

Council Reference: DNam  
Your Reference:



Customer Service | 1300 292 872 | (02) 6670 2400

29 September 2015

tsc@tweed.nsw.gov.au  
[www.tweed.nsw.gov.au](http://www.tweed.nsw.gov.au)

Email: [policy@bpb.nsw.gov.au](mailto:policy@bpb.nsw.gov.au)

Fax (02) 6670 2429  
PO Box 816  
Murwillumbah NSW 2484

Please address all communications  
to the General Manager

ABN: 90 178 732 496

To Whom It May Concern,

## **Independent Review submission in relation to The Building Professionals Act 2005**

### Introduction

An independent review of the Building Professionals Act 2005 (BP Act) has been undertaken by Mr Michael Lambert to assess the effectiveness of the BP Act in relation to building and subdivision regulation in NSW and the associated certification system that is necessary to ensure compliance with the numerous Acts, codes and policies that apply to the construction industry.

The terms of reference for the review were to take into account the scope within which certifiers and the certification system operates. This included the provisions of the Environmental Planning and Assessment Act (EPA Act) both in respect to planning and building controls, the role of local government with development approvals, compliance and record keeping processes and the role of Fair Trading and the Home Building Act in the licensing and oversight of builders and other building trades.

The review is currently in draft form and the author has encouraged submissions from interested parties before 21 September 2015.

Tweed Shire Council would like to thank Mr Lambert for his comprehensive report and would like to offer the following submission.

### Tweed Shire

Tweed Shire Council is located in northern New South Wales and has a total area of more than 1300km<sup>2</sup>, with 37 kilometres of coastline that feature some of the most pristine beaches in NSW.

In addition to the extensive coastline, the Tweed Shire is home to both wetlands and forests, lush pastoral and farm land. Tweed has one of the highest levels of biodiversity anywhere in the world and currently has a population of in excess of 89000 according to 2011 Census data.

### General Comment

Tweed Shire Council is generally supportive of the suggested reforms however we do have some serious concerns in relation to some of the recommendations made within the report. These concerns were also highlighted by Council staff in a recent telephone conference with Mr Lambert and are detailed below;

- **Extending the range of professional and academic qualifications for Building Certifiers.**
- **Standard conditions of development consent.**
- **Use of e-technology.**
- **The use of unapproved sub-standard building materials.**
- **BPB appointment of Certifiers for Strata development.**
- **Missed and pre-commencement inspections.**
- **Unauthorised Building work.**
- **Separation of Certifying Authority functions.**
- **Minister for Building Regulation and a single agency for all parties involved within the building industry.**
- **Acceptance of privately certified public infrastructure and sub-division work.**

### General Comment

The amendment of the EPA Act and introduction of BP Act provided the framework for privately accredited certifiers to undertake roles traditionally performed by Council's officers in relation to the approval of Construction Certificates and the issue of Occupation Certificates. Although there are inherent problems in relation to conflict of interest because Building Certifiers are being paid by the party whose work they are checking, the building industry has embraced private certification with a significant proportion of all new buildings being regulated and certified by privately accredited certifiers.

### Expansion of Qualifications of Building Certifiers.

The principle of extending the range of professional and academic qualifications that can be considered to be suitable to act as a Building Certifier is supported however this support is also given with a high degree of caution. This Building Professionals Act review and the number of reforms proposed by it, highlights the degree of complexity that is inherent in the system in which Building Certifiers currently operate. The amount of experience required to work within the law and act as an impartial public official should not be underestimated. NSW consumers, insurers and the Certification system do not need inexperienced persons acting as Certifiers just because their qualifications enable them to do so. The system does need individuals who are prepared to act in the public interest and make impartial decisions, even when these decisions may be to the detriment of their relationship with their client. A minimum of five years' experience working in Local Government or for a Certification company (preferably medium sized) is considered to be essential prior to any certification graduate acting as a sole practitioner.

The considerable benefit to the community of having Cadet Building Surveyors employed in Local Government cannot be overstated and there are many good reasons that would suggest that the subsidisation of this employment by the NSW government should be a high priority.

#### Standard Conditions of Development Consent

This is considered to be a pro-active measure and would assist the process in many ways however we believe that it is essential that Council retain the right to place conditions on development consents that are in addition to those standard conditions without the need for those additional conditions to be peer reviewed. Given that Development Applications are assessed on merit there are always going to be specific circumstances where applications do not fit into the “one box fits all” approach and these applications will require site specific conditions of consent to ensure that the environment and the amenity of the area is suitably protected. It would be problematic and time consuming to require peer review of proposed conditions of consent. Whereas, for Complying Development “that has to fit into a certain size box”, standard conditions of consent are considered to be appropriate.

#### The use of e-technology

Tweed Shire Council strongly supports the proposed reforms in this area and has been working closely with the NSW State Government and all local stakeholders to advance the use of technology in this important area.

It is considered to be essential irrespective of whatever e-platform is chosen that Councils are able to monitor their local development by accessing the system and sorting information using local government boundaries.

#### The use of unapproved sub-standard building materials

It is strongly suggested that the NSW state government lobby the federal government to make it illegal for building products to be imported that do not comply with Australian Standards and that are not fit for purpose for use in buildings. It is also suggested that a National register of approved products be established without delay.

#### BPB appointment of Certifiers for Strata Title development

The proposal to have the appointment of the Certifier approved by the BPB for all Strata and Community title development is not considered to be a practical solution. A practical solution would be to mandate a higher number of critical stage inspections for this type of development or to require that the PCA attend the site for at least one hour per week for the duration of the project. Most Councils would also be aware of projects where the CA and the PCA is based in a location that is a considerable distance from the project being certified. The separation by distance reduces the ability of the PCA to frequently attend the project and respond to any community concerns or complaints. This lack of attendance also means that the project manager doesn't have to be concerned about any critical impartial third party review by the PCA and is therefore less likely to be closely monitoring the project for BCA compliance.

Stipulating minimum required on site attendance times on the PCA, would help achieve the desired objectives.

#### Missed and Pre-Commencement Inspections

It is agreed that pre-commencement site inspections should be required for projects above a certain value for example \$200,000, however for minor work like the construction of a private swimming pool, this requirement would appear to be excessive and would add unnecessary cost to the project.

The proposal to have missed stage inspections notified to both Council and the BPB is also considered to be unnecessary as this will achieve little. It would be practical for the missed inspection to be noted on a schedule attached to any Occupation Certificate issued so that any prospective purchaser would be fully informed of the increased risk of purchase associated with the property. It is agreed that all practical measures should have to be implemented by the builder and that reasonable steps be taken to give the certifier a degree of comfort in relation to the uninspected item.

#### Accreditation of all persons involved in the Development and Construction process

This is an important step to ensure the improvement in the quality of projects. Councils often receive poor quality plans and specifications that are accompanied by consultants' reports that are written with considerable bias and lack objective impartiality. We consider the Accreditation of all parties involved in the process is essential as this would require the respective parties to commit to a code of conduct and be accountable for their plans, specifications and reports. This Accreditation process would also mean that those persons who continually fail to meet the required standard would risk their livelihood within the industry.

As many Building Surveyors in NSW Councils' carryout the dual functions of Development and Construction Certificate assessment Council requests that these Building Surveyors not be excluded from the opportunity to also become Accredited Assessment Planners. Many of these staff have in excess of twenty years' industry experience, have assessed thousands of Development Applications and have also led project teams for major development. Many regional Councils are also able to benefit from the diversification of having a multi-skilled workforce that is experienced, competent and able to offer significant cost and assessment time reductions to their employer. Many regional Councils suffer from staffing shortages and this is one area where the multi-skilling of staff can assist.

#### Unauthorised Building Work

This is a major concern within NSW and can place at risk the safety and health of building occupants. It can also cause considerable financial stress and imposition for any party inadvertently involved in the process. Unauthorised Building Work is carried out by Builders and property owners and we believe that harsh penalties or loss of license/Accreditation should be imposed on offenders who significantly breach planning and building legislation. The transfer of Licensing and Accreditation functions into one agency will assist to reduce the ability of offenders to escape penalty for their actions.

Council would also support the licensing of builders that carry out work on all classes of buildings rather than only requiring licensing for residential building work, as currently occurs.

#### Separation of Certifying Authority and Principal Certifying Authority functions

As noted in the report, it is not considered that there is a compelling case for change in this area and the current situation allows for flexibility in the system which we would ask be maintained. There are also circumstances that involve minor building work, for example, a dwelling an pool approved on one Development Application where there is not any reason why a different PCA could not be appointed for each portion of the work. That is, the structures are clearly distinct and any conditions of consent could be easily interpreted by the individual PCA.

#### Minister for Building Regulation and a single agency for all parties involved within the building industry

This concept is strongly supported and is considered to be essential.

#### Public Infrastructure and subdivision work

The private certification of subdivision work has not experienced the same level of acceptance that has occurred in the building industry. These works include the construction of public infrastructure such as roads, stormwater, sewer reticulation, water supply systems, pump stations and major flood drainage systems. There are several reasons why private sector certification of subdivision works has not been widely adopted. Some of these reasons are listed below;

- Public infrastructure constructed for subdivisions is generally constructed to a higher engineering standard in comparison to private infrastructure and is therefore subjected to stringent quality control procedures not widely adopted in the building industry
- The monetary value of public infrastructure is generally significantly larger than individual dwellings and therefore the financial liability that the private certifiers must accept is greater for public infrastructure.
- Consulting Engineers and Council Engineers are associated with the delivery of public infrastructure whereas Building Surveyors are responsible for buildings. Consulting Engineers have advised that they are reluctant to accept the liability associated with 'signing off' on public infrastructure. They prefer that Council as the asset owner takes the ultimate liability.
- Most Local Environmental Plans (LEP's) exclude accredited private certifiers from endorsing and issuing Subdivision Certificates. A Subdivision Certificate being the Part 4A certificate that allows for the creation of the new allotments of land and consequently the acceptance of the public infrastructure.
- The construction of new public water supply and sewer reticulation requires approval under the Water Management Act 2000 and is often regulated by Water Authorities.

### What does the Independent review recommend for subdivisions?

The review recommends the following changes associated with the certification of subdivisions;

- *Remove the requirement for councils' local environment plan to approve of private subdivision certifiers being able to be appointed as PCAs or issue subdivision certificates and simply allow accredited private certifiers to act as PCAs for subdivisions and issue subdivision certificates*
- *Recognise in the partnership agreement with councils that private subdivision certifiers are fully entitled to issue construction and compliance certificates and councils are not to represent to the contrary*
- *Councils be directed that their only role in respect to a Section 88 B strata or subdivision certification is to confirm the wording of the condition or restriction.*

*In addition it is proposed that:*

- *Council subdivision certifiers be required to be accredited with BPB on the same basis as council building certifiers are accredited*
- *NSW work with the ABCB on developing a standard for engineering design requirements for subdivisions.*

### Comments in relation to the recommendations for subdivisions

- There appears to be a definite city-based perspective when discussing subdivision works, due to the lack of reference to the Water Management Act and the fact that many non-metropolitan Councils are their own Water Authority. Scant regard for water & sewer, yet this is a major construction and development activity in country councils.
- No mention of works under Roads Act: There are many instances where improvements to existing roads must be undertaken for a subdivision, as well as connections to existing roads. These works are all regulated under the Roads Act.
- Similarly, there is no mention of works under the Local Government Act – such as works covered by Sec.68 for connections to downstream drainage connection points.
- The building certification process is the focus – yet subdivision civil works appear to be 'thrown in' as an insignificant ancillary extra. Of the 291 page document, less than 2 pages directly reference 'Subdivision and Strata Certification' – yet the recommendations aim to have subdivision civil works included.
- The proposed new 'Office of Building Regulation' would create a Standard for engineering design of subdivisions (Section 6.8).
- 'Loss of life' is raised as an issue regarding building certification matters, but then the on-going focus quickly shifts to monetary aspects and productivity.

- 'Competition' is raised as a big factor in the brief mentions of subdivision works and parity with 'Fair Trading' principles
- The Review appears to overlook that Councils are acting on behalf of communities and trying to get the best infrastructure constructed and value for money – not focussed on profits and speed.
- 'Risk assessment' and insurance matters are other factors causing concern – once again these seem to be more important than quality of work.
- Consequences of civil infrastructure failures have a less occurrence of being life threatening (than building failures), but consequences can be far more wide-reaching and catastrophic: earthworks failures can affect ALL BUILDINGS subsequently constructed; costs of road and stormwater failures and other related infrastructure impacts must be borne by the whole community – affecting rates and on-going costs to the broader community. Water and sewer failures have far-reaching health implications.

#### How do Council's currently manage subdivisions?

Councils that are experiencing population growth would also be experiencing land development or subdivision. To manage the subdivision of land and to ensure that the public infrastructure is constructed to an acceptable standard most Council's establish Development Engineering Units who are responsible for the assessment of engineering matters relating to development consents, approval of Construction Certificates, inspections of the works and issuing of the Subdivision Certificates.

A core function of the Development Engineer is to regulate and manage the private consultants who design the public infrastructure and the contractors who build this infrastructure. The quality control systems designed by Council Development Engineers to ensure the delivery of high quality public infrastructure is robust and sophisticated. These quality control systems are specifically tailored to ensure that prior to the acceptance of the public infrastructure it is fit for service and will not become an unacceptable maintenance liability for the rate payers and community at large.

This relationship between private consultants and contractors and Council development engineers has existed for many years. The public infrastructure that is delivered to the community as a result of this relationship is generally of a very high standard and it would seem illogical to change a system that is working well.

#### What are the risks to Council if the review recommendations are adopted

Council development engineers when checking construction certificates regularly find design errors in drawings prepared by consulting engineers. Some of these are locality/regionally-specific and hence are not easily able to be included in State-wide or nationally adopted construction standards. Examples are: topography specific – such as steep terrain or flood liable lands; or specific localities covered by local DCP's and their associated construction requirements. In addition, the inspection regime managed by the Development Engineers often identifies non-compliant works undertaken by the contractor. Experience has shown that these errors and non-

compliant works are an inevitable part of the land development process however they must be rectified before the infrastructure is finally accepted by Council. Sometimes the rectification process can be a costly process for the developer.

If private certifiers were solely responsible for identifying these non-compliant matters it is possible that the developer may exert influence over the certifier to accept poorly constructed infrastructure or issue a construction certificate that does not fully comply with standards.

Yours faithfully



**Vince Connell**  
**DIRECTOR PLANNING AND REGULATION**