i> should be

³⁰⁸ See for example the Code of Conduct for building certifiers, Guidelines for the assessment of competent persons and Guidelines for building work enforcement

	relocated to the Queensland Building and Construction Commission website and accessible from the one main page.
114.	Guidelines published on the internet should clearly identify their currency and previous versions (if any) should be capable of being searched.
115.	When Government has implemented the numerous planned reforms to all of the various Acts and Regulations which regulate the building industry, all the guidelines should be reviewed for their relevancy and accuracy to ensure that current provisions and legislation are contained therein.

6.1.8 Relocation of Building Codes Queensland

- [1416] In written submissions it was suggested that there needs to be better integration of policy and the regulatory functions of government agencies.
- [1417] Another submitter called for the abolition of BCQ altogether, given that it no longer provides technical assistance to building certifiers.
- [1418] In 2012/13 BCQ staffing levels have been reduced by 23% (18 staff members) and some services provided by them, most notably the technical services provided to building certifiers has ceased³⁰⁹. This issue was raised by many building certifiers during the Review and has generally led to a feeling that building certifiers have been abandoned despite them fulfilling an important statutory function.
- [1419] The Review notes that Recommendation 6 of the *Transport, Housing and Local Government Committee Report No.14 Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012* recommended that BCQ remain in the Department of Housing and Public Works and that recommendation was supported by Government as part of the Ten Point action plan.

Consideration

QBCC

- [1420] The QBCC since December 2013 has undergone a significant transformation as a result of the implementation of the Government's Ten Point plan. The QBSA has been disbanded, a new governing board has been established with a new chairman and members. The governing board replaces the advisory board of the QBSA. The QBCC board now decides the strategies and the operational, administrative and financial policies to be followed by the Commission. It also advises the Minister for Housing and Public Works on issues affecting the building industry, among other things³¹⁰.
- [1421] A Commissioner has replaced the position of the General Manager of the QBSA and there is now a greater focus on customer driven outcomes.

³⁰⁹ *Building Codes Queensland Internal Review*, June 2013, 10

³¹⁰ See s.11 of the *Queensland Building and Construction Commission Act 1991*

[1422] In the short time since its establishment, there have been significant legislative amendments driven by the board of the QBCC including:

- Further proposed amendments to the *Queensland Building and Construction Commission Act 1991*;
- The proposed repeal of the *Domestic Building Contracts Act 2000*;
- Amendments to the *Building and Construction Industry Payments Act 2004*;
- A review of the *Building Act 1975* and the building certification system;

[1423] The objects of the Act which governs the QBCC are³¹¹:

- (a) to regulate the building industry—
 - (i) to ensure the maintenance of proper standards in the industry; and
 - (ii) to achieve a reasonable balance between the interests of building contractors and consumers; and
- (b) to provide remedies for defective building work; and
- (c) to provide support, education and advice for those who undertake building work and consumers.

[1424] The functions performed by the QBCC include the provision of:

- A robust licensing regime;
- Compliance and enforcement;
- Licensee and consumer education;
- Management of the Queensland Home Warranty Scheme; and
- Early dispute resolution services.

[1425] QBCC currently has 310 permanent full-time and 41 permanent part-time staff. It also has 42 temporary staff.

BCQ

[1426] BCQ underwent an internal review in the first half of 2013. In the report which followed, BCQ describes its purpose as³¹²:

“BCQ administers Queensland’s building and plumbing policy and legislation to ensure high-quality and cost-effective building and plumbing codes, deliver an efficient system for approving building and plumbing work and provide an accessible and affordable avenue for appeal for members of the public not satisfied with decisions made by local government and private certifiers.

...

³¹¹ See s.3 of the *Queensland Building and Construction Commission Act 1991*

³¹² *Building Codes Queensland Internal Review*, June 2013, 5

BCQ represents the Queensland Government on the Australian Building Codes Board (ABCB) and the Building and Plumbing Codes Committees, and assists the Minister in providing input to the national Building Ministers' Forum (BMF). It is a key contributor to development of the National Construction Code."

[1427] BCQ currently has approximately 50 permanent full-time staff³¹³. However, as a result of the *Transport, Housing and Local Government Committee Report No.14 Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012*, the registration of plumbers, drainers and pool safety inspectors is to be transferred to the QBCC and this is very likely to have a significant impact on BCQ's staffing levels.

[1428] According to Table 10 approximately 50% of BCQ's funding is derived from revenue raised by the registration of plumbers, drainers and pool safety inspectors³¹⁴. The balance is raised from consolidated revenue.

Table 10 – BCQ Funding

Budget source	\$ '000
Appropriation	4,654
Protected revenue (PSC/PIC)	4,480
Total	9,135

[1429] Since 1 Jul 2013, BCQ has been placed within the Department of Housing and Public Works' Building Industry and Policy Division.

[1430] BCQ's core business has been described as "*policy and legislative development, legislative interpretation, compliance, licensing and the Committees. BCQ also provides some technical advice and guidance to industry and the community on plumbing and building matters.*"³¹⁵

[1431] Put simplistically, BCQ is the policy driver of the building and construction industry in Queensland, whilst the QBCC is its regulator.

[1432] Whilst QBCC and BCQ both fall within the responsibility of the Minister for Housing and Public Works, they currently act independently and are located separately from one another with QBCC operating out of its premises in Montague Road, West End,

³¹³ *id.*, 10

³¹⁴ *id.*, 11

³¹⁵ *ibid.*

whilst BCQ operate out of offices in Mineral House in George St, Brisbane.

Merits

- [1433] The Review is advised by QBCC that BCQ will be part-funded by QBCC as a result of the relocation of the registration responsibilities for plumbers, drainers and pool safety inspectors which is due to take effect in early November 2014.
- [1434] If QBCC is soon to be funding part of BCQ and a significant aspect of BCQ's responsibilities are to be devolved to QBCC, why shouldn't BCQ become part of the QBCC, as its policy arm?
- [1435] The Review is conscious that the Government supported BCQ remaining within the Department of Housing and Public Works in the Ten Point action plan. However since the Ten Point action plan was handed down in May 2013, there have been some very significant changes to the structure of both QBCC and BCQ. The Review considers that it is now appropriate that BCQ and its staff be relocated within the QBCC organisational structure as the Building Industry Policy Unit (BIPU). There are sound reasons for doing so.
- [1436] Clearer lines of communication between those who devise policy and those who are charged with regulating the industry will engender more collaborative integrated legislative and policy outcomes for the betterment of the industry and the broader community. A similar view was expressed and similar recommendation made in a previous LGAQ report into the building control model in Queensland³¹⁶.
- [1437] If the staff of BCQ are relocated to QBCC, the funding of the proposed BIPU would be industry-based rather than from consolidated revenue. This would generate considerable savings to the Government, however a full cost-benefit analysis should be undertaken before any final decision is made on this issue.
- [1438] In recognition of the statutory function in which they fulfill, Government should also consider making technical advice available to building certifiers once more. This should be able to be delivered for more general advice by the QBCC's 24/7 contact centre. If more specialist advice is required (which is likely), this should be provided through either BIPU or the building certification unit. However, care will need to be taken with the giving of advice by

³¹⁶ See: *Preferred model for building regulation in Queensland* Local Government Association of Queensland (6 October 2006), Recommendation 1

members of the building certification unit so as not to create any conflicts if a matter were to become the subject of an investigation.

6.1.8 Recommendations

[1439]

116.	Subject to a cost-benefit analysis, establish the Building Industry Policy Unit (BIPU) within the organisational structure of the QBCC using staff from Building Codes Queensland, which should then be disbanded.
117.	Subject to the acceptance of Recommendation 116, the QBCC should re-introduce the provision of technical advice for building certifiers.

6.1.9 Building Forms

- [1440] Pursuant to s.254, the chief executive may approve forms for use under the *Building Act 1975*.
- [1441] The forms approved for use under the *Building Act 1975* (building forms) are available for download from the Department's website³¹⁷.
- [1442] On a review of the building forms, it is immediately apparent that there is little logic in the sequence of their numbering. For instance, a certificate/interim certificate of classification is a Form 11, yet a compliance certificate for the design of a building or specification is a Form 15 and an inspection certificate is a Form 16, whilst a notice to an owner that a private certifier has been engaged is a Form 18.
- [1443] The Review appreciates that there is a long developed culture within the building industry of referring to documents by their form number and that any change will cause some initial confusion, but whilst the Government is embarking on a root and branch review of the *Building Act 1975*, it is an appropriate time to remedy these inconsistencies.

6.1.9 Recommendation

[1444]

- | | |
|-------------|--|
| 118. | Introduce sequential numbering of building forms approved under s.254 of the <i>Building Act 1975</i> so that wherever possible they follow the natural sequence of a building project. |
|-------------|--|

³¹⁷ See: <http://www.hpw.qld.gov.au/aboutus/ReportsPublications/FormsTemplates/Pages/BuildingForms.aspx>

6.1.10 Attract new entrants to the building certification profession

[1445] The importance of attracting new entrants, particularly younger entrants to the building certification profession has been extensively canvassed throughout this report, but particularly in response to Question 1.4.1 above. It is not necessary to further traverse these challenges facing the certification profession, except to say that those challenges will have a direct bearing on the building and construction industry itself if steps are not taken to increase the rate of entrants, particularly younger entrants to the profession.

Consideration

[1446] There must be a 'whole-of-government' approach to this issue which will span various departments.

Education

[1447] During the course of the Review a number of building certifiers and cadets explained their frustrations both from an employers' and cadet's point of view. They explained that the content of educational courses necessary to become a qualified building certifier were not in keeping with what the industry required. For instance, a number of cadets informed the Review about an assignment they were required to complete as part of their studies which was on the ABC children's television show, 'The Teletubbies'. A number of stakeholders considered that some course content was of questionable relevance to the profession and were seen by the profession as 'padding out' a course, just so that it took the required time to complete.

[1448] This is unacceptable. Educational courses whether for a trade, profession or anything in between must be directly relevant and teach the skills necessary for 'the real world'. That is what employers demand and it is what educational courses should be delivering.

[1449] Recommendation provides:

"In line with the other licensees it regulates, the QBCC ought to be responsible for setting the qualifications and experience requirements for certifiers.

The QBCC should regularly consult with industry and the current accreditation standards bodies, the Australian Institute of Building Surveyors and the Royal Institution of Chartered Surveyors to determine the

appropriate qualifications and experience requirements for building certifiers.”

- [1450] The QBCC in consultation with industry groups, should examine the course contents of the various training programs for cadets very carefully to identify any areas that are not in keeping with industry expectations and act accordingly.

Incentives

- [1451] In recognising the importance of a skilled workforce and to ensure that younger people are properly trained, the Queensland Department of Education, Training and Employment offers employers incentives of up to \$6,000.00 for each additional apprentice or trainee that they employ³¹⁸. These sorts of incentive schemes have existed for many years. Recognising there is a need to increase the number of young people to become building certifiers, the Government should provide similar incentives for the employers of cadet certifiers.

Electronic Resources

- [1452] The Review recently attended ConstructionQ³¹⁹ which is a forum sponsored by the Department to formulate a business plan to guide the strategic direction for the building and construction industry over the next twenty years. The forum was attended by various building and construction industry stakeholders from throughout the State.
- [1453] During group discussions a number of stakeholders raised the issue of the complexity of the current building control legislative regime. At paragraph [48] above, I listed a number of the various statutory instruments which a building certifier must consider when performing the building certifying function. They include:
- (a) *The Building Act 1975;*
 - (b) *The Building Regulation 2006;*
 - (c) *The Sustainable Planning Act 2009;*
 - (d) *The Sustainable Planning Regulation 2009;*
 - (e) *The Fire and Emergency Services Act 1990;*
 - (f) *The Building Fire Safety Regulation 2008;*
 - (g) *The Queensland Building and Construction Commission Act 1991;*
 - (h) *The Queensland Building and Construction Commission Regulation 2003;*

³¹⁸ See: <http://apprenticeshipsinfo.qld.gov.au/business/employ-apprentice/costs.html>

³¹⁹ See: <http://www.hpw.qld.gov.au/construction/ConstructionQ/Pages/FrequentlyAskedQuestions.aspx>

- (i) The National Construction Code;
- (j) Relevant Australian Standards;
- (k) The Queensland Development Code;
- (l) Local government by-laws;
- (m) The various guidelines produced by the chief executive of the Department;
- (n) The various “newsflashes” produced by the Department; and
- (o) The myriad of diverse local town planning schemes in the local government areas in which they work.

(The above list is not intended to be exclusive.)

[1454] A number of stakeholders asked, why can’t we just have one Act or one Code that covers everything?

[1455] Sadly, the request is unlikely to ever be satisfied. There are too many competing factors which come into play for one Act or Code to be able to cover the full gamut of planning and building law which spans various departments of at least two tiers of government. Whilst not wishing to sound defeatist, the request is simply unrealistic.

[1456] However, Government should examine partnering with a private service provider to deliver a consolidated electronic hyperlinked resource of all relevant laws, regulations and codes which regulate the construction of all classes of buildings in Queensland. This is a long way short of having a uniform building and development code, but it would be a vast improvement on the current state of affairs.

Limiting risk and liability

[1457] This issue has been considered at part 6.1.6 above and it is the subject of Recommendations 109 and 110.

6.1.10 Recommendation

[1458]

119.	<p>A ‘whole-of-government’ approach should be adopted to attract more young people into the building certification profession by:</p> <ul style="list-style-type: none"> (a) A thorough review of higher education certification courses to determine whether they are meeting industry and student expectations; (b) Providing financial incentives to employer certifiers who employ cadets; (c) The introduction of a consolidated electronic
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	<p>resource of all relevant laws, regulations and codes which regulate the construction of all classes of buildings in Queensland.</p> <p>(d) Limiting the risk and legal liability that building certifiers are exposed to in accordance with Recommendations 109 and 110.</p>
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6.1.11 Pool safety inspectors

[1459] Building certifier John Dunn argued that ‘restricted’ pool safety inspectors ought to be permitted to undertake for reward, the same type of minor repairs as a home-owner is entitled to perform on their own pool.

Consideration

[1460] Section 246BE of the *Building Act 1975* enables a pool safety inspector, “in particular circumstances” to carry out “minor repairs” prescribed under a regulation.

[1461] Pursuant to s.246B(3) of the *Building Act 1975*, the Pool Safety Council may impose conditions on the licence of a pool safety inspector.

[1462] Section 16D of the *Building Regulation 2006* refers to Schedule 2B of the *Building Regulation 2006* which lists what constitute “minor repairs”. Examples of the types of minor repairs that can be carried out, subject to certain restrictions, include erecting, repairing, replacing or adjusting a maximum of five metres and includes no more than six posts of a pool safety barrier.

[1463] However, a pool safety inspector may only carry out minor repairs if the owner agrees and they hold an “unconditional licence”³²⁰ and provided the value of the work does not exceed \$3,300.00³²¹.

[1464] On the other hand, pool owners can carry out their own pool safety repairs and maintenance within certain restrictions set out in ss.1-4 of Schedule 2C of the *Building Regulation 2006*, provided the work does not exceed \$3,300.00 in value. Examples of the type of repairs and maintenance that can be carried out include:

- Repairing or adjusting a maximum of 2.4 metres and two posts of a pool safety barrier;
- Affixing shielding (of any length) to make the barrier comply with the pool safety standard (for example, to make the fence non-climbable or to address insufficient strength and rigidity);
- Installing capping along the top of a barrier to raise the height of the barrier;
- Laying paving under a barrier to reduce the gap under the barrier;
- Repairing, replacing or adjusting a gate;

³²⁰ *Pool Safety Inspector Guidelines*, November 2012, 24 – see:

<http://www.hpw.qld.gov.au/SiteCollectionDocuments/PoolSafetyInspectorGuideline.pdf>

³²¹ See Item 2 of Schedule 1AA of the *Queensland Building and Construction Commission Regulation 2003*

- Protecting a window or door, such as installing a fixed security screen on a window;
- Removing or shielding climbable objects in the non-climbable zone.

[1465] As can be seen from the preceding paragraph, the sort of repairs and maintenance that a pool owner is permitted to perform on their own pool are relatively rudimentary. Provided the parties agree, there is little utility in preventing a pool safety inspector who does not have an unconditional licence from doing the same work, for reward that the *Building Regulation 2006* allows a pool owner to perform.

6.1.11 Recommendation

[1466]

120.	Provided the parties agree, a pool safety inspector who does not have an unconditional licence should be permitted to undertake, for reward, the same repairs and maintenance work that the <i>Building Regulation 2006</i> allows a pool owner to perform.
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6.1.12 Fire safety in residential care buildings

[1467] In their written submissions, QFES raised a number of concerns about the adequacy of QDC MP 2.3 – *Fire Safety in Existing Residential Care Buildings (Pre 1 June 2007)* and whether it is being properly applied by the industry.

[1468] MP 2.3 commenced on 1 September 2011. Its stated purpose is:

To ensure that each residential care building [RCB] to which it applies provides an adequate level of fire safety for residents and provides for the safe evacuation of those residents in the event of a fire threatening the building.

[1469] Pursuant to Schedule 7 of the *Sustainable Planning Regulation 2009*, QFES is an advice agency for:

- Special fire services; and
- Alternative solutions for the relevant performance criteria set out in MP 2.3 and the performance requirements of the *Building Code of Australia*; and
- Fire and evacuation plans assessed against Schedule 2 of MP 2.3.

[1470] QFES submitted that its involvement in the implementation of MP 2.3 as a referral (advice) agency for alternative solutions has highlighted “*significant fire safety concerns*” including:

***“1. Apparent deficiencies within QDC MP2.3 are being used by industry, resulting in little to no improvement of fire safety within existing RCBs in Queensland.*”**

- *QFES has received many Alternative Solution building approval applications based on “negative base” comparisons (i.e. demonstrating that a code-compliant design would fail, and then proving that the Alternative Solution design is equivalent).*
- *QFES are aware of several cases where (sic) the Authority-Having Jurisdiction (i.e. the Building Certifier) has approved building applications based on “negative base” comparisons, against the advice of QFES.*
- *QFES has approached BCQ regarding these issues and is awaiting a formal response.*
- *QFES review of supporting documentation used as the basis for QDC MP2.3 has raised concerns about contradictory evidence which QFES believes potentially invalidates aspects of QDC MP2.3.*

2. Queensland lags behind New South Wales and Victoria regarding fire safety in existing RCBs.

- QDC MP2.3 includes automatic fire sprinklers as one option for some in existing (pre-2007) RCBs.
- Two months after the implementation of QDC MP2.3, a fire in an unsprinklered NSW nursing home resulted in the deaths of 14 residents. NSW legislation now requires all new and existing RCBs to have an automatic sprinkler system by March 2016.
- Victoria has required automatic fire sprinklers in all new RCBs since 1996.

3. Australia not following international trend regarding fire safety in new or existing RCBs.

- The United States of America now requires all new and existing nursing homes to be fitted with an automatic sprinkler system. Any care building receiving funding under the Federal Medicare or Medicaid scheme require automatic sprinklers to continue to receive funding.
- The state of Ontario in Canada now requires all new nursing homes to be fitted with automatic sprinklers and all existing nursing homes must be retro-fitted by January 2018. Furthermore, the complete evacuation of occupants in a fire event must be demonstrated through both a desktop analysis and fire drill witnessed by the Fire Brigade for building approval.”

[1471] QFES argued that QDC MP2.3 “requires urgent review to determine the extent of amendment needed to ensure occupant safety”.

Consideration

[1472] The adequacy and implementation of MP2.3 was not an issue that was expressly included in the Terms of Reference of this Review. However, all stakeholders were given the opportunity to provide submissions on any issue which would improve the operation of the *Building Act 1975* or the system of building certification in Queensland. I therefore do consider that the adequacy of MP2.3 falls within the remit of this Review.

[1473] The Review accepts that the issue of life safety for those who live and work in a residential care building is a very significant and emotive issue for many Queenslanders. There are varied interests which impact upon any decision that might be made to alter the existing provisions of MP2.3. No one would want to see a repeat of the tragedy that occurred at the Quakers Hill nursing home in New South Wales in 2011 that resulted in the deaths of 14 residents.

[1474] The Review notes that as a result of the Quakers Hill fire, the New South Wales Department of Planning and Environment announced in January 2013, that all nursing homes in that state are required to have sprinklers installed by or before March 2016. As at 8 September 2014, the Department of Planning and Environment announced in a media release that more than 500 older aged care facilities had retrofitted fire sprinklers with a balance of approximately 200 expected to comply with the March 2016 deadline³²².

[1475] However, the issue of the adequacy of MP2.3 was not expressly ventilated in the Discussion Paper. Without having had the benefit of receiving submissions from those with competing interests, without having had the opportunity of engaging with the owners and operators of residential care buildings, without any economic forecasting having been done in relation to the likely costs of implementing for example a mandatory retrofitting program for fire sprinklers, it would be inappropriate to make any recommendations at this point in time.

[1476] Those concerns notwithstanding, the Review considers it is appropriate that Government as part of its post-report consultation, should seek further submissions from interested stakeholders whether QDC MP2.3 should be amended and if so, what the nature of those amendments should be.

6.1.12 Recommendation

[1477]

121.	Government, as part of its post-report consultation (refer Recommendation 122), should call for further submissions from interested stakeholders regarding the adequacy and implementation of QDC MP2.3 and whether any amendments should be made to it and if so, what those amendments should be.
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³²² See:

<http://www.planning.nsw.gov.au/Portals/0/BuildingInNSW/SafetyCampaigns/FireSafety/mediareleaseSeptemberdeadline.pdf>

6.1.13 Post-report industry consultation

[1478] The building legislation and associated statutory instruments that regulate the building control system in Queensland form a complex web of interconnected rules and regulations. Amend one provision in an act and this may have unexpected consequences on a provision of a code, standard or regulation. For this reason, it is important that Government should consult broadly with all industry stakeholders, including the insurance sector and aged care facility operators regarding the Recommendations contained herein.

[1479] Once the post-report industry consultation is completed, a further report should be provided to Government which will identify any amendments or additional Recommendations.

6.1.13 Recommendation

[1480]

122.	Before deciding whether or not to implement any or all of the Recommendations of this report, Government should conduct further consultation with industry stakeholders.
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ANNEXURE A:

Column1	A - Retain	B - Remove	C - Hybrid	Other	N/A	Total
1.1.1 Which is your preferred option for improving the private certification system?	170	23	48	31	16	288
	59.03%	7.99%	16.67%	10.76%	5.56%	100.00%
	Yes	No	Other	N/a		
1.2.1 Should it be made mandatory for an owner to engage a building certifier?	102	117	38	31		288
	35.42%	40.63%	13.19%	10.76%		100.00%
	Yes	No	Other	N/A		
1.2.2 If no, is there a need to make owners more aware of their ability to engage a certifier?	81	41	13	43		178
	45.51%	23.03%	7.30%	24.16%		100.00%
	Yes	No	Other	N/A		
1.2.3 Should owners have an increased ability to request information or inspections from a certifier	163	54	29	42		288
	56.60%	18.75%	10.07%	14.58%		100.00%
	Yes	No	Other	N/A		
1.2.4 Do you support mandatory requirements for a certifier to provide inspection documentation to the owner?	167	52	30	39		288
	57.99%	18.06%	10.42%	13.54%		100.00%

* responses to NO, however also includes responses from some that answered Yes in 1.2.1 and answered here also

	A - Commission	B - Contract Clause	Other	N/A		
1.3.1 Which is your preferred option for strengthening the disengagement process?	79	83	35	31	228	* question was missing off online survey 52 surveys submitted without an answer for this question
	34.65%	36.40%	15.35%	13.60%	100.00%	
	Yes	No	Other	N/A		
1.4.1 Do you support the introduction of a fourth 'inspector' level of building certifier?	141	83	34	30	288	
	48.96%	28.82%	11.81%	10.42%	100.00%	
	Yes	No	Other	N/A		
1.4.2 Do you think the Commission, not accreditation bodies, should be responsible for assessing qualification and experience requirements for certifiers?	124	96	24	44	288	
	43.06%	33.33%	8.33%	15.28%	100.00%	
	A - Legislation	B - Retain/Review	Other	N/A		
1.5.1 Which is your preferred option in relation to the Code of Conduct?	74	154	21	39	288	
	25.69%	53.47%	7.29%	13.54%	100.00%	
	Stand Alone	Regulation	Other	N/A		
1.5.2 If you support retaining the Code of Conduct, what format would you prefer?	100	87	14	87	288	
	34.72%	30.21%	4.86%	30.21%	100.00%	
	Yes	No	Other	N/A		

1.6.1 Do you support the creation of a new guideline clarifying when a certifier may provide advice during the design stage of a building?	193	33	26	36	288
	67.01%	11.46%	9.03%	12.50%	100.00%
	Yes	No	Other	N/A	
1.6.2 Do you think that building certifiers providing advice outside of the building approval process should be subject to disciplinary action for providing incorrect or misleading advice?	141	61	39	47	288
	48.96%	21.18%	13.54%	16.32%	100.00%
	A - Remove	B - Retain and review	Other	N/A	
1.7.1 Which is your preferred option for improvements to the disciplinary action framework?	80	143	27	38	288
	27.78%	49.65%	9.38%	13.19%	100.00%
	Yes	No	Other	N/A	
1.8.1 Do you think a demerit point system for building certifiers should be introduced?	170	66	20	32	288
	59.03%	22.92%	6.94%	11.11%	100.00%
	Yes	No	Other	N/A	
1.9.1 Do you think that mandatory CPD for certifiers should be linked to their licence requirements instead of their accreditation?	139	77	25	47	288
	48.26%	26.74%	8.68%	16.32%	100.00%
	Yes	No	Other	N/A	

1.9.2 Do you think the Commission should have the ability to direct CPD bodies to address specific subject areas?	183	33	22	50			288
	63.54%	11.46%	7.64%	17.36%			100.00%
	Yes	No	Other	N/A			
1.9.3 Do you think CPD activities for building certifiers should also be made available to other industry practitioners?	204	16	22	46			288
	70.83%	5.56%	7.64%	15.97%			100.00%
	A - Licence Employers	B - Employer Records	C -Individual PC - Services	D - Guidelines	Other	N/A	
1.10.1 Which is your preferred option for improving accountability and record-keeping requirements for private certifier employers?	62	51	25	68	37	45	288
	21.53%	17.71%	8.68%	23.61%	12.85%	15.63%	100.00%
	Yes	No	Other	N/A			
2.1.1. Do you think local governments should be required to provide advice to certifiers about planning scheme compliance, if requested, that can be relied upon by the certifier?	221	10	22	35			288
	76.74%	3.47%	7.64%	12.15%			100.00%
	A - remove	B - Allow reinstatement	Other	N/A			
2.2.1 Which is your preferred option for improving the current lapsing framework?	22	176	51	39			288
	7.64%	61.11%	17.71%	13.54%			100.00%
	Yes	No	Other	N/A			

2.3.1 Do you think the current referral triggers should be reviewed with the aim of reducing the number of referrals needed for building development applications ?	185	40	18	45	288
	64.24%	13.89%	6.25%	15.63%	100.00%
	Yes	No	other	N/A	
2.4.1 Do you think the scope of building work does not require an approval should be increased?	80	145	25	38	288
	27.78%	50.35%	8.68%	13.19%	100.00%
	Yes	No	Other	N/A	
3.1.1 do you think the current Form 16 should be reviewed?	144	83	17	44	288
	50.00%	28.82%	5.90%	15.28%	100.00%
	Yes	No	Other	N/A	
3.1.3 Do you think the use of competent persons should be restricted to certain aspects of building work?	147	65	31	45	288
	51.04%	22.57%	10.76%	15.63%	100.00%
	Yes	No	Other	N/A	
3.2.1 Do you think additional mandatory inspections should be introduced in relation to houses, duplexes, villas and townhouses?	121	104	25	38	288
	42.01%	36.11%	8.68%	13.19%	100.00%
	Yes	No	Other	N/A	

3.2.3 Do you think mandatory inspections should be introduced for other classes of buildings?	108	101	21	58		288
	37.50%	35.07%	7.29%	20.14%		100.00%
	A - Clarify	B - Guideline	Other	N/A		
3.3.1 Which is your preferred option for providing clarification on these of technology in inspections?	97	106	39	46		288
	33.68%	36.81%	13.54%	15.97%		100.00%
	A - Include on Approval	B - Occupancy Permit	C - Additional Information	Other	N/A	
3.4.1. Which is your preferred option for improving the use of certificates of classification?	76	41	57	68	46	288
	26.39%	14.24%	19.79%	23.61%	15.97%	100.00%
	A - legislative Amendments	B - Guidelines	Other	N/A		
3.5.1 Which is your preferred option for clarifying when certificates of classification should be given for pre-1998 buildings?	99	101	30	58		288
	34.38%	35.07%	10.42%	20.14%		100.00%
	Yes	No	Other	N/A		
3.5.2 Do you support allowing a 'final' certificate to be issued for a single detached house or shed independently of a building development approval?	104	99	28	57		288
	36.11%	34.38%	9.72%	19.79%		100.00%
	Yes	No	Other	N/A		

4.1.1 Do you support local governments taking over the enforcement processes for defective building work after a certifier has issued a show cause notice?	171	56	24	37			288
	59.38%	19.44%	8.33%	12.85%			100.00%
	A - Simplify	B - Extend	C - Repeal	Combination	Other	N/A	
4.2.1 Which is your preferred option for improving the pool safety management plan framework?	91	22	32	43	22	78	288
	31.60%	7.64%	11.11%	14.93%	7.64%	27.08%	100.00%
	A - Accreditation	B - Licensing	Other	N/A			
4.3.1 Which is your preferred option for providing greater oversight of energy assessors?	127	76	31	54			288
	44.10%	26.39%	10.76%	18.75%			100.00%
	A - Align	B - Guideline	Other	N/A			
4.4.1 Which is your preferred option for improving the framework for self-assessable government building work?	149	64	24	51			288
	51.74%	22.22%	8.33%	17.71%			100.00%
	Yes	No	Other	N/A			
5.1.1 In your opinion, is the current building certification system working well in rural and regional Queensland?	75	77	44	92			288
	26.04%	26.74%	15.28%	31.94%			100.00%
	Yes	No	Other	N/A			

5.2.1 Do you support the relocation of the provisions in the Building Act 1975 that relate to licensing and disciplinary action of building certifiers to the Queensland Building and Construction Commission Act 1991?

128

67

10

83

288

44.44%

23.26%

3.47%

28.82%

100.00%

ANNEXURE B:

Council	Segment	Does council offer a private building certification function or service?
Aurukun Shire Council	Indigenous	No
Balonne Shire Council	Rural/Remote	Yes
Banana Shire Council	Resources	Yes
Barcaldine Regional Council	Resources	No
Barcoo Shire Council	Rural/Remote	No
Blackall-Tambo Regional Council	Rural/Remote	No
Boulia Shire Council	Rural/Remote	No
Brisbane City Council	SEQ	No
Bulloo Shire Council	Rural/Remote	No
Bundaberg Regional Council	Coastal	No
Burdekin Shire Council	Coastal	Yes
Burke Shire Council	Resources	No
Cairns Regional Council	Coastal	No
Carpentaria Shire Council	Resources	No
Cassowary Coast Regional Council	Coastal	Yes
Central Highlands Regional Council	Resources	Yes
Charters Towers Regional Council	Rural/Remote	No
Cherbourg Aboriginal Shire Council	Indigenous	No
Cloncurry Shire Council	Resources	No
Cook Shire Council	Coastal	No
Council of the City of Gold Coast	SEQ	No
Croydon Shire Council	Rural/Remote	No
Diamantina Shire Council	Rural/Remote	No
Doomadgee Aboriginal Shire Council	Indigenous	No
Douglas Shire Council	Coastal	No
Etheridge Shire Council	Rural/Remote	No
Flinders Shire Council	Rural/Remote	No
Fraser Coast Regional Council	Coastal	Yes
Gladstone Regional Council	Coastal	No
Goondiwindi Regional Council	Rural/Remote	No
Gympie Regional Council	Coastal	Yes
Hinchinbrook Shire Council	Coastal	Yes
Hope Vale Aboriginal Shire Council	Indigenous	No
Ipswich City Council	SEQ	No
Isaac Regional Council	Resources	Yes
Kowanyama Aboriginal Shire Council	Indigenous	No
Livingstone Shire Council	Coastal	No
Lockhart River Aboriginal Shire Council	Indigenous	No
Lockyer Valley Regional Council	SEQ	No
Logan City Council	SEQ	No
Longreach Regional Council	Rural/Remote	No
Mackay Regional Council	Coastal	No
Mapoon Aboriginal Shire Council	Indigenous	No
Maranoa Regional Council	Resources	Yes
Mareeba Shire Council	Rural/Remote	No
McKinlay Shire Council	Rural/Remote	No

Moreton Bay Regional Council	SEQ	No
Mornington Shire Council	Indigenous	No
Mount Isa City Council	Resources	No
Murweh Shire Council	Rural/Remote	No
Napranum Aboriginal Shire Council	Indigenous	No
Noosa Shire Council	SEQ	No
North Burnett Regional Council	Rural/Remote	Yes
Northern Peninsula Area Regional Council	Indigenous	No
Palm Island Aboriginal Shire Council	Indigenous	No
Paroo Shire Council	Rural/Remote	No
Pormpuraaw Aboriginal Shire Council	Indigenous	No
Quilpie Shire Council	Rural/Remote	Yes
Redland City Council	SEQ	Yes
Richmond Shire Council	Rural/Remote	No
Rockhampton Regional Council	Coastal	Yes
Scenic Rim Regional Council	SEQ	Yes
Somerset Regional Council	SEQ	No
South Burnett Regional Council	Rural/Remote	No
Southern Downs Regional Council	Rural/Remote	Yes
Sunshine Coast Regional Council	SEQ	No
Tablelands Regional Council	Rural/Remote	No
Toowoomba Regional Council	SEQ	Yes
Torres Shire Council	Indigenous	No
Torres Strait Island Regional Council	Indigenous	No
Townsville City Council	Coastal	No
Western Downs Regional Council	Resources	Yes
Whitsunday Regional Council	Coastal	No
Winton Shire Council	Rural/Remote	No
Woorabinda Aboriginal Shire Council	Indigenous	No
Wujal Wujal Aboriginal Shire Council	Indigenous	No
Yarrabah Aboriginal Shire Council	Indigenous	No
Total Providing Service		18

ANNEXURE C:

Jurisdiction	Regulatory Body	Role of Regulatory Body over Assessors & Inspectors	Building Approval/Permit Authority	Column1	Application/Engagement	Building Development Assessor	Mandatory Inspections	Who Inspects & Certifies?	Fees
			Local Government	Private Certification					
British Columbia, Canada	Building and Safety Standards Branch, Office of Housing and Construction Standards, Ministry of Energy, Mines and Natural Gas	No current licensing or disciplinary procedures in place. May be looking at introduction of minimum qualifications and experience in the future (under modernization proposals - see useful links).	Yes	None apparent	Application to include owner's consent.	Officially, referred to as Building Officials. May also be referred to as Plan checkers.	Appears to be dependent upon type of building and individual local government requirements.	Officially referred to as Building Officials but may also be referred to as Building inspectors.	Levied by local government as per schedule of fees and charges published.
Useful links:		A Modern Building Regulatory System	Consultations	Qualification of Local Government Building Officials: Response to Consultation	Building Officials Association of BC - Similar to accreditation standards body	Family Dwelling Inspection Stages - Vancouver City	CivicInfoBC - Database of all BC local governments.	BC Building Code	Bylaw No. 3007 - City of Nelson
Alberta, Canada	Public Safety Division, Alberta Municipal Affairs	Accredits municipalities and other agencies to issue permits and undertake inspections. Issues certificate of competency to individuals seeking to be safety codes officers and may designate them as such. Accredited municipalities and accredited agencies must not employ persons to act as safety codes officers unless the individual holds the certificate of competency and have been designated as a safety codes officer by Alberta Municipal Affairs.	Yes but only if accredited by Alberta Municipal Affairs (some are and some aren't). Note: The Local government will normally issue a development permit as a prerequisite to the building permit. If the municipal is accredited to issue a building permit, then the local government may issue both the development permit and the building permit and a combined development approval/building permit may be given.	In a form but not for all local government areas. Alberta Municipal Affairs contracts to accredited agencies (private entities) who issue building permits and carry out inspections on their behalf for all construction in areas where the individual municipality is not accredited and where responsibility defaults back to Alberta Municipal Affairs to perform the permit/inspection functions. Local government can therefore seemingly exclude private entities from practicing within their areas by seeking and maintaining accreditation.	Applicant appears to be the builder for the work. If the builder is a licensed contractor, then the licensed contractor is the applicant. If the builder is the owner (an owner-builder), then the owner-builder is the applicant. However, there appears to be no reason why someone else can't be the applicant but some application forms require a declaration that owner's consent has been given (see useful links).	Officially known as a Safety Codes Officer.	Local governments have Quality Management Plans (QMP) for their own areas. The inspection requirements for building work are to be found in the QMP (see useful links). Typically under slab (vapour barrier), frame, fire suppression systems, fire alarm systems and final but may include some others or just a final dependant upon building type and value. If a private accredited agency is contracted, it appears the agency specifies the requirements for inspections.	Safety Codes Officer.	Appears to be levied by local government under a Bylaw (if the local government is an accredited municipality for the issuing of building permits). When it defaults back to Alberta Municipal Affairs, then it appears that the accredited agency (private entity) who is contracted sets the fees.
Useful links:			Permit Application - City of Edmonton	Safety Codes Act - Outlines accreditation requirements.	Where can I get a permit	Lesser Slave River contacts for permits by accredited agencies.	Private permit and inspection entity	Alberta Building Code	Quality Management Plan sample 1. Quality Management Plan sample 2
			-	-	-	-	-	-	

Notes:		Note: A building permit is not required for building work valued equal to or less than \$5,000 (Safety Codes Act Permit Regulation 204/207, s6(3)(a)).				Note: Appears that building inspections (when requested) must be carried out within a maximum of 5 business days from the preferred date of the inspection under the QMP. However, there appears to be a high probability for most inspections to occur on the preferred date.			
England, United Kingdom	Appears to be the Department for Communities and Local Government	Appears to hold no official jurisdiction over Building Control Officers or Approved Inspectors concerning licensing/registration and disciplinary matters. Local government Building Control Officers not licensed/registered. Approved Inspectors are accredited by Construction Industry Council who hold jurisdiction over their conduct.	Yes	Yes - By "Approved Inspectors"	Applicant - Appears to be no restriction but the applicant for a regularisation certificate (for existing work carried out without approval) must be the owner.	For local government - "Building Control Officers" but may also be referred to as "Building Control Surveyors". For the private sector - "Approved Inspectors".	Notice must be given at specified stages prescribed under s16, Building Regulation 2010 (excavation for foundation, foundation, damp-proof course any concrete element or other material laid over site (also drainage) and before occupation).	For local government - "Building Control Officers" but may also be referred to as "Building Control Surveyors". For the private sector - "Approved Inspectors".	For local government - Levied by local government on cost recovery basis and regulated under a regulation (see useful links below).
Useful links:		Current Legislation	Building Regulations 2010	Where to get an Approval	Building Control Performance Standards	Competent Person Schemes	Building Work, Replacement and Repairs	Sample of Schedule of Fees charged by local government	
		-	-	Approval Types	Online Application Forms - Bristol City Council	Inspection of building work - sample	-	Charges for Building Control	
		Building Control Surveyor Entry Requirements	How to become an Approved Inspector	Register of Approved Inspectors	Code of Conduct for Approved Inspectors	-	-	-	

<div>Notes:</div> <div>Note: There appears to be no mandatory requirement for the accreditation/registration of Building Control Officers who work within local government. However, qualifications/membership acceptable to/with Royal Institute of Chartered Surveyors or Chartered Association of Building Engineers is typical for the profession. Approved Inspectors are required to be accredited/registered by the Construction Industry Council.</div> <div>Note: For the type of building work made exempt and not requiring approval, see Schedule 2 of the Building Regulation 2010.</div> <div>Note: There are 3 separate types of applications. They include a "Full plans application" (for major building work), a "Building Notice" application (for less complex work) and an application for a "Regularisation Certificate" (for unauthorised building work already constructed - see s18 of the Building Regulation 2010). Interestingly, work can commence before an approval is granted, but at the owner/builders risk. Comment: This Regularisation Certificate is a good way to deal with unauthorised building work and clearly differentiates the approval of that type of work from "lawfully constructed work" which has been subjected to the more rigorous plan assessment and inspection process.</div> <div>Note: An application for a "Regularisation Certificate" must be made to the local government authority only (Approved Inspectors don't deal with these types of applications).</div> <div>Note: Some building work can be self-certified by contractors who have been accredited as "Competent Persons" under an approved competent person’s scheme. These competent persons certify the work as being compliant to the Building Regulations and forward notification of that work to the local government. It appears that the type of work that may be self-certified is limited (see useful links above).</div> <div>Note: Enforcement action can only be taken by local government.</div>										
Wales, United Kingdom	Building Regulations, Housing and Regeneration Directorate	As per England.	Yes as per England	Yes as per England	As per England	As per England	As per England	As per England	As per England	
Useful links:			Building Control Bodies						Competent Person Schemes	Competent Persons Schemes Register
General comments:	The building approval process for Wales is generally the same as for England (shared system). They both share the Building Regulations 2010.									

Northern Ireland, UK	The Department of Finance and Personnel	Appears to hold no official jurisdiction over Building Control Officers for licensing/registration and disciplinary matters. Local government Building Control Officers not licensed/registered.	Yes	No	The "Applicant" - Appears to be no restriction as to who the applicant can be.	Authorised Officer, also known as Building Control Officer or Building Control Surveyor.	Notice must be given at specified stages prescribed under s12, of The Building Regulations (Northern Ireland) 2012. They include commencement, excavation of foundation, foundation, damp-proof course or any concrete or other material laid over site, above ground structural elements, sound insulation (also drains) and completion.	Authorised Officer, also known as Building Control Officer or Building Control Surveyor for the local government.	Fees regulated under the Building (Prescribed Fees) Regulations (Northern Ireland) 1997 as amended by the Building (Prescribed Fees) (Amendment) Regulations (Northern Ireland) 2013.
Useful Links:		Application Types and Forms	Building Legislation	The Building Regulations (Northern Ireland) 2012	Building (Prescribed Fees) (Amendment) Regulations (Northern Ireland) 2013	Building Notice Applications Advice	What Inspections	Fees	
		Building Control Northern Ireland	-	-	Advice and Guidance pdf Links	Regularisation Certificate	-		
Notes:		Note: There appears to be no mandatory requirement for the accreditation/registration of Building Control Officers who work within local government. However, similar to England and Wales, qualifications/membership acceptable to/with Royal Institute of Chartered Surveyors or Chartered Association of Building Engineers is typical for the profession.		Note: Unlike England and Wales, Northern Ireland does not have a system of private certification by Approved Inspectors. Further, Northern Ireland does not have the "Competent Person" system of self-certification. Therefore, building control is regulated by local government only.	Note: For exempt building work not requiring approval, see Schedule 2 of The Building regulations (Northern Ireland) 2012.	Note: The building approval process is generally consistent with England and Wales and Northern Ireland have the same 3 types of applications being "Full Plans Application", "Building Notice Application" and "Regularisation Certificate Application". However, they also have an application process for the seeking of an "Exemption from the Building regulations".			
Scotland, UK	Appears to be the Directorate for the Built Environment, Building Standards Division, The Scottish Government	Verifiers (currently limited to local government authorities) are appointed by the Scottish Ministers. Appears to be no official jurisdiction over persons employed by Verifiers (Building Control Officer/Surveyor) and there's no mandatory requirement for licensing/registration of those individual officers.	Yes - All local government authorities have been appointed by the Scottish Ministers as "Verifiers".	No not currently. However, the Scottish Ministers may appoint private individuals/companies as verifiers but at the present time have decided not to. They do have a system of "Approved Certifiers of Design" and "Approved Certifiers of Construction" (see Notes).	Any person may be the applicant for a building warrant. Application forms include a declaration which includes a declaration that the applicant is the owner or if not the owner, the owner is aware of the application.	Verifiers (local governments) but the person who actually assesses may be referred to as a "Building Control Officer", "Building Control Surveyor", "Building Standards Officer" or the like.	As decided by the verifier and noted on the "Construction Compliance Notification Plans" and as per the "Building Standards Verifiers Performance Framework" (see Useful Links).	Verifiers (local governments) but the person who actually assesses is normally referred to as a Building Control Officer.	Prescribed by regulation under The Building (Fees) (Scotland) Regulations 2004.
Useful links:		Article - Scotland Retains Local Authorities as Only Verifiers"	Article - "Local Authority Building Standards"	Certification Register User Guidance	Procedure Handbook	Certification	Building (Scotland) Act 2003	Scottish Legislation	The Building (Fees) (Scotland) Regulations 2004

		Building Standards Verifier Re-Appointment, Report	-	-	Application for Building Warrant - Sample Form	-	Site Inspections and Notifications	-	-
		-	-	-	-	-	Building Standards Verifiers Performance Framework	-	-
	Notes:	Building approvals are officially known as "Building Warrants". Depending upon the type of development/building, there may be a need to obtain planning approval in addition to a building warrant.	Note: "Approved Certifiers of Design" and "Approved Certifiers of Construction" are dealt with under part 1.9 of the Procedure Handbook (see Useful links). Approved certifiers of design are accredited under a scheme and are able to certify aspects of a building as being compliant with the building regulations and a copy of the certificate is lodged with the application for a building warrant. Approved certifiers of construction are also accredited under a scheme and are able to certify specified parts of a completed building (parts where they have been responsible for the construction or installation of the part concerned) comply with the building regulations. The "Verifier" can accept and without further checking rely on these certificates which is effectively self-certification. The types of schemes for which this self-certification apply appears to be limited (see s2.3 in the "Certification Register User Guidance" link above).			Note: The Procedure Handbook covers the whole application, approval, certification and enforcement functions of their system and is very comprehensive.			
Japan	Comments: Primarily due to the language barrier, it has not been possible to provide detailed information about the regulatory frameworks for building approval/certification within Japanese jurisdictions. However, the information accessible from the Useful links may be								

<p>of some assistance and it appears that an entity known as "The Building Center of Japan" (a privatised building control institution) provides plan assessment and building inspection services. The information still suggests that the local authority assesses the plans and issues the permit/approval so the official capacity of The Building Center of Japan is not known. They may simply provide assessment and inspection services to private clients or may indeed provide these services to local government with the local government being the client. In light of the earthquake issue for the country, it is likely that the regulatory framework will be strict requiring much rigor with regard to demonstrating compliance, code assessment and possibly having a rigorous inspection regime.</p>								
Useful links:	Dealing with Construction Permits in Japan	Building Center of Japan	List of Permit Administration Agencies	Japan Property Central	-	-	-	-
-	-	-		Articles from Lovegrove Solicitors found while researching Japan	Article - Professor Kim Lovegrove	Another Lovegrove article	15 Keys to Best Practice Building Regulation - Lovegrove	-

Berlin, Germany	Understood to be - Senate Department for Urban Development and Environment	Regulator is the state and the state administers the building permit system with there being no apparent licensing/accreditation framework for individuals working in this field. However, for structural matters the state appoints a qualified engineer with experience to check engineering certification/calcs/drawings submitted with applications.	No - It appears that building permits are obtained from entities referred to as "local building authorities" or the "building supervisory authority". These appear to be state government entities independent of local government (municipalities) as they must consult with and obtain consent from the local municipality before granting a building permit. Please see section 3.4 (page 85) of the Planning System and Planning Terms in Germany publication (see Useful links).	None apparent as the local building authorities and building supervisory authority appear to be government agencies.	Unclear, but information suggests that it is the designing architect that must sign the application form.	For structural performance - an engineer specialising in structural engineering. For other aspects - unclear but it may be that officers appointed by the building authorities all have engineering backgrounds.	Does not appear to be mandatory inspections and the building authority appears to be able to exercise discretion as to whether they will inspect or not. However, it appears that notification might need to be given to the building authority at certain stages to allow them opportunity to inspect.	The authorised officer appointed by the building authority who issued the building permit. "Engineer" if qualified engineer.	Fees based on value/size of project and prescribed under the "Baugebührenordnung - BauGebO" (this can be accessed from the Useful links under "Building Permit Process").
Useful links:	Planning and Building	Planning and Building 2	Doing business in Germany	The Planning System and Planning Terms in Germany	Model Building Code (Musterbauordnung – MBO) - Google translated page	Federal Building Code (Baugesetzbuch, BauGB) - Google translated page	Building Code for Berlin (BauO Bln)- Google Translated page	Building Authority (Bauamt Reinickendorf) - Google translation page.	
-	Building Permit Process - Google translated page	Current Legal Status in Germany	Department of Supervision - Google translated page	Planning and Building 3	-	-			
Notes:	Note: There are a total of 16 states in Germany with Berlin, Hamburg and Bremen being the 3 "City States". Because development and building control is dealt with by federal and state government departments which appears to be based on a model framework, most states may have fairly similar frameworks/processes for building applications/approvals.	Note: Building permits are known as "Baugenehmigung" in Germany.	Note: Building permits may be obtained from local building authorities or from the Building Supervisory Authority. These are referred to as "Bauamt" or sometimes "Bauaufsichtsämter" in Germany.	Note: There appears to be a federal Building Code which may apply to all states but each state appears to be able to vary that code by the adoption of their own building code. They also have a model building code upon which the others are apparently based.	Note: Local municipalities may also have their own local Building Codes which must also be applied and considered by the building authority assessing and approving building work.	Note: Some minor work, temporary structures and work carried out by the state may not require building approval. Work not excluded must have an application lodged for approval (see s61, s63, s75 and s76 Berlin Building Code).	Note: An application may be made for "simplified building permit". If the approval body remains silent about the application for one month, the approval is taken to be granted (deemed approval) (see Doing business in Germany link above).		

California, USA	Contractors State License Board, Department of Consumer Affairs. However, they do not regulate building control (only contractor licensing).	Appears to hold no jurisdiction over plans examiners or building inspectors with there being no formalised arrangement for mandatory accreditation. However, the International Code Council (ICC) have an examination and certification process for plan examiners, building inspectors and other building professionals. From the job listings sighted, local government employers require ICC certification/accreditation as a mandatory requirement for appointment to plan examiner and building inspector positions.	Yes, but some local governments contract with a "County Building Inspection Department" or other such public entity or to a private organisation to perform the building plan checking and inspection services (see "Building Permits - Lafayette CA", "Building & Safety Department" and Charles Abbott Associates Inc." links in Useful links below).	Not in the traditional sense but there are some private firms that work under contract with local government to perform the plan checking and building inspection services on behalf of the local government (see Useful links).	Applicant - Appears to be no restriction with the homeowner, their agent or a contractor being able to apply for a building permit.	Plans examiner.	Unable to locate inspection requirements in legislative instruments but local government building departments have information relevant to inspections being required (see Useful links below).	Building inspectors	Fees levied by local government as approved by their respective "Board of Supervisors" (elected representatives - what we call "Councillors"). Appears also to have an upfront bond payment and then balance of fees payable when building permit is to be released (see "Building Permit Requirements" link below.
Useful links:	About the ICC	California Building Standards Commission	-	International Accreditation Service	-	-	Building Inspector Job Advertisement	Building Permit Requirements - City of Cloverdale	
	-	Building & Safety Department - City of Camarillo	Charles Abbott Associates Inc.	Directory of state and local government	-	Request an inspection - El Paso Robles	-	-	
Notes:	ICC Certification	Current Codes	Building Permits - Lafayette CA	Work you can do without a permit - City of Citrus Heights		Obtaining a Building Permit - Laguna Beach	Building Inspector Levels	Application Forms - Laguna Beach	
	Note: The role of local governments in this state are substantial and include such things as issuing marriage and business licences and law enforcement (operating their own police departments). So they take on many functions of what both local and state government departments ordinarily do within Australia.	Note: To obtain ICC certification/accreditation as a plan examiner/checker or building inspector, the person must sit and pass an exam.		Note: Building departments may obtain accreditation from the International Accreditation Service. This is non-mandatory.		Note: See "Obtaining a Building Permit - Laguna Beach" link and note that approvals last for 180 days from the date the last inspection was made. If no activity within 180 days, approval will lapse and require lodgement of fresh application with application assessed on current codes. This may only be a local requirement though.	Note: There appears to be 3 levels of building inspectors with level I being the entry level, level ii being the intermediate and level iii being the advanced level.	Note: In some other US jurisdictions the upfront fees are for the assessment process and the fees made payable for release of the building permit are for "development impact costs". These include fees for inspections and other diverse things like law enforcement, schools and other local infrastructure costs.	

Kentucky, USA	Department of Housing, Building and Construction (DHBC).	Grants certificates to qualified building inspectors under the "Kentucky Certified Building Inspection Program". Accepts and investigates complaints about building officials (including building inspectors). Assumed to take disciplinary action if necessary.	Yes but jurisdiction is also shared with the state (see Notes below).	Non apparent.	Applicant - Appears to be no restriction with the homeowner or their agent being able to apply for a building permit.	Building Official, also known as Code Official.	Yes - Section 110 of the Kentucky Building Code requires inspections at certain stages including but not limited to footing/foundation, fire-resistant penetrations and final stages. Other inspections may also be made.	Building Official, Code Official and Building Inspector (generally building inspector). Where the Division of Building Codes Enforcement has shared jurisdiction, inspections may be undertaken by their certified building inspectors and for local governments having their own building departments, inspections undertaken by their building inspectors.	Fees prescribed under s121 of the Kentucky Building Code.
Useful links:		Kentucky Building Code 2013	Division of Building Codes Enforcement, DHBC	DHBC Inspectors throughout Kentucky	Application Form - City of Jeffersontown		NCPCCI and ICC Exams for Building Inspectors	Application for expanded jurisdiction	
Notes:		Note: Persons seeking to be certified building inspectors must have sat and passed exams through the National Certification Program for Construction Code Inspectors (NCPCCI) or the ICC (for ICC - see ICC link under California above. For NCPCCI - see Useful links above).	Note: Local governments share jurisdiction with the Division of Building Codes Enforcement, Building Codes, of the Department of Housing, Building & Construction (DHBC) with the DHBC seemingly deciding what the local government building department can and can't do. Local governments must employ at least 1 DHBC certified building inspector. For certain types of buildings (high hazard, day care, institutional and some educational buildings), the DHBC must check plans and undertake inspections. (see Useful links).	Note: s111.3 of the Kentucky Building Code makes unlawful the occupation of any building without the code official having firstly issued a "certificate of occupancy".				Note: The local government may apply to the DHBC for expanded jurisdiction over building control within their area (see Useful links above).	
General Comments:	In total there are 50 US states and many others looked at (but not discussed above) have similar frameworks with none researched appearing to have private building certification equivalent to that applying within Australian jurisdictions. Building control is typically								

	<p>left to local government or to state government departments (or to corporations who are contracted to the local government/regional local governments who rely upon their services). In some jurisdictions it is noted that the fees for "unauthorised building work" where the owner sought to have that work approved was double the cost of a normal application for permit. Local government authorities also typically licence building contractors and it is noted that in some jurisdictions that the application for permit was to be made by a licensed contractor only but supported by owner's consent (or some declaration that the owner authorised the application). Persons undertaking plan assessment and inspections were typically required to be certified/accredited and were subjected to an exam. All looked at required various stages of inspections and a certificate of occupancy to be issued before occupying the building. Enforcement was vested in the local government/building permit body.</p>				
Random links:	Permit Process - City of Buffalo, NY	Inspection requirements - Berkeley County Council	Certificate of occupancy - Berkeley County Council	Inspections - City of Buffalo	Alternative plan assessment processes - Clark County, Nevada Residential Impact Fees - Jefferson County, West Virginia

ANNEXURE D:

The table below outlines the referral agencies for Queensland Development Code (QDC) Parts.

QDC Part	Referral Agency
MP 1.1 & 1.2 (Design and siting standards for single detached housing)	LG is a concurrence agency for alternative solutions to the performance criteria or where the building work requires assessment against the qualitative statement in the part.
MP 1.3 (Design and siting standards for duplex housing)	LG is a concurrence agency for alternative solutions to the performance criteria in the part.
MP 1.4 (Building over or near relevant infrastructure) (to commence 1 November 2013)	The relevant service provider (for a sewer, water main or stormwater drain) is a concurrence agency for alternative solutions used to comply with the performance criteria of this part.
MP 2.1 (Fire safety in budget accommodation buildings)	QFES is an advice agency for special fire services.
MP 2.2 (Fire safety in residential care buildings) & 2.3 (Fire safety in existing residential care buildings)	QFES is an advice agency for: special fire services; alternative solutions for fire safety systems assessed against the performance criteria of the part and the performance criteria of the BCA; fire and evacuation plans assessed against schedule 2 of the part.
MP 3.3 (Temporary accommodation buildings and structures)	LG is a concurrence agency for any alternative solutions used to comply with performance criteria P1 (max 24 month duration before removal or demolition) under this part.
MP 3.5 (Construction of buildings in flood hazard areas)	LG is a concurrence agency if a defined flood level or maximum flow velocity of water is relied upon which is below the level declared under the Building Regulation, section 13.
MP 4.1 - (Sustainable Buildings)	LG is a concurrence agency on whether a proposed development complies with P12 (end of trip cycling facility requirements) of this part.
MP 5.1 (Workplaces)	The regulator under the <i>Work Healthy and Safety Act 2011</i> is an advice agency under Item 7, Table 1, Schedule 7, Sustainable Planning Regulation (SPR) (note this QDC is out of date).
MP 5.2 (Higher risk personal appearance services)	LG is a concurrence agency per Item 23, Table 1, Schedule 7, SPR (note this QDC is out of date).
MP 5.3 (Retail meat premises)	Safe Food Qld is a concurrence agency under Item 5, Table 1, Schedule 7, SPR (note this QDC is out of date).
MP 5.5 (Private health facilities)	The Chief Health Officer under the <i>Health Act 1937</i> is a concurrence agency under Item 6, Table 1, Schedule 7 of the SPR (note this QDC is out of date).
MP 5.6 (Pastoral workers accommodation)	The CEO administering the <i>Pastoral Workers' Accommodation Act 1980</i> is a concurrence agency under Item 9, Table 1, Schedule 7 of the SPR (note this QDC is out of date).
MP 5.8 (Workplaces involving spray painting)	The regulator under the <i>Work Health and Safety Act 2011</i> is a concurrence agency per Item 4, Table 1, Schedule 7, SPR (note this QDC is out of date).
MP 6.1 (Commissioning and maintenance of fire safety installations)	QFES is a concurrence agency for alternative solutions for the commissioning and maintenance of a water-based fire safety installation (refer Item 2A, Table 1, Schedule 7, SPR).

ANNEXURE E:

QBCC Disciplinary Statistics: Provided to the Review by the QBCC Certification Unit, 8 May 2014

2009-10

Received: 127

Closed: 105

Unsatisfactory Conduct: 27- Generally reprimands and certain directions under section 204 of the BA. No SPERS issued due to time taken to make a decision by BSA/QBCC

Professional Misconduct: 1

2010-11

Received: 156

Closed: 130

Unsatisfactory Conduct : 13- Generally reprimands and certain directions under section 204 of the BA. No SPERS issued due to time taken to make a decision by BSA/QBCC

Professional Misconduct: 1

2011-12

Received: 127

Closed: 126

Unsatisfactory Conduct: 27- Generally reprimands and certain directions under section 204 of the BA. No SPERS issued due to time taken to make a decision by BSA/QBCC

2012-13

Received: 164

Closed: 131

Unsatisfactory Conduct: 60- Generally reprimands and certain directions under section 204 of the BA. No SPERS issued due to time taken to make a decision by BSA/QBCC

Professional Misconduct: 2

2013-14

Received: 93

Closed to date: 212

Unsatisfactory : 103- Generally reprimands and certain directions under section 204 of the BA. Approximately 6 SPERS issued as decisions now becoming within allowable time frames due to increased staffing levels.

Professional: currently 3 cases before QCAT