



ACT
Government

Environment and Planning

Improving the ACT Building Regulatory System



NOVEMBER 2015



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C/- Environment and Planning Directorate
GPO Box 158, Canberra ACT 2601

Please include your address and contact details so you can be contacted for further information if necessary. All submissions may be made public unless otherwise marked as confidential.

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Message from the Minister

The way we design, construct, operate and maintain our buildings is important to our safety and wellbeing.

Every year, individuals and businesses make substantial investments in the construction of new buildings and alterations to existing buildings. A balanced building regulatory system promotes quality building and supports a strong construction industry while helping to protect people from substandard work and unfair practices. It helps prevent problems as well as providing avenues for resolving problems when they do occur.

In recent years, the quality and compliance of some building work has been questioned and there have been increasing concerns about the costs to the community—from building owners and industry practitioners to businesses that support building and construction—as a result of poor design, construction and management practices.

The construction environment is also subject to ongoing change—from new types of construction to changes in technology, training, techniques, standards, client expectations and market conditions.

Maintaining the currency of legislation is an ongoing process. As conditions change, it is important that the regulatory system changes with it, accommodating new and emerging practices and removing outdated regulation while maintaining public protections.

Effective building policy and regulation is important to the community and industry. It is fundamental to the quality and performance of our built environment. It is also an important part of realising the government's key priorities for the ACT, particularly for enhancing liveability, suburban renewal and economic growth. This is why the government committed to review the Building Act and the building regulatory system.

To date, the government has made a series of legislative and administrative reforms as a result of the review. This paper focuses on reforms targeting issues with residential building work – including design and documentation, dispute resolution and contracts, supervision and inspection of work, licensing of builders and building surveyors. It also includes general supervision of building work and management of project funds, sub-contractors' retention money and progress payment claims.

I encourage everyone with an interest in building in the ACT—building owners, occupants, industry professionals, industry associations, residents' groups, building managers and other stakeholders—to participate in this discussion about improving the building regulatory system for the benefit of the Territory.



Mick Gentleman, MLA
Minister for Planning



About this paper and consultation

This paper includes reform options targeting some of the most common issues relating to building quality and compliance raised during the review as well as concerns about payment arrangements between contractors. It focuses on options for:

- creating more effective protections for residential building owners and improving dispute resolution processes for residential building work
- responding to the challenges and issues relating to multi-unit residential buildings
- improving documentation for building projects
- enhancing on-site supervision and verification of work at critical stages
- strengthening the builders' and building surveyors' licensing systems
- targeting administrative and compliance actions to better prevent the occurrence and severity of defects
- reducing the impact of insolvencies, bankruptcies and financial management issues and improving security of payments.



Important terms and concepts

Building regulation

Building regulation includes the *Building Act 2004* and regulations and other instruments made under that Act, including the ACT Building Code. It also includes the parts of the *Construction Occupations (Licensing) Act 2004* (COLA) for licensing of building practitioners and building surveyors.

Building regulatory system

The building regulatory system includes building legislation as well as processes and policies for administering the law, building regulatory bodies (government and privatised) and their operations.

Building certification

Building legislation prescribes certain standards and requirements for building documentation and buildings. Building plans and buildings are checked against these requirements and certified if they comply. Building certification in the Building Act does not include compliance with a building contract or parts of the building not covered by the Building Act e.g. certain fixtures, driveways etc.

Building certifier

A building certifier is a person appointed by a landowner to assess an application for approval of building plans and inspect buildings at defined stages of building work in accordance with the Building Act. In the ACT, all building certifiers must hold a building surveyor licence.

Building classifications

ACT building legislation uses the National Construction Code classification system for buildings. A building may have more than one classification. Some classifications and general descriptions are:

- Class 1 – a single dwelling or townhouse (1a), or small boarding house (1b)
- Class 2 – a residential apartment building
- Class 3 – short and long term residential accommodation such as hotels and serviced apartments
- Class 5 – an office building
- Class 6 – a shop or retail establishment, for example a restaurant or hairdresser
- Class 7a – a carpark (note: surface level carparks are not covered by the Building Act)
- Class 9 – a public building including a health-care or aged care facility, stadium, or theatre
- Class 10 – a non-habitable structure, for example a shed, fence, mast or swimming pool

Building code

The ACT Building Code is Volumes 1 and 2 of the National Construction Code published by the Australian Building Codes Board (collectively known as the Building Code of Australia) as modified by any ACT-specific variations or additions and the ACT Appendix to the code.

Building approval (BA)

An approval issued by a building certifier under the *Building Act 2004*. A BA applies only to buildings and building work as defined in the Building Act. Building approvals are separate to planning and development approvals issued under the *Planning and Development Act 2007*.

Construction Occupations Registrar (the Registrar)

The person appointed under the *Construction Occupations (Licensing) Act 2004* as the ACT Construction Occupations Registrar. The Registrar has responsibilities under a range of Acts in addition to COLA, including issuing certificates of occupancy and regulating activities carried out under the Building Act.



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Background

In response to a recommendation of the Building Quality in the ACT report (the Report), the ACT Government committed to undertake a policy review of the ACT *Building Act 2004* (the Act) and the associated regulatory and administrative system.

Although the report was developed in response to community concerns about compliance with building standards in apartment buildings, the review is to ensure the regulatory system remains effective over time and keeps pace with changes in industry and community expectations for the built environment across all types of buildings.

The main objectives of building regulation are:

- to protect the health, safety and wellbeing of the public by setting minimum standards for the design, construction, maintenance and use of buildings and other structures
- to protect those involved in the construction process from incompetent or unfair practices.

Building regulation must also be responsive to emerging technologies and ideas that can provide significant improvements to the built environment or industry practices and conditions. As well as protecting people, an effective and efficient building regulatory system will also support a strong construction industry.

What has the review found?

The Environment and Planning Directorate has reviewed the operation of the the Act and the associated regulatory and administrative systems in the ACT. The review has found there have been extensive changes in construction practices, market conditions, technology, design, the built form, policy and administrative settings and community expectation since the legislation was first developed. Reforms are needed for the regulatory system to achieve better and consistent outcomes for the public and to remain current and relevant for industry, landowners and building occupants.

Findings related to the options and issues in this paper are:

- Rectification and rework costs across all classifications of building are estimated to be at least \$150 million per year in the ACT¹; this does not include costs to owners to pursue rectification through litigation, for increased maintenance or from the reduced life of the building.
- Complaints about builders and building work or defects in residential buildings have doubled since 2009 to an average of over 350 complaints per year, representing over 10% of building approvals in residential classifications. Complaints about apartment buildings between 2010 and the beginning of 2015 covered over 1500 dwellings.
- Defects are not unique to any one building classification. Although water ingress is often discussed in relation to residential buildings, other issues that have led to major sanctions or rectification orders include structural issues, inadequate fire protection, non-functioning emergency systems, inadequate emergency egress routes and insufficient ventilation.
- No single factor or change will address all building defects. Issues at each stage of the construction process contribute to whether a building may have serious defects requiring rectification and rework.
- The regulatory and administrative systems could better differentiate requirements for specific types of construction that may be at higher risk of causing defects, disputes or need more skill and experience to build.
- The effect of insolvencies and bankruptcies in the building and construction sector is increasing, with creditors owed tens of millions of dollars each year. Although only a small number of businesses become insolvent or bankrupt, this affects a much larger group of creditors, the majority of whom are not able to recover any of the debt.

¹ EPD estimate based on industry estimates, independent studies and EPD data



- There are constraints to timely resolution of disputes and few options for quick and low-cost dispute resolution. The system could benefit from improved accountability across all relevant parties who make decisions affecting the eventual form and compliance of a building, not only licensees, to better support a proportionate liability system.
- The privatisation of building certification functions led to a significantly changed perception among many stakeholders of the government building regulator. As a result of this and the reduced technical capacity across a range of disciplines following privatisation, the regulatory system had become largely reactive to problems and emerging issues rather than preventative. Industry practices had also become predominantly reactive.
- Technology could be better used for administrative and compliance activities and there are opportunities for improving education about the design and building process and regulatory requirements for consumers, builders and other stakeholders.

Reforms to date

As a result of this review, the ACT Government has already taken steps to improve building quality in the Territory. A series of legislative reforms were introduced in three Acts to amend construction legislation. In 2013–14 the Legislative Assembly passed the Construction and Energy Efficiency Legislation Amendment Acts 2013, 2014 (No 1) and 2014 (No 2). Reforms included:

- giving the Construction Occupations Registrar (Registrar) new powers to: refuse to grant or renew a licence if it is necessary or desirable to protect the public; to request a skills assessment from a licensee or applicant to find out if they have the skills and knowledge to carry out work competently; and to improve the Registrar's ability to investigate and act on complaints and breaches of construction legislation
- major revisions to, and increased penalties for, four major offences in the *Building Act 2004* and *Construction Occupations (Licensing) Act 2004* for not complying with the building code, requirements for carrying out building work and failing to comply with a rectification order
- introducing legislation for a system of continuing professional development for licensed construction practitioners through targeted training directed by the Registrar
- creating a public register of information about construction licensees to allow potential clients to more easily locate detailed information on builders and other licensees – including what a builder is licensed to build, on past regulatory actions they have been subject to, and any conditions currently restricting how the builder's licence is used.

From October 2014, the Registrar has provided a consumer guide for people having building work done for them, *Building in the ACT: A consumer guide to the building process*². New guides and short online videos on common issues throughout the building process will be developed for landowners, practitioners, financial institutions and others involved in building projects.

Changes to administrative processes include reinstating an on-site inspection program for class 1 buildings (houses and townhouses etc.) and class 2 apartment buildings during construction and increased verification of skills and experience for builders licence applicants.

Related reforms

Work is underway to reconfigure the existing development and building approval lodgements system (e-Development) to improve functionality and reduce the time required to upload information. Changes will help engage owners in the building process, such as providing the option to sign up for notifications when the project has reached certain stages and access to project documents including stage inspection reports.

2 http://www.planning.act.gov.au/_data/assets/pdf_file/0013/40081/Building_in_the_ACT.pdf



In December 2014, the Chief Minister announced the creation of Access Canberra, bringing a range of government regulatory functions into a single agency. Administering building regulation is now the responsibility of Access Canberra. A central objective of Access Canberra is to expand the current focus on engagement and education activities to encourage greater regulatory compliance. This includes use of new technologies to contact practitioners directly to raise their awareness of regulatory requirements.

The ACT Government has also adopted risk-based regulation principles that centre on identifying and targeting risks to achieving the objectives of regulation.

Reform options in this paper

The reform options in this paper relate to essential aspects of the building process and to issues particularly affecting residential buildings and management of project and retention funds. They cover different stages in the design and construction process where interventions are likely to be effective to reduce building defects and to avoid lengthy and protracted disputes. New reforms will work alongside existing compliance mechanisms and be supported by information and education.

Potential reforms include:

- pre-application guidance and review at design stage for projects including residential apartments
- greater supervision and quality assurance by licensed builders and increased government inspection throughout construction stages
- strengthening the licensing system for builders and building surveyors
- introducing an alternative dispute resolution process for residential building work disputes
- creating more favourable operating conditions for sub-contractors covering payment terms and consumer protection through separate accounts.

Reforms cover legislation and administration. Major policy and legislation changes will be subject to regulatory impact analysis.





1. Design and documentation

Plans and specifications underpin the entire approvals and construction process. Building plans are also used throughout the building’s lifecycle. Incomplete designs, insufficient detail or conflicts between different plans and specifications can make it difficult for an owner to gain approval and for the builder to rely on the plans to meet the requirements of the Act.

Poor documentation at the beginning of projects is widely acknowledged as a contributor to building defects. Although not all defects are a result of problems with the design, a greater focus on the design stage can detect any issues early and be a cost-effective way to reduce the need for expensive defect detection and rectification work.

1.1 Minimum design documentation

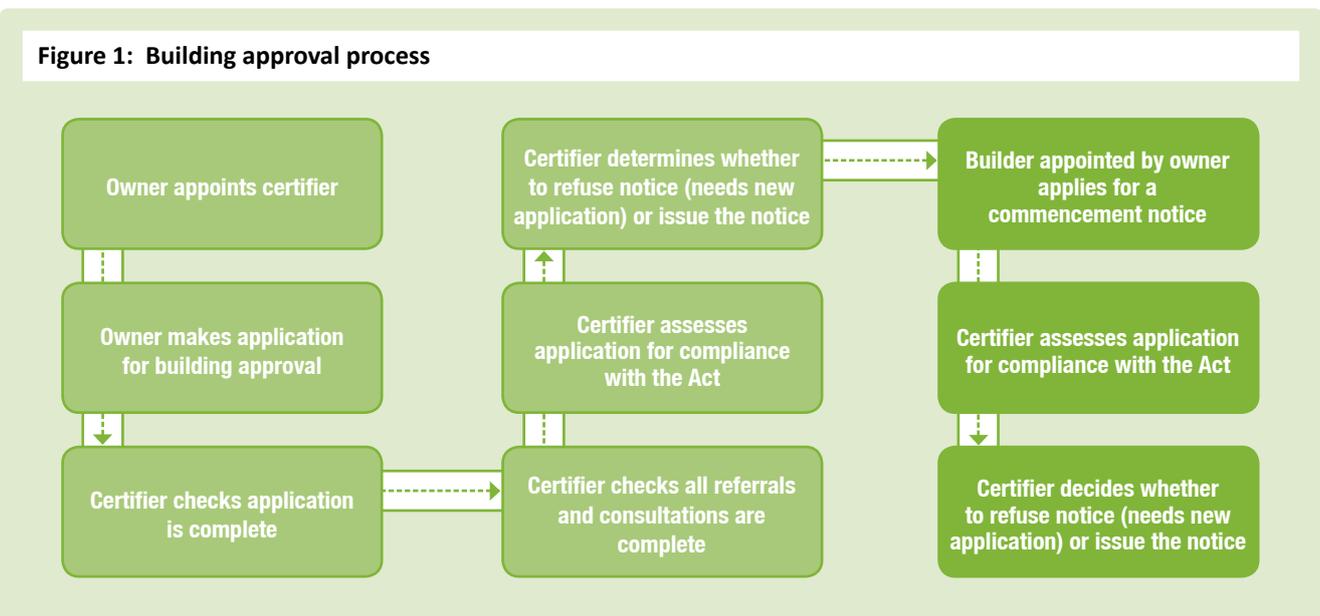
Design documentation is central to the building approval process (see below). Given all buildings are different, building standards allow for new and innovative ways of complying. An approval system must be flexible enough to allow for all building types. However, it also needs to provide sufficient detail for people to understand what is required of them and to allow for buildings that are a higher risk to the public or designs that are at greater risk of non-compliance.

The Act requires that a building approval application includes certain documents and that plans must show sufficient detail to determine whether the building would comply with the building code and that it could be built by a ‘competent builder’.

Guidelines in the Act outline what is considered sufficient for parts of small-scale buildings but not for other building types.

The certifier has discretion within the bounds of the Act to determine what is adequate for a building based on its complexity and use. Auditing has shown a difference in the application of standards among certifiers and a mismatch in the expectations between certifiers, designers and regulatory officers about the required level of documentation for particular types of building or building elements.

While it is not possible to prescribe every requirement for every building, a fair and effective approval system must be clear on what level and type of information is required as a minimum; and this must be understood by applicants, certifiers, designers and regulators.





To improve consistency of documentation and provide a greater level of certainty for practitioners and applicants, guidance and education materials will be developed to better outline expectations for documentation. Guidelines will initially focus on residential parts of buildings and cover different types of work, performance standards, alternative solutions and building elements at higher risk of non-compliance (such as balconies in apartment buildings). Guidelines could also include documentation of maintenance requirements for provision to future owners and would be supported by sample plans and specifications.

1.2 Review of applications and approvals

For complex buildings and alternative solutions, it is particularly important to coordinate design work to ensure compliance with the building code and consistency between plans required for the project.

Given the importance of getting the design right before construction, a design review process could be established to provide an independent review of proposed plans for apartment buildings before an application for building approval is made. The review would allow regulatory and building experts to highlight issues that need to be resolved. Review of design documentation for apartment buildings would focus on building elements and types of construction that are at higher risk of major defects.

A review panel established by the regulatory authority is an option. However, allowing for independent and peer review outside of the established panel could also be considered; this would require standards for people providing a review.

One of the key issues to be resolved is how to ensure a review process is used and makes a positive difference to reducing building defects. One option may be to use regulatory price signals, such as different fees for projects depending on whether they have been subject to design review. Another could be to consider initially mandating design review for apartment buildings.

The Act and building code provide general advice about who may design, document or verify an 'alternative solution'³ but there is limited guidance about the level of expertise required for particular solutions or who may be considered an expert and provide an expert judgement. While some design solutions are reasonably straightforward, others are highly complex and may require expertise from a range of specialists to develop and verify. A review process could also include alternative solutions.

The review would complement, rather than replace, the existing certification process and increased post-approval auditing and inspection of apartment buildings.

ACT building and construction — facts and figures

- Over 14,300 building approvals have been issued in the last three financial years: 4859 in 2012–13, 4677 in 2013–14 and 4778 in 2014–15. This remains considerably higher than the decade average of around 3500 approvals.
- The largest number of approvals each year is for construction or alterations to residential buildings, but the types of residential construction and the amount of activity covered by a single approval are changing.
- In 2013–14 the number of new dwellings approved in apartment buildings was greater than the number of single dwellings and townhouses for the first time.
- Over the 2012–13 and 2013–14 financial years approximately 4600 apartments were covered by newly-registered units plans, including apartments in mixed-use buildings.

³ The building code is a performance-based standard. It offers pathways for compliance with each performance standard, which can include an option to comply by following prescribed methods. An alternative solution is not prescribed but developed as an alternative method to comply.



2. Stage inspection and on-site supervision

Many of the issues with major building defects are linked to the construction phase of a building. Although some builders mitigate on-site problems, the review has identified there would be benefit in improving supervision, quality assurance of work and regulatory oversight throughout the construction process.

The person responsible for the building work, in most cases a licensed builder, is legally responsible for the day-to-day supervision of the work, for making sure the work complies with the Act and approved plans and for verifying people they have engaged to carry out building work have complied with the Act. However, attendance on site by the builder may be minimal, particularly where they are responsible for a number of sites.

2.1 Critical stages of work

Previously, building regulations listed critical stages of work that acted as hold points in the construction for the builder to be satisfied that work under their licence had been completed in accordance with the Act. The regulator also conducted random inspections at these stages.

In addition to the existing inspection stages, the critical construction or verification stages identified in the review include completion of:

- passive fire protection i.e. fire separation/penetrations
- acoustic measures (particularly for classes 2 and 3)
- pre-sheet stage—both pre-insulation for services and post-insulation for energy efficiency
- weatherproofing, including damp-proofing and flashings where applicable
- waterproofing in internal wet areas.

A building or building system subject to an alternative solution or of significant complexity may have other stages.

Guidance notes for builders of residential buildings (particularly class 1 and 2 buildings), developed in consultation with industry members, could describe standard hold points at critical stages such as the above. The guidelines would not necessarily prescribe mandatory processes but would outline the types of inspections, tests and verification the builder should carry out at these stages. Inspecting work throughout the construction process could further minimise a builder's exposure to poor workmanship and give owners greater assurance in the quality of work. Inspection guidelines would be suitable for owners to incorporate in contracts for residential building work. They would also accommodate suitable inspection standards, methods and record management systems managed by industry bodies.

Documentation generated at these stages could form part of the final documentation supplied to the certifier to support the mandatory stage inspection process. Guidelines could also be developed to cover supervision of different types of projects (based on their risk, size and complexity) throughout construction.

2.2 Mandatory stage inspections

In the ACT, only licensed building surveyors can issue building approvals or carry out stage inspections for building work. The Act currently sets out stages during construction where the certifier must approve certain work to allow construction to continue.



There are four mandatory stages for each classification of building (completion of excavations, formwork and reinforcements for footings, completion of preparations for concrete members, completion of structural framework, and siting at damp course stage). Additional stages for class 2–9 buildings can be determined by the certifier as part of the approval process but must relate to the structural framework.

There is a limit to what can reasonably be detected and rectified during a stage inspection. The current description of the process in the Act can result in multiple interpretations about what are mandatory inspection points, what is being inspected at these points, how inspections should be conducted and what is documented at the time of inspection.

Although there are many suggestions for additional stage inspections, before new stages are considered it is important to improve the operation and understanding of the stage inspection process. This could include more clearly outlining in the guidance material and legislation:

- the building certifier’s responsibilities in relation to stage inspections
- the elements of the building or building work included in the inspection and the purpose of the inspection; for example, the inspection at damp course level is primarily to check the siting of the building and should apply regardless of whether the building has a damp course
- the types of certificates and information a certifier may request from a builder in relation to each stage.

Legislative amendments would be complemented by practice guides for certifiers, builders and other people providing certificates to demonstrate compliance with the Act.

2.3 Government auditing and inspections

As part of the administration and enforcement of the Building Act, the regulator manages an audit program for building approvals lodged by private building certifiers that aims to audit 10% of all approvals. A program of on-site inspections for residential work during and post-construction was introduced in 2014.

Building inspectors may audit and inspect building work at any time. On-site inspections allow issues to be addressed directly with the builder. They also allow building inspectors to identify patterns and emerging issues across the wider building industry so they can be addressed before becoming more severe.

An expanded and integrated inspection/audit program based on the risks associated with different types of work could be effective in improving compliance, particularly for work currently subject to a high level of complaint. For example:

- low-risk work would be subject to random inspections
- medium-risk work would be subject to a higher level of on-site visits
- high-risk work would be subject to both random and targeted inspections or assigned a ‘designated inspector’.

Building auditing and inspection functions within Access Canberra are being restructured to facilitate a greater focus on apartment buildings. This approach will complement the creation of designated inspectors, who will need sufficient skills and experience to inspect and monitor complex projects and help to educate builders and practitioners on their technical and other regulatory requirements where needed.

Designated inspectors – how would it work?

Some owners, particularly those who will retain ownership of the building post-construction, may appoint someone to protect their interests if they have concerns about the eventual quality of the buildings. Owners purchasing off the plan, such as buyers of apartments, are not in a position to do this. An inspector who is independent of the developer and builder or other interests in the project could overcome the problem, reduce the likelihood of defects and minimise reliance on expensive post-construction rectification, litigation and penalty processes.



A designated inspector would:

- be allocated by the building regulator to particular projects and follow from the beginning to the end of construction, including to be part of any government-managed design review and auditing of approvals
- attend the site regularly as determined by the risks and complexity of the project and monitor the progress of the works and adherence to plans
- work with other inspectors and specialists such as engineers and coordinate their input and involvement as required
- monitor whether the builder and developers have followed the correct processes under the Act, including obtaining the consent of owners for changes where required
- educate the builder, developer and other people on site about their obligations under the building regulatory system.

An inspector would not replace the builder as the site supervisor and the builder would remain responsible for the compliance of the building work. The inspector has a different role to a building certifier, and a certifier will still be required to provide statutory certification at critical stages of the work. Designated inspectors will augment and support rather than replace existing arrangements such as the role of certifiers.

As builders demonstrate successful completion of one or more projects, good supervision and quality assurance practices, their projects will revert to a more standard inspection regime, which can include additional inspections at certain hold points or stages in the work (see 2.1 Critical stages of work above) as well as random inspections and audits.

The benefits of this system would be to bring all builders of more complex projects up to an appropriate standard and provide additional education for current practitioners and people gaining their pre-licence experience. Over time, the inspection program will raise the overall standard of apartment building in the ACT. If a builder cannot reach an acceptable standard over time, further action such as formal training or licence restrictions may be required. The model is also not intended to compromise disciplinary, rectification and other actions for completed projects.

There are less than 60 class 2 buildings constructed in the ACT each year and a relatively small geographic area to cover, making this approach feasible. 'Learning on the job' is also less disruptive than requiring formal retraining or relying on detection of defects and rectification after a project is complete.



DANGER

**CONSTRUCTION
SITE**

**UNAUTHORISED PERSONS
KEEP OUT**



3. Builders and building surveyors licensing

3.1 Builders licensing

Unless exempted under the Act, all building work in the ACT must be carried out or supervised by a licensed builder. Building work is complex and, if not done well, can affect the health and safety of building occupants. The licensing system is intended to ensure that only suitably qualified people are in charge of building work. It requires applicants to have certain qualifications and experience, be solvent and not to have committed serious offences relating to fraud and dishonesty.

The existing licence categories and eligibility requirements have changed little since the 1970s. Occupational licensing is divided into four categories. The categories do not include specialist building work (demolition and swimming pool construction), which require a separate endorsement.

- Class A – all building work
- Class B – building work in relation to a building of any classification that is three storeys or lower, and basic building work on any height of building
- Class C – building work in relation to a class 1, class 2 or class 10a building or a class 10b structure ancillary to those classifications of no more than two storeys, and basic building work on any building
- Class D – non-structural basic building work

Regardless of the classification of building, a person in charge of building work must have sufficient on-site experience and technical understanding to ensure the building complies with all building standards. A building licence authorises the holder to carry out and supervise building work; these fundamental responsibilities are the same for all building projects.

Individual licences

Formal qualifications

The current mandatory qualifications for individuals are:

Class A: A minimum of a tertiary qualification in civil engineering, structural engineering or building the equivalent to a graduate certificate or diploma, or a bachelor, masters or doctoral degree

Class B: A minimum of a diploma or an advanced diploma level qualification in architecture, civil engineering, structural engineering or building or an equivalent qualification

Class C: A minimum of a certificate IV level qualification in building or equivalent qualification

Class D: Basic building work experience for periods totalling at least three years full time.

Qualifications are one of the cornerstones of eligibility to hold a licence. The mandatory qualifications are intended to align with the skills and knowledge required to carry out or supervise building work. The depth and breadth of training on different aspects of building standards, methods and management differ from course to course and provider to provider. Over time the content of many tertiary-level design qualifications in engineering and architecture have reduced or removed content relating to building and construction. To realign the qualifications with the type of work they authorise, mandatory qualifications for new applicants could be revised to include only qualifications recognised to include sufficient content in building or construction management.



Building experience

All classes of licence (other than owner-builders) require experience. This allows practitioners to learn to apply what they have studied in their qualifications before working without supervision. Each category of occupational licence requires at least two years of full-time relevant practical building work experience other than specialist building work or basic building work in the last five years (class A licensees previously required three years).

From August 2015, at least one year must be post-graduate. For class A, experience must be in work that only a B or A class licensee can do.

The A and B class licenses are very broad and a person may gain their experience on only one type or complexity of building but be licensed to build all types of building. While building is, and always has been, about the practical application of knowledge, residential buildings have a unique set of risks in both public and consumer protections.

To ensure applicants wishing to construct residential buildings have relevant experience with that form of construction and to respond to particular issues with apartment buildings, new class A and B licenses could be conditioned to exclude work on residential buildings if the applicant has insufficient experience with those buildings. Applicants could also be required to demonstrate experience across all critical stages of a project.

If a licensee holds a condition, they can still work under the supervision of another licensee with authorisation for residential work.

Verification of experience

A person is eligible for a licence only if their claims of experience are supported by licensed builders or building surveyors i.e. industry members. However, a common criticism of the licensing system by existing licensees and industry associations is that people can gain a licence too easily.

As a result of the review, changes to the licensing process introduced in 2014 have increased the verification of statements of experience. Approximately a third of all applications are now refused by the Registrar based on insufficient experience.

To further strengthen verification of experience, particularly for people with interstate experience, independent verification processes such as those under the Australian Institute of Building's accreditation system could also be used or recognised. Qualification requirements could also be amended to allowing the Registrar not to consider:

- references from builders with a poor compliance history or whose licences have been conditioned to work under supervision, not to supervise others or to obtain further training themselves
- experience on buildings with substantial defects or compliance problems, where the experience did not include rectification work.

To support applicants and referees, standards for industry references are being updated in guidelines. Statements must relate to what the referee can reasonably verify rather than work on site they have not witnessed or supervised. References must be provided by the person responsible for the building work. Forms that can be used to record experience as it is gained will be provided.

Pre-licence assessment

The current system includes qualification and experience requirements, both of which are verified. An applicant's competency or knowledge may be assessed during formal training but is not assessed again after they have gained their practical experience. Increasingly, builders licensing processes in other jurisdictions are including an assessment for applicants in specific areas, including awareness of legislation and standards applying to the type of work authorised by the licence and an applicant's quality assurance processes.



One option to strengthen the licensing system is to introduce an assessment of the applicant’s knowledge and understanding of issues that directly relate to their responsibilities as a licensee:

- a building licensee’s obligations and rights under their licence
- building and related standards and practices appropriate to the licence category being applied for
- quality management and supervision processes.

The purpose of the assessment would be to determine whether the applicant has an adequate level of knowledge and ability to locate and interpret relevant information to manage their obligations. The assessment could also be applied as part of a skills assessment or renewal process for existing licensees.

Access Canberra is currently developing a pilot for two forms of assessment—a written assessment for class C licence applicants and an interview process for class B licensees.

Any assessment process needs to be fair and consistent across all applicants. Assessors would need to be impartial and have no conflict of interest, such as being a future competitor of the applicant, or part of a training organisation or association the applicant is involved in. The scope of the assessment and the criteria for successfully completing an assessment also needs to consider that A, B and D class licenses can include all building classifications.

Corporation and partnership licences

Corporations and partnerships can hold a licence if they have a licensed builder to act as a ‘nominee’ to supervise the work and the directors or partners meet general probity requirements for solvency and dishonesty offences. There are no mandatory qualifications for directors or partners.

Building work carries high technical and financial risks and it is important that any building licensee understands and has the capacity to comply with their obligations. In many jurisdictions, the directors or partners collectively must meet the mandatory qualifications and at least one person must be able to demonstrate experience in building projects of the type the licence would authorise. The findings of the review, particularly relating to more complex projects, indicate this could also be beneficial in the ACT.

Nominees

A building licensee is responsible for overall compliance with the Act. However, corporations and partnerships must appoint an individual licence holder as a nominee. A nominee’s role is to supervise the construction services and ensure they comply with building and licensing laws. However, not all the responsibilities of a licensee can reasonably be given to the nominee, particularly if the nominee is an employee rather than a director or partner.

Although each licensee is obliged to ensure they have sufficient oversight of work they are licensed to carry out and the people they have engaged to do it, the current system permits corporate licensees to shift responsibility to a nominee outside of the corporation. This has proved to be a problem in a range of different compliance actions. It was not intended that a nominee, particularly an employee, would take on all liability and accountability for the corporation’s actions as a licensee.

To alleviate this situation, the nominee could be required to be a director or partner in more direct control of the corporation, which would work with any requirement to expand mandatory qualifications to corporate and partnership licences. Alternatively, the nominee’s actions could be more closely linked with that of the corporation or partnership they work for, and licensing legislation could more clearly define the role of a nominee in relation to decisions made by the corporate licensee it is attached to.



3.2 Building surveyors licences

Building surveyors must meet qualification and experience requirements. In the majority of cases these are verified under external accreditation systems. Similar to builders licences, an applicant's competency or knowledge may be assessed during formal training but is not necessarily assessed again after they have gained their practical experience.

As well as being licensees, building surveyors acting as certifiers under the Building Act are regulators and make binding statutory decisions. This requires not only a good understanding of national technical codes but of ACT-specific building and planning legislation, how it is intended to be applied, and how it interacts with other legislation. Building surveyors must also be aware of their obligations and rights in carrying out their functions. Legislation can be complex and a surveyor may have gained their experience in a different jurisdiction.

To help building surveyors familiarise themselves with the ACT certification system a self-paced online course could be developed. The course could be used by licence applicants and in directed training and continuing professional development programs. Surveyors who have taken the course could also have this reported on the licensing register.

The course could also complement a pre-licence assessment for building surveying applicants to verify the applicant has an adequate level of knowledge and understanding to fulfil their obligations as a certifier and under other legislation.

3.3 Renewals and ongoing eligibility

The licensing system process can confirm that a licensee has sufficient understanding of their obligations to comply with their requirements. However, a licensee may still choose not to comply or make errors once they are licensed.

In addition, problems and defects cannot solely be attributed to 'new' licensees. There is no firm correlation between the length of time a builder has held a licence and the likelihood of compliance or financial difficulties. It is not expected that licensees will need to upgrade their qualifications each time their licence is renewed. However, it is expected that licensees will maintain their eligibility by keeping up to date with their obligations, accessing information on changes to standards, seeking advice where required, undertaking any necessary training and maintaining general eligibility requirements such as solvency.

Licensing legislation allows for a licensee's compliance history to be considered when deciding on a licence renewal, and at times existing licensees may require further training or be subject to assessment to ensure ongoing eligibility and competence. However, the links in the legislation between general licensing requirements, such as financial status, and ongoing eligibility could be improved.

3.4 Professional indemnity insurance

Professional indemnity (PI) insurance covers financial loss arising from claims and allegations of breach of professional duty and negligent acts, errors or omissions. PI insurance not only protects the client or building owner but also protects the practitioner against claims that arise in relation to their work.

The Act is intended to support a proportionate liability scheme, which can be undermined if all relevant parties are not adequately insured. Under COLA, works assessors, building assessors who prepare energy efficiency ratings for regulatory purposes, plumbing plan certifiers and building surveyors must all hold insurance. Licensed builders do not currently require PI insurance.



Building surveyors must have PI insurance that provides indemnity against claims for breach of professional duty as a building surveyor and a minimum limit of indemnity of \$1,000,000 for a single claim, \$1,000,000 for the total of all claims made during the period of cover and an additional minimum limit of indemnity for the costs and expenses of defending or settling a claim of 20% of the limit of indemnity for the claim. Industry bodies representing building surveyors report that it is difficult for certifiers to obtain insurance under the existing system. This is seen to be in part due to certifiers perhaps being the subject of claims for problems they are not liable for because they are the only relevant practitioner with insurance.

To improve the effectiveness of the proportionate liability scheme, and have consistency for the two primary licensed occupations in a building project, the current requirements for PI insurance for building surveyors could be extended to class A, B and C licensees.

Practitioners and businesses would need access to adequate and affordable PI insurance. A range of providers and insurance products for PI insurance for building practitioners can provide reasonably priced premiums. Similar to other licences a builder could be covered by their employer's or another person's insurance.

While this would add a small cost to the operating costs of those builders who do not carry insurance, it has the potential to improve consumer protection and restore more appropriate insurance prices for building surveyors.

ACT building and construction — facts and figures

- There are approximately 11,950 ACT licensees across ten construction occupations in the Construction Occupations (Licensing) Act, including building, building surveying, electrical, plumbing and gasfitting.
- In 2004, when the current Building Act commenced, there were approximately 2600 licensed builders. Today there are approximately 3800 licensed builders. There are also close to 900 current owner–builders licences.
- The number of licensed building surveyors who can carry out building certification functions under the Act has increased to over 80 from less than 20 when private certification commenced in 1999.





4. Contracts for residential buildings and building work

Two parts of the Building Act specifically apply to contracts for buildings and building work.

Section 25 does not allow people to contract out of their obligations in relation to approvals, commencements, stage inspections and requirements for carrying out work. Section 88 provides that every contract for the sale of a residential building (defined at present as a class 1 or 2 building or part of a building up to three storeys) and every contract to carry out residential building work for more than \$12,000 to which the builder is a party, is taken to contain a statutory warranty.

Most complaints about building work include a contractual component; however, this is usually in relation to work not meeting prescribed standards or not being completed when expected. Standard contracts for building work may be confusing to consumers or be unclear on the obligations of all parties and many disputes arise over a lack of awareness by one or more of the parties to the contract of their rights and obligations.

4.1 Standard contract provisions

The review has identified the potential for specific standard provisions and terms for use in contracts for sale and construction of residential buildings. This would include buildings above three storeys.

In particular the following could help reduce the instance of disputes and improve protections for all parties to a contract for residential building or building work:

- using standardised terms and descriptions for stages of work and changes to the building design or materials
- separating any agreement for the builder to act as an agent of the owner in relation to approvals and certification from the building contract
- requiring building practitioners and businesses entering into contracts for building work to give consumers standard information on the consumer's rights and obligations under the law and the kinds of remedies and dispute processes available to them.

Stages of work

A 'stage of work' provides a hold point for the owner to assure themselves that work up to that stage has been completed and that it is compliant before further payments are made. This can reduce financial losses and defects.

For residential warranty insurance to operate effectively there needs to be defined stages for payment in a building contract. The Act defines stages of building work that require a mandatory inspection from a certifier, but these stages are not regularly spaced throughout the construction process and they do not need to be used in the contract to determine when progress payments are due.

If contractual stages are well defined and understood by all parties to the contract it could reduce disputes about completion of stages and what needs to be purchased and paid for at each stage. For example, there may be many interpretations of terms such as 'lock-up stage', 'pre-sheet' and 'practical completion'. A person in industry may have a different understanding to a consumer of what certain terms mean, leading to disputes.

Changes to the building or materials

Sales of new apartments are often made based on concept drawings or development approval plans, which may need changes to meet building standards and gain building approval. The developer may also choose to make changes to the design or substitute materials based on costs or other factors during the project.

Disputes about changes to the building or materials covered by building or consumer laws could be referred to an alternative building dispute resolution process (see chapter 6).



Agency – residential owners

Although land owners are responsible for appointing their certifier, they can authorise their builder or another person to make the appointment on their behalf. This is allowed through common law, with a person authorised in writing to act on another person's behalf known as an agent. For class 1 residences (houses and townhouses etc.) in particular, owners authorise or defer to their builder to choose and appoint the certifier. This has been raised throughout the review as potentially undermining the intent of the legislation and the impartiality of the certifier.

An owner may be unaware of their rights to choose the certifier. To support the education of owners about their role in appointing a certifier, the Housing Industry Association and Master Builders Association have removed contract clauses authorising the builder to appoint the certifier from their standard ACT residential contracts. If an owner chooses to appoint an agent, the appointment will be made under a separate contract. However, other contracts in use may still have clauses giving the builder agency embedded in them.

To help people to understand the role of the certifier and their rights, agency clauses could be removed from all contracts for residential building work. A separate agreement would outline the rights of the owner and the rights an agent may have in relation to appointing a certifier, receiving information about stage inspections and applying for approvals, amendments and certificates if they are appointed. This would be supported by existing and new education materials.

4.2 Statutory warranties for residential building work

The Act gives a warranty to residential building work on class 1 and 2 parts of buildings that are three storeys or less, excluding storeys used exclusively for parking or below ground, and any structural supports to the building. Work must be for a value of \$12,000 or greater.

Under the statutory warranty in the Act the builder warrants:

- that the work has been or will be carried out in accordance with the Act and the approved plans, and in a proper and skilful way
- that good and proper materials for the work have been or will be used in carrying out work
- if the contract does not specify a date for completion, the work will be carried out with reasonable promptness
- if the owner expressly makes known to the builder (or their employee or agent) a particular purpose or desired result and the owner is relying on the builder's skill and judgment to achieve it, the work and any material used in carrying out the work will achieve the result.

The existing warranty periods for residential work are two years for defects in non-structural elements of the building and six years for defects in structural elements, including weatherproofing and other components forming part of the external walls or roof of the building.

Although the warranty has traditionally covered the bulk of the residential market in the ACT, there is an increasing number of residential buildings over three storeys, including buildings that include both residential and commercial parts. Residents of medium–high-rise apartment buildings are not less vulnerable than low-rise apartment owners if their building is defective or non-compliant. Some businesses, owners' corporations or people who buy into other forms of building may also have difficulty negotiating detailed warranty provisions in contracts.



Until recently it has been assumed there are other avenues for owners of medium–high-rise residential buildings to pursue damages for defective work and a form of implied warranty relating to the purchase of property. A recent High Court decision on *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36⁴ (HCA 36) on a serviced apartment building (class 3 building) casts doubt on this assumption and could significantly affect the rights of subsequent owners of buildings to pursue damages for economic loss for latent defects. The High Court considered that if legislation did not include statutory warranties for particular buildings or owners then none could be implied.

To ensure apartment owners and their successors in title have clearly stated warranty rights, the existing statutory warranties could be extended to apply to apartments, including serviced apartments, and associated structures (e.g. basement carparks). This would provide equal cover for all apartment owners regardless of the size of the building.

The warranty would not change the builder’s obligations in relation to the standard of building work as they are already required to build in accordance with plans and specifications, meet a reasonable standard of workmanship and ensure the building is fit for occupation. Builders would also not need to provide warranty insurance for medium–high-rise buildings.

4.3 Maximum progress payments

Legislation for residential building work contracts in other jurisdictions often prescribes a maximum deposit (typically 10% or less of the cost of the work) or a maximum stage payment. Maximum stage payments, particularly for residential contracts with a consumer, have a clear link with the operation of residential building work insurance.

Insurance has a limit of liability of \$85,000 for defective work as it is assumed work will be assessed at a number of stages in the project and this amount would be the maximum loss at any one stage of work. For incomplete work the limit is \$10,000 regardless of the size of the stage payment.

Complaints about incomplete work or substantially delayed work are reasonably common. In some cases the progress payments made for work far exceed the maximum insurance available. There are a number of insurance claims each year for incomplete work and numerous cases where a limit to the amount that could be paid at each individual stage would have prevented considerable losses to land owners.

For residential building work that requires insurance, a maximum stage payment could be introduced that aligns with or is close to the maximum required limit of \$85,000 for defective work. The maximum stage payment could also work alongside requirements to separate payments for different projects to minimise losses to owners (see part 5.1 below) from incomplete work.

4.4 Accountability for contractors

There is no particular licensing or ‘fit and proper’ requirements for people offering to sell a residential building off the plan or enter into a contract for constructing and supplying a new building. The builder and the certifier are responsible for the compliance of the work and may be held accountable through a variety of legal mechanisms but the person who made the contract for the work has far less accountability for decisions they make that affect the performance of the building. The current system also does not prevent unscrupulous builders setting up as developers and carrying on regardless of any actions against them.

4 http://www.hcourt.gov.au/cases/case_s66-2014



Although the majority of businesses that build apartment buildings are both the builder and the developer, many matters subject to litigation are a result of changes to the building or the work environment made by the business acting in its capacity as the developer. Residents and future owners do not necessarily have an equal ability to a developer to negotiate and enforce a contract. While there are legal avenues open to parties for contractual disputes, the cost of taking any action may be prohibitive.

In many cases, concerns about developers of residential buildings relate to 'phoenixing', where directors wind up a company to avoid its liabilities but set up another company to continue operating. The current Federal Inquiry into Insolvencies in the Construction Industry (Inquiry) is considering the impact of phoenixing and may result in changes at

a national level to reduce the incidences of this occurring. The ACT Government will consider the findings of the Inquiry and national responses to its recommendations with the view to fill in any remaining gaps in dealing with businesses that have a history of serious contractual breaches and a lack of compliance with the Act and relevant legislation such as the *Commonwealth Corporations Act 2001* and *Competition and Consumer Act 2010*.

ACT building and construction— facts and figures

- For the last six years, over \$2 billion worth of building work has been regulated under the Building Act each year.
- From 2005–06 to 2009–10 the annual value of approved non-residential work exceeded the value of residential work. Since 2010–11 this has reversed, with the value of residential work greater than non-residential work.
- It is estimated that investment in building and construction activity is worth approximately \$3.5 billion to the ACT economy annually. Project 5.



5. Project funding, payment claims and retentions

The effect of insolvencies in the ACT construction industry has increased significantly over the last few years. Although the number of external administrations among ACT construction businesses is relatively few compared to the number of businesses, the effect of a single insolvency can be extensive across many business and individuals. For example, in 2012–13 the 33 companies that went into external administration owed over 700 creditors in excess of \$26 million in total.

Growth in the amount of money owing to creditors is rising. At the lowest estimate, the deficiency between assets and liabilities of insolvent ACT construction business in 2012–13 and 2013–14 was in excess of \$25 million annually. This estimate is based on publicly available information from the Australian Securities and Investment Commission⁵. In reality, liabilities are considerably more. The majority of creditors (approximately 80%–85%) were unsecured and received 0 cents in the dollar.

The ACT construction industry has enjoyed high levels of activity over the last 10 years, including many lower-risk government-backed commercial projects. Notwithstanding, many contractors and sub-contractors have reported pressure to ‘cut corners’ due to short completion timeframes and tender or contract prices that do not reasonably cover the full costs of construction.

The majority of businesses that enter external administration are small businesses with fewer than 20 employees. Since the global financial crisis, between four and seven insolvencies each year have been due to general financial conditions. However, the main reasons for insolvency are lack of cash-flow, undercapitalisation, poor financial control and strategic management, and trading losses.

Even when a contractor is not insolvent, funds may also be unavailable due to financial management issues.

5.1 Retentions and building project accounts

In relation to residential work there are a growing number of disputes over non-completion of work even though the owner has made sufficient payments under the contract. Builders in financial difficulty or struggling to manage financial issues may borrow from one project to pay for incomplete projects, which can be unsustainable and lead to insolvency. For sub-contractors, issues with management of project funds can often result in a loss of securities retained by the head contractor, who in many cases is a builder. Although these two issues are usually considered separately, they are both related to financial management.

Construction contracts between a head contractor and a sub-contractor generally include clauses that provide for a performance security against damages or costs arising from work not complying with contractual requirements, remedying defects and non-completion because of the insolvency of the contracted party. A large project may involve a mix of securities (undertakings, bank guarantees etc.).

A cash retention is an amount withheld from a sub-contractor as security. The amount is generally based on the risk of the work but is usually between 5% and 10% of progress payments for work performed by the subcontractor. Cash retention as security is typically found in contracts between head contractors and sub-contractors for work on commercial buildings or large contracts where it is not feasible for small contractors to provide other forms of security. Cash retentions are particularly vulnerable in the case of the insolvency of the head contractor. Many sub-contractors have reported difficulties when securities are not returned as per the contract or within a reasonable time—or at all if the head contractor becomes insolvent.

⁵ Source ASIC. ASIC statistics show losses in bands, for example \$5 million–\$10 million. At the lowest band (\$0–\$25,000) a debt or deficiency of \$1000 is assumed, for all other bands the lowest amount in the bracket was been assumed for each creditor.



Although some contractors manage retention and project payments in accordance with Australian Standards, others do not. There have been a wide range of inquiries and reports on security of payments issues in the construction sector in Australia and the effects of insolvencies over many years, often resulting in recommendations for a form of statutory protection for cash retentions or greater financial accountability for building practitioners.

In the ACT there are no particular regulations for the retention and management of building project funds to either protect sub-contractors owed payments or owners who have made payments for the completion of a building. In contrast, if a person invests in a building through a real estate agent, the agent must place any payment received by the purchaser in a trust account managed in accordance with prescribed requirements. There are large offences attached to mismanagement of money that must be held in trust.

While trust funds can offer a greater level of protection, Australian jurisdictions have different models for protection of funds retained from sub-contractors. Options for protecting retentions and payments are outlined below. Some options are more suited to larger commercial projects and retentions only, but others could be adapted for a dual purpose—protection of sub-contractors' monies and protection of landowners' deposits. A combination of options could also be considered; for example, retention moneys deposited into a form of trust account and general project payments held in an individual project account, or projects over a certain value requiring trust arrangements with others not being subject to a requirement.

For cash retention, regulations would only apply if cash retention is provided for in the contract. It would not become mandatory to include cash retention arrangements in all construction contracts. As in Western Australia and the Northern Territory, regulation can also imply a trust when a contract does not have specific provisions for retention moneys held under a construction contract.

The effect of insolvencies could also be minimised, if problems were communicated to the regulator earlier, before the licensee is insolvent. Financial management requirements could be augmented by increased notification requirements for licensees in the case of being wound up, having a receiver appointed, entering into a deed of company arrangement with creditors, or being convicted of relevant offences under the *Commonwealth Corporations Act 2001* and the *Competition and Consumer Act 2010*.

Option 1 Trust funds established by head contractors

This option would require payments and retentions to be deposited into a statutory construction trust fund established by the head contractor. Money in the fund could only be used for reasons stated in the contracts with sub-contractors.

In the event of insolvency, funds in the account are clearly trust funds and generally not available to a liquidator. This model could minimise the risk of the contractor using the funds for purposes other than paying sub-contractors and suppliers and aligns with the practices of many larger builders for retentions, especially those following existing contracting standards. Other builders, particularly those working on lower-value projects, may not have experience in establishing and managing trusts.

This option may be less suitable for managing a high volume of payments associated with a building project.

Option 2 Deemed trust model

Under a deemed trust model, once retention moneys are received by the head contractor, in law they would be deemed to be held on trust for the benefit of sub-contractors or for use on the project. The contractor acts as the trustee and holds the money for the beneficiaries (either sub-contractors or other creditors) but the money does not necessarily have to be placed in a trust account. It is a relatively simple exercise with modern banking products to establish separate accounts or sub-accounts that can be clearly identified for each project.

However, if the money is not in a segregated trust account, it is available to the contractor and may be used for purposes other than contingencies related to the performance of work undertaken for the project. In the case of insolvency, funds not readily identifiable as trust funds could be treated as available to the liquidator to disburse to other creditors.



Option 3 General project accounts

Similar to option 2, a separate and distinct account or sub-account must be established for each project. The funds would not necessarily be deemed in trust but only payments directly relating to that project must be made from the relevant account. This option would not segregate funds in the case of insolvency but is more flexible as a dual purpose account that both sequesters project funds from other money and allows retention relating to that project to be kept and used as required. This option could also be useful for lower-value projects, such as residential alteration and additions.

Alternative arrangements that place funds in custody or trust managed by a third party and not released until a specified condition has been fulfilled could also be considered if both parties to the contract agree.

5.2 Security of payments – progress payment claims

The ACT *Building and Construction (Security of Payments) Act 2009* (Security of Payments Act) provides a rapid dispute resolution process for payment disputes between primary, head and sub-contractors or others supplying goods and services to a builder. The purpose of the Act is to assist with the flow of payments throughout the industry and help contractors receive overdue payments.

The Building Act review does not include a full review of the security of payments legislation. However, as insolvencies and complaints to the Registrar about non-payment outside of the security of payments process are increasing, there may be merit in undertaking reforms for security of payments issues in the context of building regulatory reforms.

Although the Security of Payments legislation has been in force since 2010, an average of fewer than 60 claims are resolved under the scheme each year.

For contracts that do not specify a timeframe for payment of a progress payment claim, there is a default of a maximum of 10 business days in the Security of Payments Act. However, there is no legislated maximum time period for payment terms specified in a contract. Practitioners have reported that where the payment terms in the contract are lengthy (up to 90 days after invoice) their work on a project is over before they can make a progress payment claim, making the security of payments process less effective.

The Security of Payments Act also requires a claim for progress payment from a sub-contractor to include a statement that the claim is made under that Act, known as ‘endorsing’ a claim. A claimant must not give more than one payment claim for each reference date under the construction contract.

Endorsing a claim clearly identifies a document as the payment claim in the event of a dispute or adjudication application. However, there have been reports from sub-contractors that some contractors look on the statement as a threat of legal action, rather than a standard requirement for claims. Although the requirement to make a statement could be removed, the legislation would need to include an alternative method for identifying which documents are payment claims.

The Act was modelled on the NSW security of payments legislation. Since the introduction of the ACT legislation, changes to NSW legislation have been made in relation to both of these issues. NSW legislation only requires endorsements of claims when they relate to certain residential work where disputes with the owner are not covered by the legislation. It also requires payment within 30 business days of invoice from sub-contractors. The default of 10 business days was not retained when the 30 business day period was introduced.

Maximum payment periods in NSW followed legislation in other Australian jurisdictions, for example in Queensland a payment must be made within 10 business days after a payment claim is made. Although the maximum payment period does not prevent payment disputes, it provides a standard expectation for payment and allows parties to bring forward and resolve disputes about completion of work and entitlement to the payment earlier in the project.



6. Alternative dispute resolution – residential building

Although there are existing processes for resolving building disputes over defects, contractual obligations or other issues that arise in relation to residential building work, these processes can be long and costly for all parties or may not resolve the problem.

Where disputes cannot be resolved by informal negotiations, there is a need for alternative dispute resolution processes that are focused on providing a practical resolution relatively quickly and for a reasonable cost.

Limitations of the existing processes include:

- The complaints process under the Construction Occupations Licensing Act relates only to licensees (including former licensees) and licensable work, which can result in multiple processes if a complaint involves issues or practitioners not covered by the licensing system.
- With the large volume of complaints about residential buildings each year, complaints to the regulator are prioritised according to risk (severity and potential consequence). This allows resources to be diverted to the most serious issues but reduces the ability to provide a rapid process for simpler disputes or less serious defects.
- The complaints process facilitates discussions between owners and practitioners but does not provide formal conciliation or mediation or result in binding agreements that could be recognised by the courts as a pre-cursor to formal actions if the matter is not resolved.
- The majority of people who lodge complaints have already attempted to resolve the problem before the complaint is lodged. For these people further informal negotiation in a complaints process may unnecessarily further delay a resolution of the issue.
- Builders cannot make a complaint to a regulatory body about an owner refusing to make a payment. Work for people building their own residences is also excluded from the payment dispute resolution process under the *Building and Construction Industry (Security of Payment) Act 2009*.
- Earlier surveys⁶ have indicated many people also manage their building issues outside of the complaints process but have varying degrees of success in resolving their matter. For dispute resolution processes that are intended to result in an enforceable decision it may be difficult to find a person or people with sufficient technical knowledge and dispute resolution skills to formulate a practical and workable solution.
- People can make civil claims outside of the building regulatory process. However, litigation is expensive and time consuming, which often deters one party from seeking a resolution.
- ACT tribunals and courts have large caseloads. To alleviate pressure on these bodies, they may require parties to attend an alternative dispute resolution process before a matter can be heard. For example, the ACT Civil and Administrative Tribunal generally requires parties to attend mediation with accredited mediators.

Alternative building dispute resolution processes

Alternative building dispute resolution (ABDR) mechanisms will not be appropriate for every type of dispute; for example highly complex disputes, problems that pose an imminent threat to life or property, compensation claims and rectification work potentially worth millions may be best handled under regulatory, tribunal or court processes.

However, ABDR mechanisms that focus on facilitating a collaborative approach to resolve disputes efficiently could help resolve many issues that are not likely to be resolved through other more informal mechanisms without needing to resort to litigation. They could relieve the pressure on the existing complaints system and courts and tribunals while acting as a bridge between a more informal negotiation and conciliation process and a formal action such as litigation or a regulatory order.

⁶ This includes a survey of residential building owners and occupants on building quality and defects in 2011. The survey had 323 respondents



The review has identified a range of features that could be beneficial in an ABDR for the ACT, including that the process:

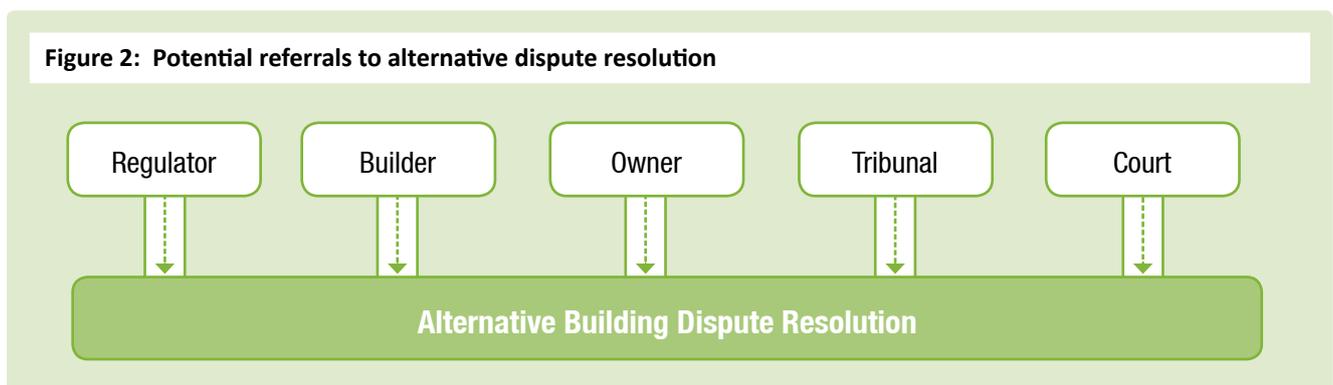
- facilitates a constructive and productive dialogue between parties to the dispute
- is relatively rapid and low-cost
- provides solutions that are technically as well as legally workable
- has the potential for enforceable outcomes
- accommodates multi-party disputes (not only parties to the contract or licensees)
- allows for a wide range of building disputes, particularly those not covered by the existing construction complaints and adjudication processes
- is not overly technical or requires complex legal negotiations
- allows disputes to be considered outside of the formal complaints system and tribunals and courts but is recognised under the regulatory system and by relevant tribunals and courts if the dispute cannot be resolved.

Throughout the review, stakeholders have suggested a variety of dispute resolution mechanisms, from conciliation and mediation through to adjudication and arbitration⁷.

A potential model

Each dispute resolution process has advantages and limitations. However, a new dispute resolution model could allow for a combination of approaches. In particular, a mediation process that incorporates elements of expert appraisal and determination—specifically advice from a technically qualified person on the facts and possible and desirable outcomes and how these may be achieved—has many, if not all, of the features identified by the review.

The process would be overseen by government agencies. However, parties to a dispute could self-refer or voluntarily commit to the process, either before or after a complaint is made to the regulator or before a matter is heard by a relevant tribunal or court. Relevant regulators, tribunals and courts could also refer people to the process, which could be recognised under relevant Acts governing ACAT and the courts.



⁷ Explanations of some common types of alternative dispute resolution can be found at (Link TBC)



This model could also require mandatory ABDR before a matter could go to a court or tribunal unless the dispute is solely about a point of law. This is similar to the processes in place in other jurisdictions. For example, parties in a domestic building dispute in Queensland must attend mandatory mediation managed by the regulator before they can lodge an application for a hearing with the Queensland Civil and Administrative Tribunal (QCAT).

Although a mediation process does not guarantee an outcome, if this process fails to resolve the issue the technical advice provided as part of the process would place the regulator, tribunal or court in a better position to take firmer action if required to produce a fair and reasonable outcome. Any ABDR process would also need to work alongside the existing disciplinary and other systems. It is not intended that this process be used to negotiate owners out of rectifying serious issues, particularly those that affect the integrity of the building. If the consequences of the defect are severe or a licensee is regularly involved with defective buildings the regulator may need to take an action regardless of a mediated outcome.

This option would also be supported by provision of succinct and useful information to home-owners, owners corporations and building practitioners on the responsibilities of each party in relation to resolution of disputes and defects and where they can find support in progressing steps towards resolution. An expanded range of standards and tolerances for these items would also be adopted to assist with determining whether any rectification work is required.

Further information

For more information about the Building Act Review and building regulatory reforms visit www.planning.act.gov.au/building_act_review

If you have any other comments you would like to make or issues you would like to raise go to www.timetotalk.com.au and complete one of the surveys or make a submission.