Building certification engagement sessions

The Building Professionals Board is offering practitioners and the community the opportunity to comment on the further development of the building certification system in NSW during consultation sessions across NSW in February and March 2012.

The outcomes of these sessions will feed into the NSW Planning System Review and the extended review of the Building Professionals Act 2005 (BP Act).

Given the planning review will cover many wider aspects of the NSW planning system, the Board’s consultation process will focus on:
- the type of building defects affecting construction in NSW, their causes and costs
- how the current building and certification system works in NSW
- the role of builders, certifiers and subcontractors in the existing building and certification system
- the consumer protections in place
- the issues or limitations that may be impacting the current system’s ability to overcome building defects, building disputes and any resulting dissatisfaction with the system
- how similar issues or limitations are dealt with in other states.

This document discusses these issues and should be read by those attending the morning consultation sessions.

Construction defects

Studies, anecdotal reports and litigated building disputes demonstrate that, despite regulation and the strict inspection regime enshrined in legislation, significant defects continue to occur during construction.

Several factors may contribute to defects in a building:
- poor workmanship
- lack of focus on or supervision of tradespersons
- inappropriate use of materials by contractors and their knowledge of procedures for using materials together
- lack of training when new materials come onto the market
- disregard by some subcontractors for the effects of their actions on subsequent trades workmanship, materials or design faults
- time and cost pressure
- competency of tradespersons.

A 2009 UNSW study estimated rectification costs for a multi-storey residential building as between $2.5 million and $4.5 million.\(^1\)

A building may generally comply with the Building Code of Australia (BCA) and development consent, yet still have defects. These are generally the responsibility of the builder. Defects not rectified as part of the building process become the responsibility of owners and their successors in title (or the owners’ corporation in the case of strata buildings).\(^2\)

Building construction regulation

Builders who carry out residential building work are licensed by NSW Fair Trading under the Home Building Act 1989. Fair Trading also licences building trades.
Specialist tradespeople who carry out work such as electrical wiring, plumbing, drainage, gasfitting, air-conditioning or refrigeration work must be licensed in NSW regardless of the value of the work and irrespective of whether the work is residential, commercial or industrial.

The 2006 Review of Licensing in the NSW Home Building Industry recommended reserving licensing for occupations with significant risks (public health and safety, or the critical and technical nature of the work to the structure of the building). Parties undertaking commercial or industrial development generally have sufficient capability and resources to safeguard their interests and are subject to other forms of government regulation.

In addition, the cyclical nature of the construction industry means some builders licensed for residential work move between the residential and commercial building sectors as work opportunities dictate.

Building certification

In 1998, building certification-related functions were transferred from the Local Government Act 1993 to the Environmental Planning and Assessment Act 1979 (EP&A Act) and certifying authorities were given responsibility for issuing Part 4A certificates, strata certificates and complying development certificates (CDCs).

While construction certificates (CCs) and CDCs are mandatory to certify that plans and specifications will satisfy the requirements of the BCA, amongst other things, there is no mandatory certification of the design of detailed building systems and elements. The extent to which design certification is sought is at the discretion of the certifier, and depends on the type of work proposed and the size of the development.

Verifying designs when issuing CCs or CDCs may include:

- detailed engineering plans from each engineering discipline
- specifications
- design certificates
- statements of intent
- other evidence of suitability specified in A2.2 of the BCA, including certification from a professional engineer.

The person with the benefit of the development consent appoints a Principal Certifying Authority (PCA) to inspect building work and issue an occupation certificate (OC) at the completion of work, once satisfied that:

- a development consent or CDC is in force
- if building works had been carried out, a current CC or CDC has been issued
- the building is fit for occupation in accordance with its BCA classification
- the required fire safety certificates have been issued and a report from the fire brigades has been considered, where required.

Prior to the issue of a CC, the plans and specifications that accompany the application must be ‘not inconsistent with’ the development consent. However, it is not mandatory for a building certifier to check that all building work undertaken complies with the approvals issued before construction started and with certificates for work provided by trade and system installers.

An OC may be issued if the PCA can be satisfied the building is fit for occupation. Variations exist as to the level of certification required for this purpose. The PCA can rely on compliance certificates issued by another accredited certifier - this removes their liability under the EP&A Act for any loss or damage arising from the work to which the certificate relates. However, compliance certificates are not mandatory and are infrequently issued,
mainly because the certification is absolute and the number of people accredited to issue these certificates is limited.

Certifiers regularly rely on certificates from manufacturers and installers of building systems certifying a building component complies with the relevant Australian Standard. This certification does not provide automatic protection from liability to the certifier and significant variations exist between the quality of certificates issued and the information they contain. In addition, reliance on unaccredited persons may result in liability ultimately being carried by the certifying authority or the PCA.

However, in respect of reliance on other certificates, the NSW Administrative Decisions Tribunal commented in a 2010 case that

> the public would not expect a certifier to rely blindly on the word of an installer, without having formed an independent view of what standards should be referenced, making enquiries if the applicable standards were not referenced, and, wherever practical, performing simple, independent checks (for example, visual inspection of items externally exposed) to corroborate the sign-off provided.”

Other consumer protection

The Home Building Act 1989 establishes a statutory warranties scheme that allows the homeowner to recover losses from incomplete or defective home building work directly from their builder.

The NSW Home Warranty Insurance Scheme provides a safety net for homeowners who cannot recover their losses from a builder who has died, disappeared, become insolvent, or had their licence suspended. Home warranty insurance is ‘last resort’ insurance.

Builders must take out an insurance policy before starting home building work and owner-builders are also required to obtain home warranty insurance depending on the value of the project.

Only some practitioners are required to hold insurance to cover the cost of defective work and insure against their professional conduct. Architects and members of Engineers Australia must maintain current professional indemnity insurance. Certifiers accredited under the BP Act must also maintain professional indemnity insurance.

Under the EP&A Act, a building action for defective work may be brought up to 10 years from the issue of the final OC, the last inspection by a certifying authority or first occupation or use of the building.

Certifiers have reported they are increasingly being joined to building actions because of their mandatory insurance.

Comparison with other States

Accreditation regimes

While NSW accredits persons to carry out specific tasks, other states accredit relevant professions within the building industry and those working in those professions must be accredited.

In Victoria, for example, the Building Act 1993 requires most professionals who work in building to be registered as building practitioners. These practitioners are required to hold appropriate insurance. For example, civil, electrical, fire safety and mechanical engineers
must be registered whether they are consultants in the design phase of a development and/or certifying the completed building work.

Reliance on certification

Queensland’s building legislation allows building certifiers to rely on certificates from other qualified practitioners (known as competent persons) for building designs and building inspections. The certifier must determine whether the person is competent to give the design or inspection services, by considering their experience, qualifications and skills. The certifier is not provided with statutory protection from liability.

The Victorian Building Act 1993 allows the building surveyor to accept certificates in good faith from a registered building practitioner who has inspected the relevant work, providing the building surveyor acts in a competent manner when relying on a certificate. The building surveyor must be satisfied the person issuing the certificate is competent.

In Tasmania, a building surveyor may rely on a certificate issued by a person with the expertise and qualifications required for that certificate, as specified by legislation. In relying on a certificate, the building surveyor is not liable for an honest act done or omission made.

In South Australia, a private certifier may rely on a certificate of a person with prescribed qualifications and must seek and consider the advice of such a person in relation to any matters prescribed. The certifier can rely on the certificate in good faith without being subject to liability. A building certifier in the Northern Territory can also rely on a certificate from a building practitioner in good faith without being subject to liability.

Providing feedback

The consultation sessions will provide a number of mechanisms for you to provide feedback on these issues. Those unable to attend the sessions in person will be given an opportunity to have their say on an online survey.

Further background material will be distributed at the consultation sessions and on the Board’s website.

The outcomes of this review and consultation process will feed into Stage 4 of the Planning Review. Stage 4 of the Planning Review sees the release of Policy Options in a “Green Paper.” It is anticipated that this paper will be published in April 2012.

More information

- www.bpb.nsw.gov.au

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Level 3, 10 Valentine Avenue Parramatta NSW 2124 www.bpb.nsw.gov.au

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