



**LOCAL GOVERNMENT ENGINEERS' ASSOCIATION OF  
NEW SOUTH WALES**

**SUBMISSION ON**

**THE INDEPENDENT REVIEW OF THE BUILDING  
PROFESSIONALS ACT 2005**

**Prepared September 2015**



## **LGEA's submission to the Independent Statutory Review of the Building Professionals Act 2005**

The Local Government Engineers' Association (LGEA) welcomes the opportunity to make a submission to the NSW Government Building Professionals Board on the effectiveness of certification and building regulation as part of the independent statutory review of the *Building Professionals Act 2005*.

The LGEA is a registered industrial organisation that is run by, and represents, professional engineers, engineering staff and related technical professionals working in local government in NSW. LGEA is also a division of Professionals Australia which is a nationally registered industrial organisation of more than 25,000 professionals working in a range of industries throughout Australia.

Our members are directly responsible for the planning, design, construction and maintenance of council assets and infrastructure including roads and footpaths, parks and gardens, community buildings and amenities and water and sewerage assets owned and operated by local government authorities.

Given the nature of the Association and the work undertaken by our members within the industry, we are well placed to comment upon a number of the issues that are raised within the draft independent report. In particular, we have concentrated on the impact of private certification on public infrastructure created by subdivisions as that impinges of work that is currently undertaken by engineers and others employed within local government.



## Comments on the draft report

The Building Professionals Board is undertaking a review of the effectiveness of the *Building Professionals Act 2005* and the broader issue of the effectiveness of the building regulation and certification system, including private certification, which applies in NSW.

The terms of reference for the review are deliberately broad and take into account the scope within which certifiers and the certification system operates. This includes, at page 11 of the draft report, “*the provisions of the Environmental Planning and Assessment 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.*”

LGEA members have reviewed the draft report and have expressed strong concern in relation to a number of the proposed recommendations for reform. Primarily, those concerns relate to the proposal to extend the role of private certifiers and private certification in subdivision work and the impact of private certification on water and sewerage infrastructure and services and the obligation of developers to Local Water Utilities (LWU’s) under both the *Local Government Act 1993* (LGA) and the *Water Management Act 2000* (WMA).

### **Private certification of public infrastructure created by subdivisions**

The amendment of the EPA Act and introduction of the BP Act provided the framework for privately accredited certifiers to undertake roles traditionally performed by council officers in relation to the approval of Construction Certificates and the issue of Occupation Certificates. The building industry has embraced private certification with a significant proportion of all new buildings being regulated and certified by privately accredited certifiers.

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 a number of good reasons why private sector certification of subdivision works has not been widely adopted:

- 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 engineering staff are associated with the delivery of public infrastructure whereas building inspectors are responsible for buildings. Feedback from industry has suggested that 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 on responsibility for the 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 LWU's.

### **Private certification of public infrastructure created by subdivisions – proposals for change**

The proposed reforms associated with the certification of subdivisions are set out at pages 211 and 212 of the draft report. The recommendations are:

- *“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 on proposed reforms**

When reading through the draft report it is clear that the **building** certification process is the focus of the review of the BP Act. This is of no surprise and there are no doubt a number of good and clear recommendations included in the report as to how the current processes and relationships can be improved and how the existing Act might be amended to function better with respect to building certification. However, the recommendations which aim to have subdivision civil works included in the process appear to have been thrown into the report almost as an afterthought. Of the 291 pages in the report less than three pages deal directly with Subdivision and Strata Certification. This is clearly inadequate consideration to be able to recommend a reform of this nature and insufficient regard has been had to the range of issues and flow on effects associated with the proposed changes to enable them to be supported.



For example, the report appears to have a city-based perspective when discussing subdivision works. There is a complete lack of reference to the WMA even though outside of the Sydney metropolitan area and the Newcastle region the majority of councils are their own Water Authority. Despite that fact, there is very little regard for water and sewerage infrastructure within the report even though it forms a major construction and development activity in regional areas.

There is also no mention of works under the 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 and must therefore be undertaken in accordance with the requirements of that piece of legislation. 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 for both building works and subdivision works.

The draft report appears to place a premium on profits and speed over other considerations such as quality of work and infrastructure, safety and value for money. It is vital that the review does not overlook the fact that councils are acting on behalf of their communities and therefore need to take a more holistic approach to the certification of what will be community assets. Consequences of civil infrastructure failure can be far more wide-reaching and catastrophic than building failures. For example, earthwork failures can affect all buildings subsequently constructed and water and sewer failures have far-reaching health implications for the entire community.

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

It makes sense that councils that are experiencing population growth tend to also be the areas that are undergoing land development and subdivision. To manage the subdivision of land and to ensure that the public infrastructure is constructed to an acceptable standard most councils establish specific development engineering units. These are staffed by appropriately qualified engineering professionals who are responsible for the assessment of engineering matters relating to development consents including the approval of Construction Certificates, undertaking inspections of the works and the issuing of Subdivision Certificates.

A core function of development engineers is to regulate and manage the private consultants who design the public infrastructure and the contractors who build this infrastructure. Council engineering staff design and apply quality control systems to ensure that when delivered public infrastructure is of a high quality. These quality control systems are specifically tailored to ensure that prior to the acceptance of the public infrastructure it is fit for service, safe 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 seems illogical to change a system that is, in the main, working well.



## **What are the risks if the draft recommendations are adopted?**

Feedback from industry suggests that it is commonplace for council development engineers to find design errors in drawings prepared by consulting engineers when checking construction certificates. Some of these are the result of locality specific factors and hence are not easily able to be included in state-wide or nationally adopted construction standards. Examples may include, topography issues (such as steep terrain or flood liable lands), or specific localities covered by local DCP's and their associated construction requirements. In addition, inspection regimes managed by council engineers often identify non-compliant works that have been undertaken by contractors.

Experience has shown that these errors and non-compliant works are an inevitable part of the land development process. This means that it is vital to have in place a system of appropriate "checks and balances" to ensure that any issues are firstly identified and secondly rectified, before the infrastructure is finally accepted by the council. There is no doubt that the rectification process may be a costly process for the developer. However, the end goal must be the delivery of quality infrastructure to the community that is safe, reliable and fit for purpose. Developer profitability and convenience, whilst no doubt important, must not be the guiding consideration when it comes to the provision of public infrastructure.

Additionally, because council engineers have no financial relationship with the developer, consulting engineer or contractor, the potential for conflicts of interest to arise in the relationship is by nature quite low. This is not the case with a private certifier who has a direct contractual arrangement with the developer in relation to the job at hand as well as the prospect of future work. This financial relationship between the developer and private certifier could result in the private certifier making decisions that are not in the best interest of the community. For example, the private certifier may be persuaded to accept a construction despite the fact that it does not meet the design and construction specifications; alternatively, pressure to issue a subdivision certificate even though all conditions of consent are not complied with may be applied.

A range of issues arise in the event that a private certifier issues a subdivision certificate which transfers sub-standard infrastructure to Council. And, because the council had no involvement in the CC approval, inspections and acceptance of the works, it is likely that there may be some delay before the council becomes aware of the non-compliance issues making remediation potentially more costly and extensive as a result for the community involved. Even if the council did identify non-compliance at the time of transfer of the asset, council's only recourse would be to commence litigation which would also be costly in the event that the developer did not agree to rectify the non-compliance issues.

Under the current system council engineers are able to ensure that prior to the issue of the Subdivision Certificate all public infrastructure meets the desired standards. Experience has shown that the private sector is often compromised when trying to achieve high quality outcomes because of pressures associated with achieving completion of the works within limited time frames and tight financial budgets.



## Conclusion

The recommendations contained in the draft report concerning the private certification of public infrastructure created by subdivisions propose significant adverse changes to a public infrastructure delivery system that has been working efficiently for many years. In addition, the review does not address the interrelationship that exists between the Local Government Act, Roads Act, Water Management Act and the Environmental Planning and Assessment Act and how those various Acts impact on the provision of new public infrastructure.

The independent review has a strong bias towards the many problems associated with private certification within the **building** industry and makes various recommendations to rectify these problems. Unfortunately the review attempts to apply those recommendations to the certification and delivery of **public infrastructure** created in new subdivisions. As outlined in the submission above, that is neither desirable nor appropriate given the differing considerations that are required to be applied to infrastructure, compared to private buildings, as well as the community ownership, impact and use of the infrastructure.

The proposed changes create an environment where the actual owner of the public infrastructure has no ability to reject substandard design or poor quality work. This is an illogical outcome as the prospective owner of any product or good should have the right to reject substandard or poor quality goods. If the private certifier accepts poor quality public infrastructure on behalf of the community, the only option for recourse is litigation which is an expensive and inefficient method for rectifying non-compliant works.

The private sector might be efficient at designing and constructing public infrastructure. However it is the public sector, in the form of council engineers, which is best placed to independently, effectively and ethically regulate the approval and construction of that infrastructure. The combined resources of the private and public sectors has been delivering quality public infrastructure to the community for many years that is fit for purpose, safe and reliable and we believe that it would be undesirable to depart from the current approach and that the recommendations in the draft report should be rejected.



**LGEA**

**Contact:** Gordon Brock, Director

**Street** Level 1, 491 Kent Street, Sydney 2000

- - -

**Phone** 02 9263 6528

**Email** [gbrock@professionalsaustralia.org.au](mailto:gbrock@professionalsaustralia.org.au)

**Web** [www.professionalsaustralia.org.au/groups/lgea](http://www.professionalsaustralia.org.au/groups/lgea)

A division of Professionals Australia: