Submission No 101

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

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INTRODUCTION & SUMMARY

This submission has been prepared entirely by Jan Luikens B.Build (UNSW 1971) whose curriculum vitae is attached at the end of this submission.

This inquiry into the effect of NSW government agencies upon building standards, building quality and building disputes must consider factors that impact upon the outcomes that are sought to be achieved. Principal factors include the financial imperatives of the participants in the industry including those of its clients and the end users of its product and the capacity of the participants to achieve those outcomes.

The present inquiry appears to revisit a number of the matters previously investigated the NSW Parliament Joint Select Committee Report on the Quality of Buildings 2002 (The Campbell Report)[1] the terms of reference for which included inquiry and report into "…. *the quality of buildings in NSW to determine whether there are enough checks and balances existing to ensure consumers are guaranteed that their new homes are safe, properly certified and built to satisfactory standards ….*" and included:

- the certification process;
- the builders' licensing scheme;
- adequacy of current minimum building standards.

In the intervening 17 years since the Campbell Report, little effective progress has been made in achieving resolution of the issues investigated in that report. There is no benefit in holding enquiries unless there is the will to address the issues identified in such enquiries in a manner that is effective.

Regulation as currently designed is reactive. If regulation is to be effective, it must be designed to make proactive avoidance of lack of compliance economically more advantageous than at present. In particular, it must create an environment that makes on-the-job supervision by builders and trade contractors advantageous and overcomes the current widespread culture in which supervision is regarded as non-productive labour.

Regulation of the industry is bound to fail if the various regulators and certifiers lack the skills that are necessary to identify, analyse and prescribe remedies for issues. Further, the reactive need for further regulation and highly skilled certifiers will only increase unless the skills (education and experience) of architects, engineers, contractors, subcontractors and trade operatives are substantially improved.

The Campbell Report[2] importantly identified a chasm between Regulation & Quality. There is still a clear need to define "quality" and differentiate between quality and regulatory compliance.

Because of the depth of the malaise in the residential building industry there is a necessity for legislation and regulation to be designed so as to minimise its effective defeat, arising out of privity of contract even if it means creating personal liability for principals of developers, builders trade contractors and certifiers.

BACKROUND

To be able to remedy the ailments in the building industry, it is worthwhile considering how the present situation has arisen.

[1] Referenced at 6.2 of the Lambert Report.

[2] New South Wales. Parliament. Legislative Assembly. Joint Select Committee on the Quality of Buildings (The Campbell Report July 2002 at 1.3 (pp 3-6)

The following is not a call to return to "the good old days", which in fact were not necessarily all that good, there being many issues that required resolving. The intent of the following is to identify factors that need to be addressed if consistent compliance with regulations and build quality is to be achieved.

The issues facing the construction industry have been developing over a long period during which there has been a virtual explosion in education in parallel with the deskilling of the industry from the top down. Architects largely were stripped of, or abandoned their former roles as designers, detailers, specifiers, coordinators of structural and services engineering, superintendents and administrators of projects, to become merely specialist designers (exterior and interior decorators) and planning authority requirement consultants. The management of the discarded functions is now passed to head contractors who are largely ill trained and ill disposed to carry out such functions and who in turn ensure that design consultants and trade contractors, both of which are engaged as subcontractors are encumbered with the risks of design development and detailing functions, with trade (sub)contractors also bearing their customary execution risk.

Many head contractors consider that supervision is non-productive labour. After all, contractually, risk for defective detailing and executed work and for delay has been contractually passed to others. This situation is further exacerbated by a consequence of outsourcing which is the loss of management and supervision skills which is caused by a lack of intimate involvement in the processes being carried out.

Developers found that the traditional design process took too long, exacerbating market-timing risk. Developers sought ways to foreshorten the design and documentation process. The advent of the 'Project Manager' commencing in the 1970's marked the beginning of, and contributed to a general decline in project quality outcomes. Instead of a central coordinating design consultant (traditionally the architect) project management practice functions entirely differently. Project managers act as catalyst, both delegating functions and typically contractually nullifying their own responsibility for any negative results. The delegation and contractual abandonment of responsibility away from a principal design entity is a significant cause of the malady in construction outcomes.

The trend of head contractors providing little if any trade labour[3] is not new:-

> "*The unique service which the general contractor supplies to the owner, and which is his justification of existence, is risk taking*."

Subcontracting which is merely another name for outsourcing is the norm. However, subcontracting has developed into a process of 'Delegate and Abrogate' with risk contractually loaded into the subcontracts. Head contractors having offloaded risk to their subcontractors consider that they need not provide any form of consistent supervision.

Subcontracting[4] has progressively led to fewer and fewer staff directly employed by construction contractors who have a working trade background. In the common Design and Construct contracts, architects, structural engineers and services engineers are subcontractors:-

> "*Subcontracting is the main mechanism of the construction process. Buildings are physically built by subcontractors, while general contractors act as planners, co-ordinators and controllers of construction activities. While*

[3] Ferry D.J.O. (1976) Developing Trends in the procurement of buildings. Building Economist Vol. 14 No 4 pp. 216-220

[4] The Concept of Subcontracting in Australia – Dr Thomas E. Uher - Building Owner & Manager May 1991

subcontracting makes utilisation of resources more efficient, it increases the complexity of the co-ordination and contract administration process. Because the construction work is performed predominantly by subcontractors and because many of those engaged are small and often financially weak, the risk of delays, contractual dispute, industrial unrest, insolvency or even bankruptcy could potentially be high". The Concept of Subcontracting in Australia.

A further issue is the difficulty in finding skilled planners – Juliet Pratley[5] in an article 'Has anyone got a spare estimator or two?" – comments upon the difficulty of even major contractors to attract estimators. A similar situation exists in respect of all skills in the industry.

"… *common consensus amongst rival head contractors and subcontractors that the building industry is facing a shortage of young estimators, with no heirs apparent even amongst their own ranks. …The decline in interest in estimating as a building discipline (and one incidentally with often greater monetary gain than for project managers) can also be attributed to the decline in estimators originating from a trade background, with former carpenters being well represented in the older estimators' ranks*." … "*The growth in the sub-contracting industry and its replacement of traditional tradespersons as a major cause of the current lack of estimators. Estimating is becoming more and more closely aligned with an academic background. Tertiary institutions seem to be placing less and less emphasis on skills such as measurement and traditional QS skills. Estimating is becoming based not so much on the establishment of first principles, but on having an appreciation of contract conditions, the transfer of risk, coupled with a much better understanding of design documentation. Effective de-skilling of design consultants out of intense fee competition and the perceived need for less than full documentation – progressive or staged documentation*."

PRECEDING REPORTS

Campbell Report 2002 - The Committee was required to inquire into and report on:-

(1) (a) quality of buildings in NSW to determine whether there are enough checks and balances existing to ensure consumers are guaranteed that their new homes are safe, properly certified and built to satisfactory standards.

(b) the certification process created under the Environmental Planning and Assessment Act 1979 and in operation since July 1998, including, but not limited to:

(i) What changes if any, need to be made to tighten the certification process;

(ii) What sort of qualifications experience and conduct is expected of the people who certify buildings and how should their certification be monitored; and

(iii) Whether there is enough regulatory power in the certification system to deal with buildings that do not comply with the approval codes and standards.

(c) (i)The adequacy of disciplinary procedures available in the certification process;

(ii)The adequacy of current minimum building standards, particularly in regard to waterproofing, thermal and noise insulation in meeting environmental and

[5] Building Australia, April 2000

cost performance expectations in the community; and

(iii) The extent to which matters such as inappropriate building standards and shortfalls in the current certification system have resulted in increased pressures on the Home Warranty Insurance Scheme.

(d) the builders' licensing scheme as established under the Home Building Act 1989, including, but not limited to:

(i) The qualifications, experience and conduct required for the licensing of the people who build our residential buildings;

(ii) The adequacy of the checks and balances in the builders' licensing scheme; and

(iii) The role of the Department of Fair Trading and the Consumer, Trader and Tenancy Tribunal in dispute resolution under the Act.

Lambert Report 2016 - The purpose of this review was to assess the effectiveness of the Building Professionals Act (BP Act) and the broader issue of the effectiveness of the building regulation and certification system that applies in NSW and to make recommendations to improve the operation of the Act and of the overall system.

Shergold Weir Report 2018 – an assessment of the effectiveness of compliance and enforcement systems for the building and construction industry across Australia.

MARKET ECONOMICS ISSUES & STRATA TITLES

The objectives of the parties

A major part of the residential property market is the provision of properties for trading. A significant attraction for property investment has long been the prospect of capital gains outstripping the net cost of ownership. A further attraction has been that property appeals as a tangible asset viz-a-vis investment in equities particularly since equity fundamentals have been no guide to market value of equities. Owning property is considered by the public as a means towards wealth creation. This has positively reinforced the public's appetite for property. Developers are businesspeople meeting a market need for trading stock. Home units are considered tradeable commodities with an apparent advantage of being tangible.

In reality such assets are barely tangible being merely a defined volume and equity in a corporation that owns the substance defining the volume and the land upon which it is located. The lot owner generally only owns[6] the air space within their unit and the car space. This space includes dividing walls within the unit, paint on the walls and facilities including: kitchen, laundry and bathroom fittings and fixtures. That being the case, the developer's marketing imperatives are to create a product that is attractive to purchasers and is driven by economic imperatives to provide the cheapest possible substrate upon which the visible attributes of the project can be mounted. This is a significant factor in the testing of the boundaries set by regulations and the Building Code of Australia (BCA).

Economic imperatives upon developers and builders are likely to result in the selection of material and construction methods on short term cost benefit basis. The interests of both developers and builders are comparatively short term. Six years[7] for a breach of warranty that results in a major defect in residential building work or 2 years in any other case is a relatively short period in the life cycle of a building.

There is a need to define 'major defect' and there should be further

[6] Campbell Report July 2002 7.2.3 (p 166)

[7] Home Building Act 1989, s.18E (1)(b)

identification of other warranted defects. Adoption and expansion of 'The NSW Guide to Standards and Tolerances 2017' as an integral part of the hierarchy forming the regulatory framework for building standards.

BUILDING CODE OF AUSTRALIA (BCA) AND QUALITY

The Campbell Report[8] in commenting on the BCA recorded a witness from the BCA stating:

> "*The goal of the Building Code is to enable the achievement and maintenance of acceptable standards of structural sufficiency, fire safety, health and amenity in the design, construction and use of buildings. It represents a suite of "minimum acceptable standards based on cost effective solutions". Joint Select Committee on the Quality of Buildings Chapter 3 – Building Codes and Standards 66 The Building Code is focused on minimum acceptable standards required to preserve human safety in buildings. The Board clearly stated to the Committee that, despite consumer perceptions that the code may relate or reflect a quality benchmark, it is not the role of the Building Code to determine quality standards which are considered above the minimum set by the Building Code.*" (Emphasis added).

Further, the The Campbell Report finds[9]:

> *"Clearly, "quality" has at least two meanings or applications in the context of home building. The first relates to the quality to be delivered by building codes and standards – a minimum safety and structural integrity that applies to all construction and the second relates to quality of workmanship and products"*.

A witness to the Campbell Report[10] advised the committee:

> "*I think there is a misconception that building inspections are going to guarantee you good quality buildings and that is just not the case. It will not pick up faulty workmanship*."

There is still a clear need to define "quality" and differentiate between quality and regulatory compliance. Further, there needs to be effective education of consumers as to the difference between compliance and quality.

In terms of providing protection to consumers the warranty periods should be considered to be ludicrous. Six years[11] for a breach of warranty that results in a major defect in residential building work or 2 years in any other case is a relatively short period in the life cycle of a building. In terms of providing protection to consumers the warranty periods should be considered to be ludicrous.

A minimum of 70 percent of the design life of the structure is suggested as appropriate warranty for Stucture and structural elements; warranties of up to 7 years are available for motor cars, when they can be considered obsolescent at 10 years old.

Waterproofing elements such as roofing, membranes, non structural facade elements (including windows) should be warranted for a minimum of 25 years

[8] New South Wales. Parliament. Legislative Assembly. Joint Select Committee on the Quality of Buildings (The Campbell Report July 2002 3.2.2 "What Does "Quality" in Home Building Mean?" p 65)
[9] Ibid (p5)
[10] Ibid (p5)
[11] Home Building Act 1989, s.18E (1)(b)

There is a need to define 'major defect' and there should be further identification of other warranted defects. Adoption and expansion of 'The NSW Guide to Standards and Tolerances 2017' as an integral part of the hierarchy forming the regulatory framework for building standards.

EDUCATION & EXPERIENCE

Importantly, the Campbell Report[12] states:

"The Committee believes that building quality will not be improved simply through better skills and practices at the construction stage, but that improvements should start at the design stage with appropriate preparation of plans and specifications. The goal should be to identify potential problems before construction commences and that during the construction process, the builder must be able to recognise potential problems".

While there are traineeships for Civil Construction[13] the there is no equivalent traineeship for Building Construction. Civil Construction supervision requires a working knowledge of relatively few trades while Building Construction requires a working knowledge of many trades.

The issues facing the construction industry have been developing over a long period during which there has been a virtual explosion in education in parallel with the deskilling of the industry from the top down. Architects largely were stripped of, or abrogated their former roles as detailers, specifiers, co-ordinators of structural and services engineering, superintendents and administrators of projects, to become merely specialist designers (exterior and interior decorators) and planning authority requirement consultants.

STRATA BODY REQUIREMENTS

Every Strata Plan should be required to maintain a 'maintenance, repair and alteration' history from the registration of the Strata Plan onward, setting out what was done the location and extent of work and who carried out the work. The history, it is suggested, should be implemented prospectively due to the difficulty and cost existing plans would encounter were they required to comply retrospectively.

The benefit of such history would aid in diagnoses of issues as they arise and help prevent the repeat of ineffective rectification as well as assist in the preparation of Capital Works Fund forecasting as required by the Strata Schemes Management Act.[14]

[12] Campbell Report 2002 - 2.6.7 Need for Licencing Other Practitioners (p56)

[13] Training Services Civil Construction Certificate IV (ID 6388 & 6399)

[14] Strata Schemes Management Act 2015, s.79 & 80

CURRICULUM VITAE

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Specialisations:	Management Consulting	Analysis & Implementation,
	Building and Construction	Project Management, Superintendence, Project Planning, Delay and Prolongation, Contract Administration, Defect Analysis
	Dispute Resolution	Arbitrator, Mediator, Expert Determination, Expert Witness, Adjudication (Security of Payment Act)

Year of Birth:

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Qualifications and Professional Associations

- Bachelor of Building, University of New South Wales (1971)
- Member, Institute of Arbitrators and Mediators Australia (1993-2015)
  - Arbitrator (1993)
  - Mediator (1995)
  - Expert Determination (1998)
  - NSW BCISOPA Adjudicator (2002)
- Member Australian Institute of Building (1972 – 2014)
- Member Society of Construction Law Australia (2011- 2014)
- Member Australian Construction Law Discussion Group (1991 – present)

Experience

1999 to 1916	**Jan Luikens Management Pty Limited, Sydney** Establishment of sole practitioner practice in Management Consulting, specialising in providing project planning, contract administration and management advice to the Building and Construction Industry and its Clients and their Consultants and providing dispute resolution services.
1995 to 1999	**Bovis Australia Pty Ltd -** Senior Consultant,
1982 to 1995	**McLachlan Consultants Pty Limited -** Senior Consultant,
1980 to 1982	**Graham Evans & Co Pty Ltd** - Group Planning Manager and Technical Services Manager
1976 to 1979	**McLachlan Group Pty Ltd -** Senior Consultant
1976	**Westminster Homes Pty Ltd** - Contracts Manager
1973 to 1975	**Mirvac Pty Ltd /J L Dunrose Pty Ltd -** Contracts Manager
1973	**Macbeson Pty Ltd –** Construction Manager
1970 to 1972	**T C Whittle Pty Ltd -** Assistant Construction Manager.
1969	**McDonald Constructions (Building Division) Pty Ltd –** Trade Contract Officer.