

LGNSW Submission on Review of the Building Professionals Act

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1. Introduction

Local Government NSW (LGNSW) is the peak body for NSW Local Government, representing all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council. In essence LGNSW is the ‘sword and shield’ of the NSW Local Government sector. The mission of Local Government NSW is to be a credible, professional organisation representing Local Government and facilitating the development of an effective community-based system of Local Government in NSW.

LGNSW welcomes the Review of the *Building Professionals Act 2005* and the wider brief of the Terms of Reference to look at the building regulation and certification system in its entirety. We are pleased to have an opportunity to make a formal submission in response to the recently published *Independent Review of the Building Professionals Act 2005 - Discussion Paper*.

LGNSW’s understanding is that the Discussion Paper, stakeholder meetings, public forums and on-line surveys comprise the first stage of consultation on this review, and a draft report, taking into account the consultation feedback will be prepared and exhibited for public comment in mid-August 2015. It is understood that further opportunity to comment will be provided in response to draft findings and recommendations contained in the draft report, with a final report scheduled for completion by 31 October 2015.

Local Government’s key concerns have been documented on numerous occasions previously. A detailed account of the problems with building certification facing Local Government is contained in LGNSW’s March 2014 Submission to the Building Professionals Board Report on “Building Certification and Regulation – Serving a New Planning System for NSW”. This submission is available on the LGNSW web site.

The issues with the building regulation and certification system detailed in the Discussion Paper are evidently well-understood and broadly reflect the concerns of Local Government with the current system. All these issues are therefore not repeated in detail here. Rather, this submission has been limited to an account of key points in response to the five broad areas covered by the Discussion Paper as follows:

- Governance structure of building regulation and certification;
- Use of e-technology to improve access to information, processing of transactions and management of systems;
- Building regulation and certification process;
- Supply, accreditation, accountability and oversight of certifiers; and
- Resourcing and funding arrangements for the building regulation and certification system.

2. General Comments

Local Government's key issues with the building regulation and certification system in NSW have been well documented. All sectors involved in the planning and building inspection process agree that change is needed. Yet despite the many reports and reviews of these issues over more than a decade, and unanimous calls from industry and Local Government alike, very little has changed. While Local Government accepts that private certifiers in the marketplace are here to stay, it expects this to operate within a much tighter regulatory regime.

LGNSW and councils therefore welcomed proposed provisions in the Planning White Paper¹ to tighten building regulation and address many of the known issues, the five key areas of change being:

- Accreditation of additional occupations involved in building design and construction such as designers, specialist engineers, fire protection system installers and inspect/test technicians, energy efficiency designers, access consultants and other relevant professions;
- Mandatory certification of specified building aspects including the design, installation and commissioning of critical building systems and elements;
- Improved levels of documentation through all stages of the building life cycle, including the requirement for a building manual which will include key building information;
- Increased support for certifiers on complex building matters through peer review and enhanced decision support; and
- Strengthened controls on certifiers through stronger disciplinary guidelines, increased auditing and increased obligations to report non-compliant building work and other controls.

Local Government remains optimistic that after more than a decade of reviews and the ongoing and unchecked issues, this latest review signals a genuine commitment by the NSW Government to renew the proposals of chapter 8 of the Planning White Paper or something similar to address the problems once and for all.

LGNSW has had some involvement in the work of the Local Government Reference Group and endorses the efforts of this group to develop a framework for interaction between private certifiers and Local Government.

¹ NSW Government, *A New Planning System for NSW: White Paper*, April 2013, p.180

3. Response to Discussion Paper

3.1 Governance structure

LGNSW supports the concept of consolidating administration of building industry responsibilities within a single agency. All players (designers, installers, trades, builders, certifiers etc.) should be accredited or licensed by the same central body. This should also include setting work standards, maintaining accountability, dealing with complaints and carrying out disciplinary action when required for all players in the industry. It would provide a consistency and greater fairness in management of the industry that is lacking in the current split between the Building Professionals Board (BPB) and NSW Fair Trading. Accrediting all players would also help the system become self-regulating, and potentially reduce unauthorised work.

However, consolidating administration in itself is not a condition for success; any new or consolidated agency must be properly resourced to deliver the specific responsibilities within its remit. The current under-resourcing of the regulatory regime must not be allowed to continue. There must be a commitment from the NSW Government to sufficiently and effectively resource any new or consolidated agency overseeing building industry activities.

The question of whether and how to consolidate building regulation into a single piece of legislation (e.g. a stand-alone Building Act) is a more complex matter, because of the blurring of boundaries in current NSW legislation (since 1998) between planning and building certification. LGNSW and councils agree that current codes and regulation are overly complex and need to be simplified. An important principle is that planning decisions and building decisions must be made by the person or agency with the right expertise. The future legislative structure is definitely an area that requires further deliberation, with all options and their consequences requiring full consideration and wide consultation to ensure the fairest and most workable outcome.

At this point in time, LGNSW does not see merit in a partnership model similar to the Food Regulation Partnership² between the State and Local Government for certification and building regulation enforcement. LGNSW understands this model to be based on two government agencies clarifying roles and responsibilities, with the primary objective on food safety, combined with the education of food handlers, inspection of premises and enforcement, with cost recovery. By contrast, in the realm of certification and building regulation enforcement, State Government and Local Government do not share these responsibilities in the same way as they are shared with the NSW Food Authority. Local Government shares its certification and building regulation responsibilities not with State government but with private certifiers; it is currently more critical to clearly define the roles of these entities rather than to implement a formal partnership model between State and local government.

3.2 Use of e-technology

Local Government supports e-lodgement for development and construction and many councils are already going down this path. A centralised electronic system, done well, would mean that key players in the building process can access the relevant documents for a development /property. LGNSW therefore supports advancements in technology that will make processes, information, forms etc. clearer and more accessible for everyone, and could help resolve some of the problems identified with the building/construction phase, such as access to full, relevant, reliable and up-to-date information.

² Michael Lambert, *Independent Review of the Building Professionals Act 2005 - Discussion Paper*, May 2015, p 29

Local Government would also support any improved technology that would streamline both the accreditation and complaints processes at the BPB. LGNSW supports any such initiatives that would lead to more proactive auditing and policing of certifiers, a simpler and unimpeded complaints process, responsive disciplinary action, and an ongoing program of effective audits of certifiers.

Local Government recognises the benefits of having a standard format for development application (DA) forms and construction certificates (CCs), complying development certificates (CDCs) and occupation certificates (OCs), as proposed in the Discussion Paper³. Councils take different approaches for their DA and other forms, which have evolved to suit the particular nature of development in their areas. Councils must be therefore involved in any process to review and standardise such forms.

3.3 Building regulation and certification process

i) Planning and design approval stage

Councils do not support the proposal that the DA process is limited to a more conceptual approval⁴. This would shift more discretion to the building certifier who does not have the qualifications or expertise to determine planning issues. For the building certification system to work, it needs to minimise discretion, not increase it. While a two-part approval was achievable under the old DA/BA (building approval) process (i.e. prior to 1998), councils now only get one opportunity to specify their planning and building requirements/conditions for a development, as they may no longer be involved in the CC process. The DA should provide clear direction to the certifier on what is required to be addressed in the CC.

For the above reasons, LGNSW disputes the claim that councils' DA consent conditions contain excessive, restrictive or unnecessary detail⁵. Nevertheless, LGNSW does acknowledge the benefits for certifiers/developers of having clearer wording for DA conditions and a structure that follows an agreed format. There is definitely scope in some cases for more standardised formats with DA conditions to be more clearly conceived and written. However, any attempt to standardise DA consent conditions must not reduce them to a 'drop-down' menu of standard conditions, nor should they be mandatory - councils need discretion to be able to word a condition as needed. To be effective and workable, developing standardised conditions would require a rigorous review process with active input from council practitioners.

ii) Certification to allow commencement of building work

The Discussion Paper has attempted to address the problems with the application and interpretation of the 'not inconsistent' provisions, which have been well documented in previous reviews. The intent of the 'not inconsistent test' is critical to achieving sensible built form outcomes. Unfortunately, in practice, it is not without difficulty, as the double negative creates a level of uncertainty and still requires a decision on the part of the certifier. LGNSW agrees there

³ Michael Lambert, Independent Review of the Building Professionals Act 2005 - Discussion Paper, May 2015, p 32

⁴ Note: It is apparent that between disciplines there are many interpretations of what a 'concept' approval would actually include. Therefore in the event that such an approach was to be further explored, it would first need to be based on a clear and agreed understanding and interpretation of 'concept' plan.

⁵ Michael Lambert, Independent Review of the Building Professionals Act 2005 - Discussion Paper, May 2015, p 35

is a need for better guidelines around the meaning of 'not inconsistent', and would only support a change to this provision if a robust alternative can be found.

Councils in general agree with the proposal to combine the roles of certifier and PCA; this seems to be the general practice in industry anyway.

A common issue faced by councils is that a private certifier issues an invalid CDC (for example, by failing to include the necessary conditions relating to additional car parking requirements or developer contributions resulting from increased intensity of use, such as retail floor area or bedroom numbers). This is yet another area requiring follow up. LGNSW understands that the NSW Department of Planning and Environment was advised of problems with the expression of legal provisions affecting developer contributions by one metropolitan council in 2013, with no response forthcoming.

iii) *Building construction and occupation stages*

There are numerous problems with the construction and occupation phase of the building process, and again these have been well-documented. Key issues for councils include unauthorised work (and subsequent applications for building certificates), enforcement issues, and the need to find balanced ground between 'occupation' and 'completion'.

Unauthorised work is one of the most significant concerns for Local Government in the building process. Councils report that there has been a noticeable increase in building certificate applications in recent months and these are being used in a manner not originally intended. While this is not necessarily the fault of private certifiers, it is a definite indicator that the building regulation system is not working.

The sanctions and penalties are such that it is easier and cheaper to simply proceed with unauthorised work and then seek a 'quick fix' with a building certificate after the work is complete, rather than obtaining the correct approvals from the start. Councils also observe that the system has become increasingly difficult to understand, with different planning codes applying to different pathways for consent. The pressure for development has resulted with more people disregarding the system - either from ignorance, wilful neglect or expedience.

There is a misconception of the role of a building certificate - it is not an approval but an undertaking that the council will not require demolition of unauthorised work for seven years. The insurance industry needs to have a greater understanding of these circumstances, as this may help with the regulation of the industry if there is an issue of later insurance of unauthorised construction work.

The problem as identified in the Discussion Paper (p 41)⁶ is that there are no effective penalties for unauthorised work. The approach to dealing with unauthorised work varies from council to council. Some councils may issue demolition or rectification orders. LGNSW is aware of at least one metropolitan council which has successfully reduced the volume of unauthorised work and subsequent building certificates by consistently issuing demolition orders and follow-up penalty infringements notices (PINs) on property owners until the unauthorised work is rectified. However, while current legislation allows for legal action to be undertaken, the enforcement procedures can involve a good deal of administrative work for councils, and courts have clearly indicated that they are not prepared to impose major sanctions in the case of unauthorised work.

⁶ Michael Lambert, Independent Review of the Building Professionals Act 2005 - Discussion Paper, May 2015, p 41

LGNSW would definitely support the introduction of suitable sanctions in the form of fines of a size that would effectively discourage unauthorised work. Builders must be made more accountable and penalties must be increased. The system must be changed so that owners are forced to have to rectify non-conforming work. The ability to issue multiple infringements to certifiers/builders should also be strengthened.

LGNSW notes that the BPB is developing a Practice Guide that documents the requirements of a certifier at each stage of a development, and that this is proposed to be given legal recognition. While the content of the guide has not yet been publicised, any attempt to clarify the requirements of a certifier and give them greater legal recognition is supported by Local Government.

LGNSW also supports the idea of a 'development completion certificate' (DCC) or similar, that would certify that all the consent conditions have been met. However, consultation with key industry groups will be needed to address the questions of the most effective mechanism(s) that could be used to trigger a property owner to seek to obtain a DCC.

iv) *Building safety maintenance*

LGNSW and councils welcome the proposal for the creation and maintenance of a building manual. Along with other proposals to improve electronic information, this would be an advancement that will make information more accessible for all players. The requirement should have regulatory backing, be mandatory for certain buildings and there will need to be provisions that ensure it is kept updated over time as the building and its use changes.

v) *Fire performance and safety*

Many councils will attest to the complex nature of fire safety issues in the building process as described in the Discussion Paper⁷. This is a critical area of building safety in which urgent reform is needed and which requires an entirely separate discussion. Local Government agrees that fire engineers need to be accredited and it is critical to allocate appropriate resources to Fire & Rescue NSW if they are to take on a revised role.

3.4 Supply, accreditation, accountability and oversight of certifiers

Councils have echoed the concerns recognised in the Discussion Paper⁸ and also raised by private certifiers that there will be a massive shortage of building surveyors/certifiers in the industry in the next five to ten years. The most pressing concerns with the future supply of building certifiers from Local Government's perspective are:

- Difficulty in resourcing/recruiting building compliance officers, particularly in regional areas, but also within some metropolitan areas - The current private certification system is based on the premise that Local Government provides the regulation and enforcement function. However, this will be seriously compromised with a diminishing number of experienced Local Government certifiers in coming years. It is critical that this role continues to be supported with measures to address the long term viability of the building surveying profession.
- Imbalance of qualifications between Local Government certifiers and private building certifiers - councils have been the training ground for certifiers in the past, providing the

⁷ Michael Lambert, Independent Review of the Building Professionals Act 2005 - Discussion Paper, May 2015, section 3.6

⁸ Michael Lambert, Independent Review of the Building Professionals Act 2005 - Discussion Paper, May 2015, section 4.1

practical grass roots experience to upskill officers. Many of these officers have extensive hands-on experience but not necessarily the relevant degree. While enjoying high level qualifications as a building certifier within council, some council officers' qualifications would rank much lower in the private sector. Given the predicted and concerning shortage of highly qualified and experienced certifiers in the short to medium term, the accreditation system must be reviewed to give recognition of relevant and extensive experience within Local Government.

- The imbalance in qualifications is a real concern for some senior officers in councils, who, if made redundant as a result of the Local Government reforms, would be unable to practice certification at the same level in the private sector despite holding wide ranging experience and often training up younger certifiers who end up in the private sector.
- Increasingly restricted skill base, as younger council certifiers leave council to move to the private sector and older more experienced certifiers retire. Importantly, communities will lose the expertise of the experienced officers, who have a thorough understanding of the certifier's role as a public servant.

Section 4.3 of the Discussion Paper rightly addresses the critical issue of accountability, private certifiers' role as 'public officials', and the conflict of interest allowing buildings to be approved, certified and occupied under certificates issued by the certifiers paid by builders/developers. The solutions to these issues are not straightforward, but LGNSW maintains that a strong regulator, a dedicated and well-resourced program of auditing and a much more effective complaints management system would go some way to addressing these issues.

LGNSW also endorses the proposal to ensure all players (designers, installers, trades, builders, certifiers etc.) are accredited and held accountable. One of the core issues, as referred to throughout the Discussion Paper, is that the only person in the whole development process that is being held accountable and is required to hold insurance is the accredited certifier (both private and council). It has been an ongoing concern, and one that was documented by the BPB more than three years ago⁹ that "one of the emerging trends associated with defects in buildings is that some accredited certifiers, as the only holders of mandatory professional indemnity insurance, are reportedly being pursued in legal claims for building work". A certifier cannot reasonably take on responsibilities and liabilities of the whole design and construction team and each and every contractor. The risk exposure for certifiers being the 'last person standing' has tremendous implications for the future viability of the profession and must be rectified.

3.5 Resourcing and funding arrangements

Councils have reported a number of issues relating to the performance of the BPB and the overall regulatory framework, including a lack of clear policing of certifiers; insufficient penalties; poor disciplinary action; ineffective audits; and problems and delays with the complaints process. The single biggest issue for Local Government with the BPB has been its lack of 'teeth' in relation to matters of compliance and enforcement. Undoubtedly, the BPB has not been well enough resourced to perform its regulatory functions and responsibilities.

LGNSW has for some time called for a review of the structure, resources and processes of the BPB to make it more effective in regulating the building approvals and certification system. The BPB is an enforcement body and anything less than resourcing it appropriately and retaining it as an independent entity would be unacceptable.

⁹ *BPB Submission to NSW Planning System Review*, November 2011, p. 11

LGNSW therefore broadly supports the proposals that are outlined in the Discussion Paper to address funding of the BPB, which will hopefully in turn improve the complaints process, establish an active audit program, and broaden the range of penalties that can be imposed.

LGNSW welcomes the proposal to address the cost recovery issues facing councils as a result of their important compliance role in the building regulation sector¹⁰. This has been a protracted issue for Local Government for some time, and must be addressed for the private certification system and enforcement actions are to work effectively.

¹⁰ Michael Lambert, Independent Review of the Building Professionals Act 2005 - Discussion Paper, May 2015, p 61

4. Conclusion

It is clear from all the reports to date and the current round of consultations, that urgent change is needed to the following:

- Setting in place a clear structure of governance, and committing an appropriate level of resources, as a matter of priority, to a dedicated authority/body to regulate and properly audit the building regulation and certification industry.
- Introducing/implementing measures that reward those who do the right thing and penalise those who do not, including substantially increasing penalties and compelling owners to rectify non-conforming or unauthorised work.
- Removing the 'last person standing' liability on certifiers by ensuring all players are accredited and held accountable.
- Addressing the conflict of interest that arises from allowing buildings to be approved, certified and occupied under certificates issued by the certifiers paid by builders/developers.
- Addressing a diminishing number of certifiers in the industry.
- Introducing cost recovery measures for councils undertaking their compliance role in the building regulation sector.

LGNSW and all councils are calling for the NSW Government to commit to changes that will implement an effective and efficient building certification system in NSW, which facilitates construction of approved development and compliance with relevant consents and building regulations. Local Government wants to see a system which ensures that all parties are responsible and accountable for their actions, and the community and public interest is at the forefront.

The proposed reforms seek to address numerous aspects of the building regulation and certification process with a view to improving the quality and safety of buildings. Local Government welcomes all measures that will improve the quality of buildings and help reduce the amount of defective work that councils have to deal with post development.

A great deal of reliance is being placed on the Practice Guide that is being developed by the BPB to achieve significant improvements in many areas of building certification. To attain these outcomes the Practice Guide must have legal recognition, be well resourced, well communicated and regularly reviewed and updated with new material and examples of good practice as they come to light through proactive auditing, training and the like.

While there is broad support within the Local Government sector for the changes being proposed, council practitioners flag specific details and practical implications that will need to be resolved. Local Government has participated to date as part of the BPB's reference groups, and it is critical that Local Government expertise is sought during the development of any further policies, guidelines, regulations and detailed implementation of aspects of these reforms.