Submission No 86

INQUIRY INTO REGULATION OF BUILDING STANDARDS, BUILDING QUALITY AND BUILDING DISPUTES

Organisation: Waverley, Woollahra & Randwick Councils

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Inquiry into the Regulation of Building Standards, Building Quality and Building Disputes

26 July 2019

Randwick City Council
a sense of community

WAVERLEY
COUNCIL

Thank you for providing the opportunity to comment on these issues which are of significant importance to the community, consumers and local government.

This is a joint submission, prepared by senior Council Building Officers, made on behalf of the following local Councils:

- Woollahra Municipal Council
- Randwick City Council
- Waverley Council

Introduction

The events and incidents which have occurred in Australia and overseas in recent years have brought the issues outlined in the Terms of Reference for this Inquiry to the forefront and they have identified problems and flaws in all aspects of the construction process. These problems go way beyond the building certification process in NSW and extend from the design, manufacturing and importation of building products; the training and competence of all building practitioners; the provisions of the National Construction Code – Building Code of Australia (NCC-BCA); State planning and building legislation; accreditation/licensing of practitioners; design and construction of buildings; building certification and compliance; consumer protection and insurance.

Whilst building certifiers play an important role in this process and the provisions relating to building certification are in need of improvement, it would be remiss to focus on only one aspect of the broader and complex problems that we are faced with.

As you are aware private-sector certification of buildings was introduced in 1998 and instead of simplifying the planning approval and building certification process, it has undoubtedly made it more complex, more expensive, more litigious and less credible and reliable.

The legislative provisions relating to building certification, accreditation, compliance and insurance are in need of significant reform if it is intended to gain community confidence and consumer protection.

As a result of significant concerns about the quality of building construction, the NSW Parliament, Joint Select Committee produced a report into the Quality of Buildings in 2002 (the "Campbell Report"). Whilst a number of reforms were introduced in the years following this Inquiry, many of the recommendations in this report are still applicable today and the issues have not been adequately addressed in seventeen (17) years.

In 2015, the NSW Government commissioned Mr Michael Lambert, to undertake an Independent Review of the *Building Professionals Act 2005*. The Lambert review was very comprehensive and the report identified many issues and problems with the building regulation and certification regime in NSW. Sadly, only a few of the recommendations and initiatives have been implemented to date. To the detriment of the community and consumers, the vast majority of recommendations and initiatives are yet to be implemented.

Following the Grenfell Tower tragedy in 2017, the Building Ministers Forum (BMF) commissioned Professor Peter Shergold AC and Ms Bronwyn Weir to undertake an examination into the broader compliance and enforcement problems within Australia's building and construction industry. This resulted in the development of the Building Confidence Report in February 2018, which incorporated twenty four (24) recommendations aimed at improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia.

Importantly, many of the problems and recommendations in the Building Confidence Report are very similar to those identified in the 2002 Campbell Report and the 2015 Lambert Review, which highlights the fact that Government has failed to adequately address the key issues and problems with the building and construction regime and industry.

The release of the NSW Government's response to the Shergold Weir Building Confidence Report, and the Building Stronger Foundations discussion paper in 2019, indicates that the Government is now giving these issues the level of consideration that is warranted.

The following four (4) key reforms outlined by the NSW Government are reservedly supported by officers of Woollahra, Randwick and Waverley Councils:

1. Requiring building designers to declare building plans to be compliant with the NCC-BCA
2. Introduction of a Registration Scheme for building designers and builders
3. Introducing 'duty of care' provisions to help protect building owners and consumers
4. Appointing a Building Commissioner to act as a consolidated regulator in NSW.

While the above recommendations do not fully align with the recommendations of the Shergold Weir Building Confidence report they show a positive change in approach. These reforms need to be properly developed, resourced and implemented as soon as practicable, together with appropriate consultation with key stakeholders, otherwise, the likelihood of success of these initiatives will be diminished.

Terms of Reference

(a) Role of private certification in protecting building standards

There have been several key reviews undertaken in NSW considering this issue including the following;

1. Joint Select Committee on the Quality of Buildings: Report Upon the Quality of Buildings: 2002 (the ''Campbell Report'');
2. Productivity Commission Research Report, Reform of Building Regulation, November 2004;
3. Planning White Paper: April 2013
4. Maltabarow Report: 'Building Certification and Regulation - Serving a New Planning System for NSW': May 2013
5. IPART Regulation Review: Local Government Compliance and Enforcement: October 2013; and
6. Lambert Report: 'Independent Review of the Building Professionals Act 2005': October 2015.

In addition, at a national level, Professor Peter Shergold and Ms Bronwyn Weir completed their 'Building Confidence Report' in February 2018, which has now been responded to the State Government's discussion paper on 'Building Stronger Foundations' that was released in late June 2019.

The above reports highlight the complexity of the issue and the building regulatory framework in which certification occurs and many of the recommendations are yet to be implemented. Decisions in the past have been made on a selective and piecemeal basis rather than considering the outcomes of the reviews as a total package.

These reviews, together with the combustible cladding issue, also demonstrate that the problems with the building and construction legislative framework is in need of reform, in which building certification is only one of many components.

In NSW there are more than 20 certifier categories including building surveyors, engineers of various disciplines and swimming pool inspectors. While many professionals can be accredited in NSW, it is largely the private building certifiers who are targeted, however a more holistic view of the situation would reveal it is the regulatory system within which they work that has failed, not certification.

For example, compulsory registration and licensing should be applied to every building professional and building practitioner involved in the design, approval, construction, installation and inspection phases of the building process, including but not limited to;

- Architects;
- Building designers;
- Builders;
- Building surveyors;
- Carpenters;
- Electricians;
- Engineers of all disciplines;
- Fire safety professionals;
- Plumbers;
- Project managers; and
- Site managers.

Registration and licensing should;

1. Be accompanied by compulsory insurance;
2. Be subject to routine auditing by the State regulator – possibly a future Building Commission; and
3. Require ongoing training and development to ensure all parties in the building and construction industry maintain an acceptable level of knowledge, especially in such an ever changing environment.

Without appropriate checks and balances and without all professionals and practitioners taking responsibility for their work and being held accountable, the building regulatory system will continue to fail and consumers will continue to lose out.

It can further be argued that many of the issues and concerns about private certification can be attributed to the legislative provisions in the *Environmental Planning & Assessment Act 1979* (EP&A Act) and the *Environmental Planning & Assessment Regulation 2000* (EP&A Regulation), which affect the rigour and integrity of the planning and building certification processes and again illustrates a failure of the regulatory framework.

Some certifiers 'push-the boundaries' of the provisions, making the most of the provisions which are open for differing interpretations or allow for the certifier to exercise some level of discretion. These decisions can undermine the integrity of the development consent and cause the community significant distress and dissatisfaction. Case-law, has contributed to this problem in their interpretation of the current provisions.

Many builders, developers and home owners exploit these provisions and would aim to appoint known, flexible certifiers for their projects. Why on earth would they appoint Council as their certifier? Council certifiers are seen as being too rigorous and inflexible!

When things go wrong and it is subsequently identified that a complying development certificate or construction certificate is (in the Council's or communities opinion) inconsistent with the provisions or development consent, the current provisions provide no practical or cost-effective manner in which to take regulatory action or challenge the decision or actions of the building certifier.

Another flaw with the above legislation is the limited requirement for critical stage inspections, especially of the type of buildings recently highlighted in the media. It is difficult to point the figure at private certification when Clause 162A of the EP&A Regulation only requires the following mandatory inspections;

"*(5) In the case of a class 2, 3 or 4 building, the occasions on which building work must be inspected are:*

(a) prior to covering of fire protection at service penetrations to building elements that are required to resist internal fire or smoke spread, inspection of a minimum of one of each type of protection method for each type of service, on each storey of the building comprising the building work, and

(a1) prior to covering the junction of any internal fire-resisting construction bounding a sole-occupancy unit, and any other building element required to resist internal fire spread, inspection of a minimum of 30% of sole-occupancy units on each storey of the building containing sole-occupancy units, and

(b) prior to covering of waterproofing in any wet areas, for a minimum of 10% of rooms with wet areas within a building, and

(c) prior to covering any stormwater drainage connections, and

(d) after the building work has been completed and prior to any occupation certificate being issued in relation to the building.

(6) In the case of a class 5, 6, 7, 8 or 9 building, the occasions on which building work for which a principal certifying authority is first appointed on or after 1 July 2004 must be inspected are:

(a) in relation to a critical stage inspection of a class 9a and 9c building, as defined in the Building Code of Australia—prior to covering of fire protection at service penetrations to building elements that are required to resist internal fire or smoke spread, inspection of a minimum of one of each type of protection method for each type of service, on each storey of the building comprising the building work, and

(b) prior to covering any stormwater drainage connections, and

(c) after the building work has been completed and prior to any occupation certificate being issued in relation to the building.

"(7A) Inspections of building work must be made on the following occasions in addition to those required by the other provisions of this clause for the building work:

(b) in the case of a class 2, 3, 4, 5, 6, 7, 8 or 9 building, after the commencement of the excavation for, and before the placement of, the first footing."

(b) Adequacy of consumer protections for owners and purchasers of new apartments/dwellings

As stated earlier it is the Councils' position that every building professional and building practitioner involved in the design, approval, construction, installation and inspection phases of the building process must be registered or licensed and must carry appropriate insurance.

Further, home warranty insurance should be required on all developments that contain a residential component, with claims being possible from future owners for an appropriate period of time for defined defects including quality of work if the builder/developer fails to respond or has ceased to trade. This should apply to high-rise developments and mixed use developments containing residential units.

The reintroduction of home warranty insurance would remove the need for the Strata Bonds scheme and the complex nature of implementing that scheme.

Any home warranty insurance disputes should be independently adjudicated – possibly by a future Building Commission.

(c) Role of strata committees in responding to building defects discovered in common property

Individual strata owners should be permitted to make claims on the compulsory home warranty insurance recommended under part (b) above if the builder/developer fails to respond or has ceased to trade.

(d) Flammable cladding on NSW buildings

The current systems and practices put in place, or lack thereof, by the State Government are far from being the best approach or effective.

Few, if any, councils know what to do and how to prioritise developments with cladding. Councils are still receiving notifications from the cladding register without any consistent formal instructions.

There is no guidance or consistency on;

1. The circumstances under which a building can be classified as safe – with no rectification work?
2. What is considered reasonable rectification?
3. What is considered a reasonable rectification period?

To ensure;

1. all buildings are assessed to the same standard;
2. all buildings are assessed using the same priorities or risk matrix; and
3. the same reasonableness test is applied when compliance periods are set,

it is recommended that a Government supported expert panel is created, similar to the arrangements implemented in Victoria and Queensland. The Panel could act as an advisory body with all the relevant State Government protections, however they should be responsible for assessing all buildings that have been identified as having potentially hazardous material and adjudicate on any disputes relating to recommended rectification work.

While it is likely the Government would not want to alter the current legislative framework the Panel could issue their advice to the individual local councils together with the terms of any rectification work required and a recommended timeframe within which the work should be completed. The councils could then issue the required notices/orders as per the relevant provisions of the EP&A Act. In this way the councils are simply the vehicle to make things happen within the current legislative framework.

The level of consultation between the NSW government and local Councils on this issue and participation in the development of strategies and solutions, has been negligible. The NSW Government appears to be relying on Councils to manage the problem at a local level, without any technical or financial support, resources or consideration. This approach is very different from that in Victoria and Queensland and it has

the potential to either fail and/or result in building-owners undertaking unnecessary and expensive building upgrades, causing financial and emotional distress.

The Government also needs to give consideration to how the required rectification work is to be funded to ensure the required rectification works are undertaken in an acceptable timeframe, rather than expecting liabilities to be sorted via the courts before any work is actually carried out. The Lacrosse fire occurred in November 2014 and some 4 ½ years later it is understood that no rectification work has been carried out. This is considered unacceptable.

Considering the likely cost of undertaking rectification work across the State and the barriers that may exist for owners and body corporates to fund this work, including lack of insurance, it is considered a government funding model may be warranted to ensure all necessary rectification work is undertaken in a timely manner.

(e) Current status and degree of implementation of recommendations of reports

As identified under part (a) earlier, many of the previous reports have only been actioned in a selective and piecemeal manner and there is concern that the Government's 'Building Stronger Foundations' discussion paper continues this approach in its response to the Shergold-Weir 'Building Confidence Report'.

The nature and number of issues being identified is a clear indication of a regulatory system with systemic problems and failures. Band-aid solutions are not the answer. It is critical that the root-cause of the systemic failure is identified and only holistic and meaningful change is implemented. Anything less will again fail.

(f) Any other related matter

Since the inception of private-sector certification local Councils have increasingly been burdened with the responsibility of regulation, with little to no prior knowledge of the development site.

It must be appreciated, when a council is not the principal certifier, the council does not have ready access to various professional reports that may be produced during the construction phase, including structural engineer's certification and survey information. Such information and reports are not required to be submitted to Council until the occupation certificate has been issued. This is a significant impediment to a council's ability to respond in an effective and efficient manner. Leading to councils incurring significant costs.

It is therefore of the utmost importance that cost recovery mechanisms be considered with any reform.

It is recognised Part 12 Schedule 5 of the EP&A Act allows for the issue of compliance cost notices however the process is cumbersome and seldom used by councils. The introduction of an up-front levy to be used solely for the purpose of investigation and action against unlawful activity would allow councils to adequately fund and resource compliance functions.

Conclusion

It is evident that the current building and construction regime, industry and regulatory system is in distress and has failed. This is putting the public at risk, both physically and financially, and creating uncertainty in an industry that plays a key role in the financial success of our state. The problems with the current regulatory system have been identified in numerous reports with numerous recommendations, however the changes made since 2002 have been limited and piecemeal. Real change is needed and it must go beyond popular rhetoric and look at the whole building regulatory system.

Private certification is an easy target. It is important to remember that accredited building certifiers do not make the laws, do not design the buildings, do not specify, purchase or install any products, do not hammer a nail, turn a screw or physically construct any element. To fix the problems facing the building and construction industry in NSW, and across the country, we need leadership and all building practitioners to be competent and accountable for their actions.

Council's officers would be happy to elaborate on this submission.