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

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- By the very nature of private certifiers being employed by the builder/developer, there is an inherent conflict of interest. Particularly with developers who undertake numerous projects, it is not in a private certifier's best interests to provide any negative feedback let alone refuse to certify a procedure. To do so would be to ensure that no further work came from that client. This results in reports and certifications that omit crucial information.

  It would be beneficial for the Inquiry to look at the past results of complaints to the Building Professionals Board to see this type of problem. There are many private certifiers that have multiple complaints found against them, repeated fines, yet most if not all are still practicing. One had numerous findings regarding breaches of bushfire protection regulations which is a concerning safety issue.

  Solution: While the cost of private certification should still be borne directly by the builder/developer, Councils should provide the details of the certifier to be used. This could be done from a list of heavily vetted private certifiers provided by the State Government, much as was done for the Local Planning Panels (or IHAPs as they were originally named).

  Or the list could be created by each local Council. However it would be essential that:
  a) the certifiers were provided on a strictly rotational basis so that there was no perception of bias in the selection of certifier, and
  b) there was a strict ongoing vetting process such as a 3-strike rule.
  Only the most competent certifiers with integrity would then be able to practice in this capacity. It would ensure honesty and go some way to restoring the public's faith in the building industry.

- It is often seen that Council's provide development consent then private certifiers provide the construction certificate. However the private certifiers are not always given complete information by the developer, so the construction certificate becomes inconsistent with the development consent. A recent example saw a construction certificate provided for a site that fire-fighting equipment could not properly access. The General Terms of Approval from the Rural Fire Service could not be met. The case ended up in the Land and Environment Court where the Court was quite scathing of all parties.

  Solution: If Councils provide development consent then they should also provide the construction certificate to ensure consistency of consent conditions.

- There are inadequate site inspections undertaken. A recent example saw a private certifier from Nowra be appointed on a development 40km north of Sydney. Only one site visit was carried out at the start of the project. There were numerous breaches of consent conditions including road-opening without a permit and crane deliveries without traffic controllers but the private certifier did not get involved. Despite Council advising any problems were the responsibility of the private certifier it was eventually left to Council, at ratepayers' cost not at cost to the developer, to repeatedly visit the site to pursue compliance issues.

  Solution: Certification must be based on regular site inspections not simply on inadequate documentation and builder's assurances that the build is consistent with plans and consent conditions. All development application documentation must be provided to the private certifier. If any part of the build is found to be not compliant, a stop work order must be issued and the non-compliance rectified prior to the work recommencing.

- A similar issue occurs much further back in the design process, with the consultant's reports that are provided with development applications. Again, no consultant can afford to provide negative reports for development applications or proposals. What is seen time and again is what could at best be called 'errors of omission'. It is often only by comparing the different consultants' reports that these 'errors' can be seen. Comparison of the bushfire report, landscape plan, arborist report, flora and fauna report, statement of environmental effects and architectural drawings almost ALWAYS shows up significant inconsistencies of information.

  Vegetation types are misrepresented, leading to inappropriate clearing and/or inadequate bushfire asset protection zones. Arboricultural reports will omit large numbers of trees leading to inadequate assessment of the environmental impacts. Flora and fauna reports say certain areas must not be cleared when the bushfire report says they must be cleared. Neighbouring buildings are positioned incorrectly so that assessment of impact upon them is not properly considered. Shadow diagrams show shadows that abruptly end at the boundary of a site. 'Artist's impressions' omit crucial factors such a correct heights of the buildings.

  In a recent example, eleven arborists were engaged one after another on a development. Yes that's right, eleven arborists. As each report was found to be lacking or onsite work was found to be illegal, that arborist would be let go and another engaged.

  At least one council has instigated a triage system whereby documentation is reviewed when it is first lodged. However this has failed to prevent inadequate documentation from being accepted.

  Solution: Councils must be unequivocal as they can only assess a development on the documentation provided. If the documentation is inconsistent in any material way the Council must refuse to accept the application in the first instance.

  Councils should also start to apply the EP&A Act Section 10.6(1) Offence - false or misleading information: "A person must not provide information in connection with a planning matter that the persons knows, or ought reasonably to know, is false or misleading in a material particular. Maximum penalty: Tier 3 monetary penalty".

  A few high profile court cases would ensure errant consultants and private certifiers did not continue to provide false or misleading information.

- In a worst case example of the pressure applied to ignore defects, a senior engineer on a major project in the Sydney CBD was requested to sign off on works that the engineer did not agree met appropriate standards. The engineer repeatedly refused to sign off on many of the works. After several months of this the engineer was told by his employer that there was a restructuring within the company and that he no longer had a job. Within two weeks that job was readvertised. What is a professional to do in those circumstances? Put their name to works they know should not be approved? Or lose their job?

  Solution: The legal responsibility for signing-off must sit with the employing company, not with individual professionals. While it is absolutely necessary for those individuals to have the appropriate qualifications, it is only when the insurance liability is with the company instead of an individual that this sort of pressure might end.

  This should only apply to companies employing perhaps 20 or more people, so that it is not used by single individuals to avoid liability.

- All consultants' reports provided in support of a development application must be made publicly available as open access documents. This will facilitate proper public scrutiny of any inconsistencies in documentation. Currently some councils only publish or provide documents that are included with the initial lodgement of a DA. This just encourages developers to not provide the full documentation required at the time of lodgement, so that these documents are not available for public exhibition and scrutiny. This can even include documents required under the *Environmental Planning and Assessment Regulation 2000*, such as Landscape Plans.

  The rather ludicrous reasoning provided by one council for this refusal to publish all documents is that the *EP&A Regulation 2000, Schedule 1 Forms (2)* wording refers to *"Documents to accompany development application"* ie documents that are included with the initial lodgement. However the *GIPA Act*, which regulates which documents are considered to be open access information, *Schedule 1 (3) Information about development applications (1) (a)* uses the wording *"development applications and any associated documents received in relation to a proposed development".*

  The council therefore refuses to provide associated documents until after the DA is determined, even under a Formal GIPA Application, thereby avoiding public scrutiny of crucial documents during the public exhibition period. Councils often do not have the resources to scrutinize and compare all documents nor have the local knowledge that neighbours have. It is ridiculous that some councils actively prevent public access to development application documents.

  Solution: A Ministerial Guideline (or stronger planning mechanism) should be issued by the Minister for Planning, Industry and Environment that informs councils of their responsibility to publish development applications/proposals and any associated documents to enable all documentation to be publicly scrutinized.

- Too many Australian Standards are Guidelines only. This means basically that it is optional as to whether they are applied or not.

  Solution: All Australian Standards should be converted to what the public thinks they are, immutable or near-immutable standards not simply Guidelines.

- The setting of short time limits on councils for approval of large developments must be reconsidered. As this system currently operates, councils can receive upwards of 25 documents running to many thousands of pages from a developer, which the council is expected to either approve or respond to within a short period of time, either 21 or 40 days. When documents are inaccurate it is difficult or nearly impossible for the inconsistencies to be uncovered in that time.

  Well funded developers will often 'advise' a council that if the development is not approved the matter will go to the Land and Environment Court. The Court's remit appears to be to find speedy and effective facilitation of development. The cost of these Court cases for a council, particularly in an area that is undergoing significant redevelopment, is impossible to sustain. Council budgetary considerations have then to be taken into account which can lead to councils approving inappropriate developments. The financial state of a council should not be an impediment to ensuring good and safe design.

  Solution: The setting of short time limits on councils for approval of large developments must be reconsidered. The system whereby a developer can automatically take Council to the LEC on the grounds of a 'deemed refusal' must be discontinued.

- Developers shop around for consultant's reports that are supportive of a development as well for certification. If report is negative or a certifier refuses certification, the developer simply gets another report or finds another certifier.

  Solution: While it is possibly difficult to implement, in the case of registered practitioners such as bushfire consultants or engineers, a record of all refusals or negative reports on a development could be uploaded to a database held by the relevant professional body, or must be provided to the relevant council. This would enable councils to access negative assessments and deter developers from shopping around for dodgy reports or certification.

- Even when non-compliance occurs it is hidden before compliance officers attend site. In a recent example excavation occurred immediately adjacent to the boundary of a property, in breach of the development consent conditions. The council compliance officer attended many hours later and the excavation was filled in before they arrived. Council staff advised that it was "only fair" to the builder to notify them before a site visit. It is understood that under the *Local Government Act Chapter 8 Part 2 Section 200*, council can enter a private property *"if entry is necessary for the purpose of inspecting work being carried out under an approval".*

  Solution: Council compliance officers must make all site visits unannounced. When attendance times are arranged with the builder/developer to visit the site, naturally non-compliance is hidden before the compliance officer arrives.

- "Compliant development" has become a misnomer. The developments built under the *Exempt and Compliant Development Code* are frequently non-compliant. Councils refuse to become involved with compliance issues, referring enquiries to private certifiers who often haven't even visited the site. In a recent example the stormwater was illegally connected into the sewer at the rear of the block rather than connected to the stormwater on the street, with its attendant costs. This still has not been rectified. In another example a builder put almost a metre of fill across the whole residential site right up to and against the timber boundary fence. It took months and dozens of phone calls before the neighbour could get the fill removed.

  Solution: The Exempt and Compliant Development Code must be reviewed and a prompt and easily accessible compliance framework instigated. The Code must not be expanded any further and certainly must not include the Medium Density Housing Code. Otherwise Sydney will be besieged with tens of thousands of mini blocks of flats (manor houses) that are non-compliant.

- The watertable is very close to the surface over large areas of Sydney. Excavations frequently hit aquifers in the northern suburbs or are dug into reclaimed swampland in the southern suburbs.

  In a recent example in the northern suburbs, the basement of a block of units was excavated into the watertable. The basement was continuously submerged and pumps needed to drain the water into the gutters on the street. The units were not able to be occupied for many months and condensation could be seen running down the inside of the windows of the unoccupied units. It is unclear how this has been rectified or even whether it could be permanently rectified. Mature trees in the surrounding area are dying because of the significant change in the hydrology of the area caused by the excavations and pumping.

  In another example, on a fairly steep hill the developer was permitted to run the stormwater into absorption pits instead of into the council stormwater system which was a much cheaper option. The site was then backfilled behind a timber retaining wall which is now collapsing due to heavy water flows from between the timbers which flood the courtyard and enter in through the front door of the house on the property below the site. Council and Sydney Water both say it is not their problem. As the stormwater was Council approved, insurance does not cover any damage.

Solution: Hydrological reports must form part of the EP&A Regulation 2000, Schedule 1 Forms (2) Documents to accompany development application.

Determinations must adequately consider the development's impact on the watertable as well as the watertable's impact upon the development.

- Employees of local councils should not be allowed to provide their services as private consultants at the same time that they are working for a council. Planners, arborists, ecologists, engineers and probably other professions are permitted to run their own private practice at the same time as being employed by councils, at the individual council's absolute discretion. This has the potential to create conflicts of interest or at the very least the perception of a conflict of interest.

  In a recent example a planner who currently works for a city council provided 'independent' advice, providing their name under the name of their private practice, to another council for a development application for a councillor.

  In a different example, a council arborist provided a consultant's report, providing their name under the name of their private practice, for a development in an adjacent council.

  In a slightly different but related example a planner who provided independent consultant's advice on changes to a council's DCP, within weeks provided a consultant's report for a development application from a councillor on that same council. It could reasonably be perceived that the council officers might have some bias in favour of a consultant that provided recent DCP planning advice to council.

  Solution: To ensure there are no conflicts of interests, perceived or otherwise, the Local Government Act should include a clause that forbids council staff to operate a private practice in the same profession while employed by council.

  It should also be amended to ensure that consultants that undertake private consultancy work in a local government area, are not engaged to do independent work for that council. The state government has already set a precedent for this in disallowing the appointment of a local planning panel member who had a private consultancy practice in that council area.