



Consultation Regulation Impact Statement – Reforms to the approval process for commercial buildings in Western Australia

SUBMISSION TO WA GOVERNMENT

JULY 2020

Reforms to the approval process for commercial buildings in Western Australia

Response to the Consultation Regulation Impact Statement



ABOUT US



Consult Australia is the industry association representing consulting businesses in design, advisory and engineering. Our industry comprises some 48,000 businesses across Australia, ranging from sole practitioners through to some of Australia's top 500 companies, providing solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry is a job creator for the Australian economy, directly employing 240,000 people. The services we provide unlock many more jobs across the construction industry and the broader community.

Some of our member firms include:



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INTRODUCTORY REMARKS

Consult Australia welcomes the opportunity to provide this response to the Western Australian (WA) Government's Consultation Regulation Impact Statement (CRIS) on reforms to the approval process for commercial buildings in WA. We understand this is one part of a broader suite of reforms proposed by the WA Government. It is appreciated that the consultation was extended due to the COVID-19 pandemic.

The *Consult Australia COVID-19 Pulse Survey* (undertaken and published in early June 2020) indicates that two-thirds of our member businesses are experiencing a reduction in work from COVID-19. The building sector is a significant area of concern with 64% of businesses reporting a reduction in commercial building work. While the east coast states and territories are the most impacted, 50% of our members in WA have reported a reduction in work. COVID-19 is expected to leave a lasting impression on the WA, Australian, and world economies making it more vital than ever to regulate smartly. The survey also revealed that 56% of members anticipate that competition across the industry will become tighter over the next six months. Any regulatory impost on industry should therefore be carefully weighed against the public benefit.

We support the WA Government's intention to improve community confidence in the quality of building construction in the state. The *Building Confidence Report* by Shergold & Weir (BCR)¹ highlighted that the integrity in the system needs improvement. As we discussed in our response to the BCR, real cultural and behavioural change is needed in the industry. The current commercial realities see:

- design and construct (D&C) contracts dominating with contractors taking the lead on all aspects and consultants as sub-contractors to the main contractor, meaning that the consultants delivering the professional design and advisory services are kept at arms-length from the principle client;
- no willingness to invest time up-front on design work before a permit is granted;
- construction managers sign-off on work without any rigor on the skills and expertise needed for this role, many have minimal to no understanding of the National Construction Code (NCC);
- consultants are generally not on-site regularly, and ad-hoc visits make it near impossible to see if designs were implemented during construction; and
- a reluctance to pay consultants to re-draw designs to ensure they match the constructed building.

Reforms need to support the changes need to address the above practices. The true value of consultants needs to be realised and non-designers need to be dissuaded from varying designs. Whilst these much-needed reforms may lead to increased cost of buildings, these costs will be offset by the savings in reducing the need for variations and avoidance of delays that currently arise during construction.

For example, the costs associated with an improved system will consist of:

- having relevant consultants on-site regularly to ensure construction conforms to their designs,
- having NCC trained construction managers, and
- added time invested up-front to develop designs to 85%-90% completion before permit approval and the cost of accurate as-built drawings.

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www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf

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However, these changes combined will limit the need for variations during construction and ensure any variations are approved by people with the right skills, knowledge and experience.

We appreciate that the WA Government's proposed reforms seek to address integrity issues, for example, through a Code of Practice for building surveyors, third party reviews, and set processes for variations during construction. In this submission we have provided comments on the practicality of the proposals and indicated where improvements could be made to assist in delivering the cultural and behavioural shift required.

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SUMMARY OF CONSULT AUSTRALIA'S POSITION ON EACH PROPOSAL

The table below summarises our support or otherwise for each of the 28 proposals in the CRIS. In this submission we have not made substantive comments on all 28 proposals.

Proposal	Consult Australia position
Regulators' monitoring and enforcement powers	
1 – Amend the <i>Code of Practice: Safe design of buildings and structures</i> to address non-conforming and non-compliant building products.	We have no objection to this proposal.
2 – Amend the Building Regulations to mandate the Code of Practice: Safe Design of Buildings and Structures as an applicable standard for all classes of building.	We have no objection to this proposal.
3 – Amend the <i>Building Services (Complaint Resolution and Administration) Act 2011</i> to empower the Building Commissioner to prescribe requirements on technical matters.	We are concerned about the lack of detail on this proposal. If the WA Building Commissioner is given these powers, there must be consultation on any draft requirements. Further, national consistency is a key consideration, it is recommended that the WA Building Commissioner regularly share insights and learnings with counterparts throughout other states and territories.
4 – Amend the <i>Building Act</i> and the BSCRA Act to empower the Building Commissioner's inspectors to enter and inspect any building site.	We have no objection to this proposal.
5 – Amend to definition of dangerous situation in the BSCRA Act to empower the Building Commissioner to remedy any situation where there is a high risk to people, property or the environment from the carrying out of a building service.	We have no objection to this proposal.
Fire authority consultation	
6 – Amend the Building Regulations to require that documentation of fire safety performance solutions must include a fire engineering brief and fire engineering report, in accordance with the International Fire Engineering Guidelines' process.	We recommend this proposal be reconsidered given the May 2020 approval by the Australian Building Codes Board to the NCC amendment to include a new provision for the process to document performance solutions.
7 – Amend the Building Regulations to provide that the FES Commissioner may issue a certificate at any time confirming that a building design meets operational requirements.	We support the timing flexibility of the proposal but suggest additional transparency mechanisms and framework for responses.
8 – Amend the Building Regulations to clarify that the FES Commissioner's written advice must be considered and responded to no matter when it is provided.	We do not support this proposal, instead there should be a framework for advice including agreed timelines.

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9 – Amend the Building Regulations to clarify the information that must be included when responding to the FES Commissioner’s advice.	We support this proposal to improve transparency, which would be assisted by also having a framework for advice.
Building surveyors’ conflicts of interest	
10 – Amend the definition of ‘independent building surveyor’ in the <i>Building Act</i> to require that a building surveyor must be independent of anyone whose work they certify.	We suggest this proposal be reconsidered given the consolidation of the market occurring in response to the hardening of the insurance market and the economic impacts of COVID-19.
11 – Introduce a mandatory Code of Conduct for registered building surveyors in WA.	We support Codes of Practice over changes to legislation but would seek industry consultation and engagement on development of the final Codes.
Supervisory powers for building surveyors	
12 – Amend the <i>Building Act</i> to require that a building surveying contractor’s contract for certification must extend for the duration of a construction project, must incorporate a prescribed scope of services, and may not be terminated early except in certain prescribed circumstances.	We are concerned this proposal could impede the freedom to contract and also put undue pressure on a building surveyor to issue a certificate of construction compliance. We propose modifications to the <i>Building Act</i> that would not interfere with the contract.
13 – Amend the <i>Building Act</i> to require that a building surveyor must be paid for work undertaken, even if they are unable to issue a certificate of compliance because the building design or construction does not comply with the applicable standards.	We are concerned how the proposal will be enforced and if it provides any relief to the building surveyor not already available under contract.
Building documentation requirements	
14 – Amend the Building Regulations to require that supporting documents specified in a certificate of compliance must demonstrate how the building work will comply with each applicable building standard.	We suggest modifications to this proposal to ensure there is sufficient flexibility in the regulations to address actual practice and the fact that many practitioners are involved.
15 – Amend the Building Regulations to require that all supporting documents referenced in a certificate of compliance must state the author’s name, and registration number if applicable.	This proposal seems to misunderstand that consultants work under company logo and insurance. We suggest modifications to this proposal.
16 – Amend the Building Regulations to prescribe the information that must be included in documents supporting a permit application.	We support improved documentation but request further consultation with industry on this aspect. This proposal combined with Proposal 24 could have the most significant impact in terms of cultural and behavioural change – it is vital that it is well considered and delivered correctly.
17 – Amend the Building Regulations to prescribe that when completing the certificate of design compliance (CDC), building surveyors must include the revision number or date of each supporting document.	We support this proposal.

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18 – Amend the Building Regulations to prescribe that any occupancy or maintenance conditions that must be met, to ensure compliance over the life of a building, are stated on the certificates of design and construction compliance, and the occupancy permit.	We support this proposal but question if it is necessary as the policy outcome will be achieved in the building manual (Proposal 28).
19 – Amend the <i>Building Act</i> to require that a builder’s notice of completion is not required for building work that requires an occupancy permit.	We support this proposal.
Performance solutions	
20 – Amend building legislation to prescribe documentation requirements for performance solutions.	We support this proposal where it is consistent with the NCC amendment approved in May 2020 by the Australian Building Codes Board to include a new provision for the process to document performance solutions.
Retrospective building approval	
21 – Amend the <i>Building Act</i> to prescribe a process for retrospective approval of performance solutions.	We support this proposal and note that a peer review could help ensure retrospective performance solutions are being applied appropriately and not to avoid compliance.
22 – Require certain types of unauthorised or non-compliant work to be reported to permit authorities and Building and Energy.	We support this proposal to increase government oversight but suggest that reports can be made by any practitioner. Further the obligation for building surveyors could be included in the proposed Code of Practice (Proposal 11).
23 – Amend the <i>Building Act</i> to require a certificate of construction compliance to certify that the building meets applicable standards.	We support this proposal.
Variations during construction	
24 – Amend the <i>Building Act</i> to provide a process to manage variations to the approved design during construction.	We support improved management of variations during construction but request further consultation with industry on this aspect. This proposal combined with Proposal 16 could have the most significant impact in terms of cultural and behavioural change – it is vital that it is well considered and delivered correctly.

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Third party review of design work	
25 – Amend the <i>Building Act</i> to require independent, third-party reviews for high-risk design elements.	We support the proposal but are concerned to ensure that the additional risk mitigation steps of peer review of design elements are not undermined by changes made to the design during construction. Builders need to be educated on the risk of variations made during construction and must notify all variations during construction to building surveyors (as per Proposal 24).
Mandatory inspections	
26 – Amend the <i>Building Act</i> and Regulations to mandate inspections for all class 2-9 buildings, via either: <ul style="list-style-type: none"> • Option A: The permit authority manages all inspections and issues the CCC. • Option B: Inspections are done by the design engineers and building surveyor for the project. Details of all inspections must be attached to the CCC and accompany the occupancy permit application. 	We support Option B. For success, it is vital that inspectors have the right skills, knowledge and experience. Further, this proposal depends on successful implementation of Proposals 24 and 25.
27 – Amend the Building Regulations to state that required inspections, as identified on the building permit, are 'notifiable stages' at which the builder may face disciplinary action if unreasonable and/or significant areas of non-compliance are found.	We support this proposal.
Building manual for building documentation and operational information	
28 – Amend the <i>Building Act</i> to provide for digital building manuals for all buildings.	We support this proposal.

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REGULATORS' MONITORING AND ENFORCEMENT POWERS

Proposals 1-5 relate to regulators' monitoring and enforcement powers.

In summary, Consult Australia's comments are:

- > Proposal 1 – We have no objection to this proposal.
- > Proposal 2 – We have no objection to this proposal.
- > Proposal 3 – We are concerned about the lack of detail on this proposal. If the WA Building Commissioner is given these powers, there must be consultation on any draft requirements. Further, national consistency is a key consideration, it is recommended that the WA Building Commissioner regularly share insights and learnings with counterparts throughout other states and territories.
- > Proposal 4 – We have no objection to this proposal.
- > Proposal 5 – We have no objection to this proposal.

Proposal 1: Amend the *Code of Practice: Safe Design of Buildings and Structures* to address non-conforming and non-compliant building products.

The CRIS states this proposal would assign responsibility for compliance across the whole construction industry supply chain. The relevant Code is administered by WorkSafe and would be amended to:

- require that a building material must comply, in that it must:
 - be safe;
 - comply with the applicable building standards; and
 - perform to the standard it is represented to perform; and
- assign a duty of care to suppliers and importers of building materials to assume some responsibility for product compliance.

We have no objection to this proposal.

Proposal 2: Amend the Building Regulations to mandate the *Code of Practice: Safe Design of Buildings and Structures* as an applicable standard for all classes of building.

The CRIS states that this proposal would empower regulators to enforce compliance with the relevant Code. The Building Regulations, part 4 division 1, sets out the applicable building standards for all types of construction. Compliance with the Code could be mandated for class 2-9 buildings.

We have no objection to this proposal.

Proposal 3: Amend the *Building Services (Complaint Resolution and Administration) Act 2011* to empower the Building Commissioner to prescribe requirements on technical matters

The CRIS states that this proposal would allow the Building Commissioner to prescribe requirements on '...matters relating to building industry policy, building services and other matters that relate to the functions of the Building Commissioner.'

It is unclear if these additional matters will be limited to application of the National Construction Code (NCC) or could be broader. It is also unclear if the Building Commissioner will be required to consult on proposed requirements.

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Throughout the BCR much was made about consistent rules and enforcement. We want to ensure that any technical requirements prescribed by the WA Building Commissioner are consistent with requirements in other states and territories or is otherwise focussed on matters particular to the WA environment. As per our recommendations in response to the BCR we suggest that regulators should follow a nationally consistent set of guidelines on monitoring and enforcement to ensure consistency of application, and regularly share learnings and insights.

Proposal 4: Amend the *Building Act* and the *BSCRA Act* to empower the Building Commissioner’s inspectors to enter and inspect any building site.

The CRIS states that this proposal would reinstate the entry powers that were provided by the *Builders’ Registration Act 1939*, which empowered the Building Services Board to enter any building site to inspect building work and made it an offence to impede or obstruct an inspector.

We have no objection to this proposal.

Proposal 5: Amend to definition of dangerous situation in the *BSCRA Act* to empower the Building Commissioner to remedy any situation where there is a high risk to people, property or the environment from the carrying out of a building service.

The CRIS states that this proposal removed the word ‘imminent’ from the relevant provision to broaden the Building Commissioner’s enforcement powers so not to be constrained to imminent dangers.

We have no objection to this proposal.

FIRE AUTHORITY CONSULTATION

Proposals 6-9 relate to fire authority consultation.

In summary, Consult Australia’s comments are:

- > Proposal 6 – We recommend this proposal be reconsidered given the May 2020 approval by the Australian Building Codes Board to the NCC amendment to include a new provision for the process to document performance solutions.
- > Proposal 7 – We support the timing flexibility of the proposal but suggest additional transparency mechanisms and framework for responses.
- > Proposal 8 – We do not support this proposal, instead there should be framework for advice including agreed timelines.
- > Proposal 9 – We support this proposal to improve transparency, which would be assisted by also having a framework for advice.

Proposal 6: Amend the Building Regulations to require that documentation of fire safety performance solutions must include a fire engineering brief and fire engineering report, in accordance with the International Fire Engineering Guidelines’ process.

The CRIS states that fire engineering performance solutions are not always documented clearly, making it difficult to assess compliance. To address this, the proposal is to require that performance solutions be documented in accordance with the International Fire Engineering Guidelines (IFEG). The IFEG process requires detailed assessment and documentation of performance solutions.

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Performance solutions are an important methodology, allowing innovation where a problem has no clear standard solution. Consult Australia supported the BCR recommendation for a national best practice guideline for documenting performance solutions, provided it did not include prescriptive requirements that could impinge on innovation. We note the [Australian Building Codes Board \(ABCB\) announcement of 22 May 2020](#) that the NCC will be amended to include a new provision for the process to document performance solutions. This new provision comes into effect until 1 July 2021.

Therefore, it is recommended that this proposal be reviewed in light of the NCC amendment. Consult Australia supports moves to improve documentation but does not support prescriptive requirements that could impinge on innovation.

Proposal 7: Amend the Building Regulations to provide that the FES Commissioner may issue a certificate at any time confirming that a building design meets operational requirements.

The CRIS states that this proposal is modelled on a similar provision in SA and would allow the FES Commissioner to issue a certificate earlier in the design phase rather than at the end of the design process.

We support the flexibility on timing anticipated by the proposal which should further assist collaboration between the fire authorities and the parties involved in design and construction.

However, it should be made clear that fire authorities are not design experts and have no qualifications in this regard. It would not be appropriate for a fire authority to have final sign-off of the design, and they should not be considered the default approval body. There should be a clear explanation that operational requirements are different to design performance requirements.

For example, it should be a requirement that the fire authority set out in writing clear reasoning for objecting to the design. For example:

- Does the design contravene fire safety policy, if so please provide details?
- Does the design fail to meet operational requirements, if so please provide details?

With these details, the parties can work together to resolve issues to ensure the design meets FED operational requirements.

Further, there should be timeframes imposed on fire authority feedback to ensure that works can progress. It is noted that additional resourcing of DFES might be needed to ensure timeliness of advice.

Proposal 8: Amend the Building Regulations to clarify that the FES Commissioner's written advice must be considered and responded to no matter when it is provided.

The CRIS states that this proposal is to clarify the requirement on building surveyors to consider and respond to the FES Commissioner's advice, no matter when the advice is provided.

We do not support this proposal. While we understand the reasoning behind this proposal, there is a real risk that without a framework for fire authority feedback, advice might not be received in a timely manner. A preferable approach would be to ensure there is a framework, agreed timelines and potentially additional resourcing.

Proposal 9: Amend the Building Regulations to clarify the information that must be included when responding to the FES Commissioner's advice.

The CRIS states that this proposal would ensure that the building surveyor notify the FES Commissioner where the advice is not incorporated into the design and be clear on the reasons.

As stated above, fire authorities are not design experts and have no qualifications in this regard. Therefore, there will be cases where the fire authority's advice should not be incorporated into the design. To ensure transparency, we support the building surveyor making that clear. This would be further assisted by having a framework for advice at the outset (as discussed above).

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BUILDING SURVEYORS' CONFLICTS OF INTEREST

Proposals 10-11 relate to building surveyors' conflicts of interest.

In summary, Consult Australia's comments are:

- > Proposal 10 – We suggest this proposal be reconsidered given the consolidation of the market occurring in response to the hardening of the insurance market and the economic impacts of COVID-19.
- > Proposal 11 – We support Codes of Practice over changes to legislation but would seek industry consultation and engagement on development of the final Codes.

Proposal 10: Amend the definition of 'independent building surveyor' in the *Building Act* to require that a building surveyor must be independent of anyone whose work they certify.

The CRIS states that this proposal will align WA *Building Act* requirements in respect of 'independent building surveyor' with those in Qld, Vic and Tas. It will prevent a building surveyor from certifying their own work or design work produced by their employer.

The CRIS acknowledges that this change would prevent firms that offer full design and certification services from being contracted to do the design on a project as well as certify that project. This will likely increase design and/or certification costs because of the need to contract various consultant businesses. While Consult Australia supports broader market participation however, we are concerned that there is insufficient capacity in the market to deliver this complete separation of roles. Further, the separation might also be impractical noting the number of multi-national consultancy firms.

It is important that there is acknowledgement of the hardening in the insurance market, particularly in relation to professional indemnity insurance that provide cover to providers of professional services. This hardening has resulted in reduced capacity due to market consolidation, significantly increased premiums, and a reduction in policy coverage with carve-outs for risks associated with building work. Where the insurance policy does not provide cover, businesses and practitioners are exposed. While larger businesses can weather the changes better than smaller operators, the hardening of the insurance market affects all business.

By way of example, in the week of sending in this submission we were contacted by one of our SME members gravely concerned about the affordability of their professional indemnity insurance. Their newly quoted premium for 2020/21 has gone from \$30,000 for a \$2million policy in the previous year, to >\$100,000 for a \$1million policy. This is not an isolated case.

The building and construction sector is now further impacted by COVID-19. The *Consult Australia COVID-19 Pulse Survey* (undertaken and published in early June 2020) indicates that two-thirds of our member businesses are experiencing a reduction in work from COVID-19. The building sector is a significant area of concern with 64% of businesses reporting a reduction in commercial buildings. While the east coast states and territories are the most impacted, 50% of our members in WA have reported a reduction in work. 56% of members anticipate that competition across the industry will become tighter over the next six months. This impact cannot be ignored when exploring reforms that can impact the market.

It is recommended that this proposal be reconsidered. While the economy recovers from COVID-19 the government could explore with industry practical internal arrangements businesses could put in place to alleviate risks. For example, the building surveyor may be employed by a consulting business that provides design services, but that business is not involved in the design for a project in which the building surveyor is engaged. The same should follow if a building surveyor is employed by a business that provides construction services or development services (including related entities). Potentially best practice guidelines could be included in the Code of Practices (Proposal 11) for building surveyors.

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Proposal 11: Introduce a mandatory Code of Practice for registered building surveyors in WA.

The CRIS states that this proposal would utilise existing powers of the WA Building Commissioner and the Code could be modelled on the relevant Tasmanian code.

Consult Australia supports a non-legislative approach in the first instance to lift standards. However, we recommend further industry consultation to finalise the Code of Practice. Industry and government could develop a strong co-regulatory approach on these matters to ensure buy-in from all parties.

SUPERVISORY POWERS FOR BUILDING SURVEYORS

Proposals 12-13 relate to supervisory powers for building surveyors.

In summary, Consult Australia's comments are:

- > Proposal 12 – We are concerned this proposal could impede the freedom to contract and also put undue pressure on a building surveyor to issue a certificate of construction compliance. We propose modifications to the *Building Act* that would not interfere with the contract combined with obligations in the proposed Codes of Practice (Proposal 11).
- > Proposal 13 – We are concerned how the proposal will be enforced and if it provides any relief to the building surveyor not already available under contract.

Proposal 12: Amend the *Building Act* to require that a building surveying contractor's contract must extend for the duration of a construction project, must incorporate a prescribed scope of services, and may not be terminated early except in certain prescribed circumstances.

The CRIS acknowledges that building surveyors can come under pressure from the builder. There are instances where the building surveyor has not agreed to certify the building due to quality/compliance issues and their contract has been terminated early as a result. To address this issue, the proposal is that building surveyor's contracts will not be able to be terminated until a certificate of construction compliance is issued, unless:

- both parties to the contract mutually agree; or
- a court orders that a new building surveyor be appointed; or
- the building surveyor is unable to fulfil their contractual obligations due to:
 - no longer holding the required registration,
 - declaring bankruptcy or insolvency, or
 - death.

Consult Australia agrees with the policy intent of giving building surveyors security to enforce a higher level of compliance. However, we are concerned this proposal will not deliver that outcome, but instead lead to additional undue pressure on the building surveyor and increase disputes. For example, if the building surveyor reasonably believes the building is not fit to be certified, but the builder disagrees and will not mutually agree to terminate the contract, the building surveyor will be forced to seek a court order to end the contract. The Australian construction industry already has a high level of legal disputation, this proposal could increase that. Given the time, cost, and stress that is involved in seeking a court order, there is a risk that this proposal will have the unintended consequence of deterring building surveyors from legitimately refusing to certify.

The proposal also fails to address the ongoing behaviour of builders who would seek to exert undue pressure on building surveyors to certify. This proposal could be improved if the parties could approach the WA Building Commissioner for a determination in the first instance, with the right to appeal the determination through the Courts as a last resort. The WA Building Commission should also have oversight of changes to building surveyors on projects in progress to see if there is a trend with particular builders.

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We are concerned about legislative intervention in contracts – especially where it could mean that building surveyors could be prevented from having a no cause termination term in their contracts. The CRIS notes that this proposal would require review of the standard form contracts for engaging building surveyors.

The CRIS states that this proposal would align WA legislation more closely with legislative provisions in ACT, NSW, NT, SA, Tas and Vic. Having considered the relevant provisions in these other jurisdictions, we recommend modifications to this proposal that will not interfere with the building surveyor's contract. The *Building Act* could be amended to:

- make clear that only one building surveyor can be engaged at any time;
- allow the engaged building surveyor to refer work to an independent building surveyor, with this change to be notified to the WA Building Commissioner;
- ensure that a builder cannot remove the engaged building surveyor without providing reasons to, and getting consent from, the WA Building Commissioner;
- allow a building surveyor to leave a project without cause if three years has been elapsed, with this change being notified to the WA Building Commissioner;
- allow the WA Building Commissioner to receive anonymous complaints about builders allegedly exerting undue pressure on building surveyors, and the WA Building Commissioner should actively monitor that builder.

In addition, the scope of services listed in the CRIS could be included in the proposed Code of Practice for building surveyors (see Proposal 11) as the minimum expected to be undertaken. This would achieve transparency of government expectations for industry (building surveyors could refer builders to the Code obligations when challenged) without imposing unnecessary burdens via legislation or interfering in contractual matters.

Proposal 13: Amend the *Building Act* to require that a building surveyor must be paid for work undertaken, even if they are unable to issue a certificate of compliance because the building design or construction does not comply with the applicable standards.

The CRIS proposes that the *Building Act* should require that building surveyors be paid for the services delivered, even where they do not issue the relevant certification. The work of building surveyors is broader than just issuing the certification, as indicated under Proposal 12 of the CRIS, the WA Government expects the building surveyor's scope of services to include:

- assessing the building design for compliance;
- ensuring documentation clearly demonstrates how the design complies with each applicable standard;
- identifying required inspections;
- submitting documentation to the FES Commissioner, if required, and respond as required to any advice received;
- producing an NCC assessment report detailing the assessment and decision-making process, particularly for any performance solution;
- issuing a certificate of design compliance;
- ensuring required inspections are undertaken, and documented, by appropriately qualified people;
- assessing and certify any variations to the design during the construction process;
- undertaking a final inspection;
- collecting all inspection documentation; and
- issuing a certificate of construction compliance.

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Consult Australia supports the building surveyor being paid for work completed. However, we question what benefits this amendment to the Building Code will have for building surveyors. For example, will they be able to complain to the government where payment is being withheld? What actions will be open to the building surveyor not already available when enforcing the contract? We suggest that more detail on this proposal be considered.

BUILDING DOCUMENTATION REQUIREMENTS

Proposals 14-19 relate to building documentation requirements.

In summary, Consult Australia's comments are:

- > Proposal 14 – We suggest modifications to this proposal to ensure there is sufficient flexibility in the regulations to address actual practice and the fact that many practitioners are involved.
- > Proposal 15 – This proposal seems to misunderstand that consultants work under company logo and company-wide insurance cover. We suggest modifications to this proposal.
- > Proposal 16 – We support improved documentation but request further consultation with industry on this aspect. This proposal combined with Proposal 24 could have the most significant impact in terms of cultural and behavioural change – it is vital that it is well considered and delivered correctly.
- > Proposal 17 – We support this proposal.
- > Proposal 18 – We support this proposal but question if it is necessary as the policy outcome will be achieved in the building manual (Proposal 28).
- > Proposal 19 – We support this proposal.

Proposal 14: Amend the Building Regulations to require that supporting documents specified in a certificate of compliance must demonstrate how the building work will comply with each applicable building standard.

The CRIS states that this proposal, along with the following five proposals seek to improve documentation standards.

The designer is only one practitioner of many involved in the delivery of a building and Consult Australia supports improved documentation, particularly where it demonstrates that the final as-built building accords with designs and the NCC. At early design stages, not all supporting documents will be able to demonstrate how the (yet to be done) building work will comply with each building standard. Later in the process it is likely more detail will be available for this purpose.

Therefore, we suggest that the regulations require the practitioner to 'take all reasonable steps' to demonstrate how the building work will comply with the relevant building standards, rather than a strict liability.

Proposal 15: Amend the Building Regulations to require that all supporting documents referenced in a certificate of compliance must state the author's name, and registration number if applicable.

The CRIS states that this proposal is modelled on a similar clause in the Qld *Building Act*. The process in Qld is overly onerous and we would not suggest replicating it.

This proposal misunderstands that consultants work under company logo and company-wide insurance. Further, many individuals work on designs and consultancy reports. We support improved documentation and note the recent audit of bushfire safety compliance cited in the CRIS. We are of the view that company details on the designs is sufficient and could be mandated.

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Proposal 16: Amend the Building Regulations to prescribe the information that must be included in documents supporting a permit application.

The CRIS states that this proposal is modelled on the approach in Singapore and that most Australian jurisdictions also prescribe minimum building documentation requirements.

We support improved documentation but request further consultation with industry on this aspect. This proposal combined with Proposal 24 could lead to the most significant changes in culture and behaviour if well considered and delivered correctly.

It needs to be understood that currently, commercial pressures in the building sector mean that the documentation provided to support a permit application are essentially shell documents. There is little to no incentive for developers to invest time on up-front design work. The majority of building work is delivered through design and construct (D&C) contracts where the developer/contractor takes the lead on all matters, including design, which is subcontracted to a consulting business. Current practice is that the set of permits needs significant work before they are ready as 'issued for construction'. There is a risk that these extensive changes could impact permit issues.

To achieve real improvements in the documentation requirements, cultural and behavioural changes are necessary. This needs to go hand-in-hand with other reform proposals particularly Proposal 24 (variations during construction). The true value of consultants needs to be acknowledged, and reforms need to ensure that consultants are involved as an integral party all the way through a building project - from permit, through construction to completion. When it comes to the permit phase, there is a potential to require designs to be 85-90% complete with the application. While this would add time to the overall project timeline it could alleviate many of the concerns with variations later in the process. This would also incentivise developers to spend the time on design earlier.

The set of documentation needed for permit will need to be settled via a collaborative approach with all relevant industry participants – as architects, building surveyors, and engineers will all have ideas on what documents are required. We recommend that WA take the time to undertake such a process.

Proposal 17: Amend the Building Regulations to prescribe that when completing the CDC, building surveyors must include the revision number or date of the supporting documents.

The CRIS states that this proposal is to deal with the fact that building documentation is often amended multiple times before and after a building permit is issued.

We support this proposal.

Proposal 18: Amend the Building Regulations to prescribe that any occupancy or maintenance conditions that must be met, to ensure compliance over the life of a building, are stated on the certificates of design and construction compliance, and the occupancy permit.

The CRIS states that this proposal is to help ensure a building doesn't become non-compliant during use. Matters suggested in the CRIS to be covered as maintenance conditions are:

- the maximum number of occupants permitted;
- any other occupancy conditions that must be met;
- any maintenance conditions for required safety features, such as active fire safety systems; and
- any other maintenance conditions that must be met to ensure compliance over the life of the building, including those set out in the prescribed information required for any performance solutions (see Proposal 20).

We support reforms that provide more information to the owner and occupants to ensure that lack of maintenance does not lead to non-compliant buildings. However, we wonder if this proposal is necessary noting Proposal 28 (below) for each building to have a Building Manual, which would include maintenance information. It seems that the policy outcome is achieved by the Building Manual.

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Proposal 19: Amend the *Building Act* to require that a builder's notice of completion is not required for building work that requires an occupancy permit.

The CRIS states that this proposal would reduce administrative red tape.

We support the proposal.

PERFORMANCE SOLUTIONS

Proposal 20 relates to performance solutions.

In summary, Consult Australia's comments are:

- > Proposal 20 – We support this proposal where it is consistent with the NCC amendment approved in May 2020 by the Australian Building Codes Board to include a new provision for the process to document performance solutions.

Proposal 20: Amend building legislation to prescribe documentation requirements for performance solutions.

The CRIS states that this proposal is modelled on requirements in Qld and Vic.

Performance solutions are an important methodology, allowing innovation where a problem has no clear standard solution. Consult Australia supported the BCR recommendation for a national best practice guideline for documenting performance solutions, provided it did not include prescriptive requirements that could impinge on innovation. We note the [Australian Building Codes Board \(ABCB\) announcement of 22 May 2020](#) that the NCC will be amended to include a new provision for the process to document performance solutions. This new provision comes into effect until 1 July 2021.

We support this proposal so long as the amendment to the WA building legislation is consistent with the NCC amendment. Consult Australia supports moves to improve documentation but does not support prescriptive requirements that could impinge on innovation. National consistency is of particular importance.

RETROSPECTIVE BUILDING APPROVAL

Proposals 21-23 relate to retrospective building approval.

In summary, Consult Australia's comments are:

- > Proposal 21 – We support this proposal and note that a peer review could help ensure retrospective performance solutions are being applied appropriately and not to avoid compliance.
- > Proposal 22 – We support this proposal to increase government oversight but suggest that reports be made by any practitioner. Further, the obligation for building surveyors could be included in the proposed Code of Practice (Proposal 11).
- > Proposal 23 – We support the proposal.

Proposal 21: Amend the *Building Act* to prescribe a process for retrospective approval of performance solutions.

The CRIS states that this approach would align WA's legislation more closely with requirements in Qld and Vic. It would also provide a more rigorous framework to assess and approve performance solutions for completed buildings.

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Performance solutions are an important methodology allowing innovation to be applied to issues where a there is no clear standard solution. We are concerned that retrospective agreement of a performance solution is not used to avoid compliance. It is noted that a peer review could help ensure performance solutions are being applied appropriately.

Proposal 22: Require certain types of unauthorised or non-compliant work to be reported to permit authorities and Building and Energy.

The CRIS states that building surveyors would be required to report to permit authorities on certain types of high-risk, non-compliant building work. Permit authorities would then pass the information on to Building and Energy. This data would enable both permit authorities and Building and Energy to target their education and enforcement resources to greatest effect.

We support the increase in government oversight but suggest that the reporting ability be broadened out to all practitioners who may observe potentially risky matters. For building surveyors, the ability to notify permit authorities could be included in the Code of Practice (Proposal 11).

Proposal 23: Amend the *Building Act* to require a certificate of construction compliance to certify that the building meets applicable standards.

The CRIS states that this proposal is to clarify the intention of the *Building Act* so that a certificate can be issued to a building constructed in accordance with non-compliant plans. The amendment would make clear that the construction meets the applicable standards.

Consult Australia's submission to the BCR made the point that compliant designs do not guarantee a compliant building as variations can occur without designer input during construction. We support a mechanism that:

- ensures designs are compliant;
- buildings are constructed in accordance with those designs; and
- the resultant building is compliant.

We support the proposal.

VARIATIONS DURING CONSTRUCTION

Proposal 24 relates to variations during construction.

In summary, Consult Australia's comments are:

- > Proposal 24 – We support improved management of variations during construction but request further consultation with industry on this aspect. This proposal combined with Proposal 16 could have the most significant impact in terms of cultural and behavioural change – it is vital that it is well considered and delivered correctly.

Proposal 24: Amend the *Building Act* to provide a process to manage variations to the approved design during construction.

The CRIS states that this proposal will provide a more rigorous process to manage variations during construction, thereby reducing instances of non-compliance in completed buildings. Builders will be required to notify the building surveyor of any work that varies from the building permit. The building surveyor will determine if the change affects the way the building complies with the NCC. Further documentation will be required where the change affects compliance. The proposal also includes a cost penalty for builders who do the work without notifying the building surveyor.

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Consult Australia's submission to the BCR stressed the issue of variations, we therefore support a mechanism to deal with variations but request further consultation with industry on this aspect. This proposal combined with Proposal 16 could lead to the most significant changes in culture and behaviour if well considered and delivered correctly.

The approach suggested in the CRIS prioritises communication between the builder and the building surveyor which is strongly supported. As we identified in our submission to the BCR, builders make changes on-site without the involvement of a designer, which are then signed off by a Construction Manager who may not have the relevant knowledge of the NCC to determine how the change impacts compliance. This mechanism would be enhanced with a requirement that builders notify any variation to the building surveyor, not just changes that the builder considers are major.

However, the CRIS proposal fails to address the commercial issues that often lead to variations being made on-site without involvement of the consultant. The majority of building work is delivered through D&C contracts where the developer/contractor takes the lead on all matters, including design. There are generally three different ways a consultant can be engaged:

1. In a full contract administrator role, with regular site attendance.
2. As a contract adviser, with limited rights and access.
3. On an ad-hoc hourly basis, where site visits could be infrequent, say monthly.

Of these three, the first option obviously costs the most as the consultant is on site regularly with a dedicated role and responsibilities, but it also delivers the best results because the consultant can advise of variations before and as they occur. In practice the third option is the most common, because it is less costly, but it is the most dangerous as variations may not be seen by the consultant on their infrequent visits.

To achieve real improvements to the construction-to-design outcomes, cultural and behavioural changes are necessary. This needs to go hand-in-hand with other reform proposals particularly Proposal 16 which values the consultant's involvement at the permit stage. As explored above, if designs were more complete at permit stage, it is likely less variations would be needed at construction. Further, at the construction phase, developers need to see the value of regular site attendance of consultants and having construction managers with an understanding of NCC. While this would add cost to the overall project it could alleviate many of the concerns with non-designer variations.

To finalise this approach, we suggest a collaborative approach with all relevant industry participants. We recommend that WA take the time to undertake such a process as it will be extremely worthwhile.

THIRD PARTY REVIEW OF DESIGN WORK

Proposal 25 relates to third party review of design work.

In summary, Consult Australia's comments are:

- > Proposal 25 – We support the proposal but are concerned to ensure that the additional risk mitigation steps of peer review of design elements are not undermined by changes made to the design during construction. Builders need to be educated on the risk of variations made during construction and must notify all variations during construction to building surveyors (as per Proposal 24).

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Proposal 25: Amend the *Building Act* to require independent, third-party reviews for high-risk design elements.

The CRIS states that legislation would provide two means to identify the review requirements for a building project:

1. A prescribed approach, whereby one-size-fits-all review requirements are prescribed according to risk triggers (as per Table 2 in the CRIS (pages 51-52); or
2. A risk-based approach, whereby project-specific review requirements are identified by a full, project-specific risk analysis.

The proposal would require the reviewer to be independent to the project. Independence would be defined in similar terms to that of an independent building surveyor, as per Proposal 10. The CRIS notes that the ABCB is working to define 'building complexity', to create a head of power in the NCC under which to introduce increased supervision and other governance requirements to manage high-risk, complex buildings.

Consult Australia notes the May 2020 announcement by ABCB that it did not endorse the proposed introduction of a 'building complexity' definition into the NCC. Further consultation is being undertaken on an [Exposure Draft of the term, open until 1 November 2020](#).

Comparing the ABCB's Exposure Draft and the framework for third-party reviews in the CRIS, it seems that the CRIS provides more certainty.

Proposal 25 ensures increased oversight of the design side of construction work. The key to its success in delivering increased building compliance will be ensuring that after the third-party review of high-risk design elements have been completed, no variations are made during construction that undermine that review. Therefore, this proposal must go hand-in-hand with Proposal 24. We recommend that builders are educated on the high-risk design elements so that they can be certain that any and all variations during construction relevant to those elements are notified to the building surveyor (as per Proposal 24).

MANDATORY INSPECTIONS

Proposals 26-27 relate to mandatory inspections.

In summary, Consult Australia's comments are:

- > Proposal 26 – We support Option B. For success, it is vital that inspectors have the right skills, knowledge and experience. Further, this proposal depends on successful implementation of Proposals 24 and 25.
- > Proposal 27 – We support this proposal.

Proposal 26: Amend the *Building Act* and Regulations to mandate inspections for all class 2-9 buildings, via either Option A or Option B.

The CRIS states that this proposal is intended to address the fact that a single inspection by a building surveyor at the end of construction is not enough to determine if a building complies with the required standards. It is recommended that appropriately qualified people should inspect the building at various points throughout the construction process, when the footings, structure and other critical elements are still exposed. The CRIS sets out two different options to implement inspections for commercial building construction in WA. The table below is as per Table 8 in the CRIS and sets out a comparison of the inspection elements under Options A and B.

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	Option A Inspections by permit authorities	Option B Inspections by private sector
Number and timing of inspections	Either prescribed or risk-based inspections.	Either prescribed or risk-based inspections.
What to inspect	Prescribed stages for site work only. Guidelines to identify project-specific inspections may address inspections of off-site prefabrication.	Prescribed stages for site work only. Guidelines to identify project-specific inspections may address inspections of off-site prefabrication.
Who should identify inspections	Inspections either prescribed in legislation or identified by risk analysis by the certifying building surveyor.	Inspections either prescribed in legislation or identified by risk analysis by the certifying building surveyor.
Who will do inspection work	Permit authority, likely via private contractors.	Project design engineers and building surveyor.
What happens if non-compliance is identified?	Inspector notifies permit authority, which issues and enforces a rectification order if required.	Building surveyor issues a notice of rectification, and states on the CCC if notice(s) have been complied with or notifies permit authority if notice(s) is not complied with.
How should the cost be set	Legislation to prescribe cost.	Market forces.

Consult Australia in response to the BCR, supported an appropriate system of mandatory inspections to support and review the actions of the building surveyor. We maintain our concern that the effectiveness of inspections is synonymous with the skills, expertise and knowledge of the inspector. As indicated in the CRIS not all current building surveyors will have the right skills, expertise and knowledge to inspect all the relevant high-risk design elements. However, there will be design practitioners who do have that experience.

Consult Australia sees the advantages and disadvantages of both options. On balance, we support Option B. The disadvantages specific to Option A weigh heavily against this option. For example, increased administrative burden for permit authorities to manage all inspections will be very difficult to achieve in practice. We believe the concerns with Option B are managed by the use of the CCC to ensure compliance with notices. We agree with the CRIS that this option will create a level field for engineers to quote for undertaking design and inspection work for a project. It will also prevent unscrupulous people from constructing a building and then shopping around for an inspector willing to certify it as constructed. Key to the success of this proposal will be ensuring the inspectors are appropriately qualified and that Proposals 24 and 25 function well.

[Proposal 27: Amend the Building Regulations to state that required inspections, as identified on the building permit, are 'notifiable stages' at which the builder may face disciplinary action if unreasonable and/or significant areas of non-compliance are found.](#)

The CRIS states that this proposal is intended to ensure that builders are more accountable to ensure building work is compliant.

We support this proposal.

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BUILDING MANUAL FOR BUILDING DOCUMENTATION AND OPERATIONAL INFORMATION

Proposal 28 relates to a building manual for building documentation and operational information.

In summary, Consult Australia's comments are:

> Proposal 28 – We support this proposal.

*Proposal 28: Amend the *Building Act* to provide for digital building manuals for all buildings.*

The CRIS demonstrated that many of the reform proposals support Proposal 28, as it is necessary to ensure that correct documentation is available to ensure that a useful building manual can be created.

Consult Australia strongly agrees that a comprehensive building manual should be available to the building owner and subsequent owner. This should be held digitally via a secure service to which access is granted on proof of ownership. This will ensure a better system of maintenance. The inclusion of maintenance reports and any subsequent changes to the building over time will ensure that information is accurate and up to date.

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CONTACT

We would welcome the opportunity to further discuss the issues raised in this submission. To do so, please contact:

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