Inquiry into the regulation of building standards, building quality and building disputes

SUBMISSION TO THE NSW LEGISLATIVE COUNCIL PUBLIC ACCOUNTABILITY COMMITTEE

AUGUST 2019

CONTENTS

ABOUT US

Consult Australia is the industry association representing consulting firms operating in the built and natural environment sectors. These services include design, engineering, architecture, technology, survey, legal and management solutions for individual consumers through to major companies in the private and public sector including local, state and federal governments. We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms with combined revenue exceeding $40 billion a year.

Some of our member firms include:

INTRODUCTION

Consult Australia welcomes the opportunity to provide this response to the Legislative Council Public Accountability Committee's Inquiry into the regulation of building standards, building quality and building disputes.

There is no doubt that confidence must be restored to the broader community regarding the quality control for building construction in this state.

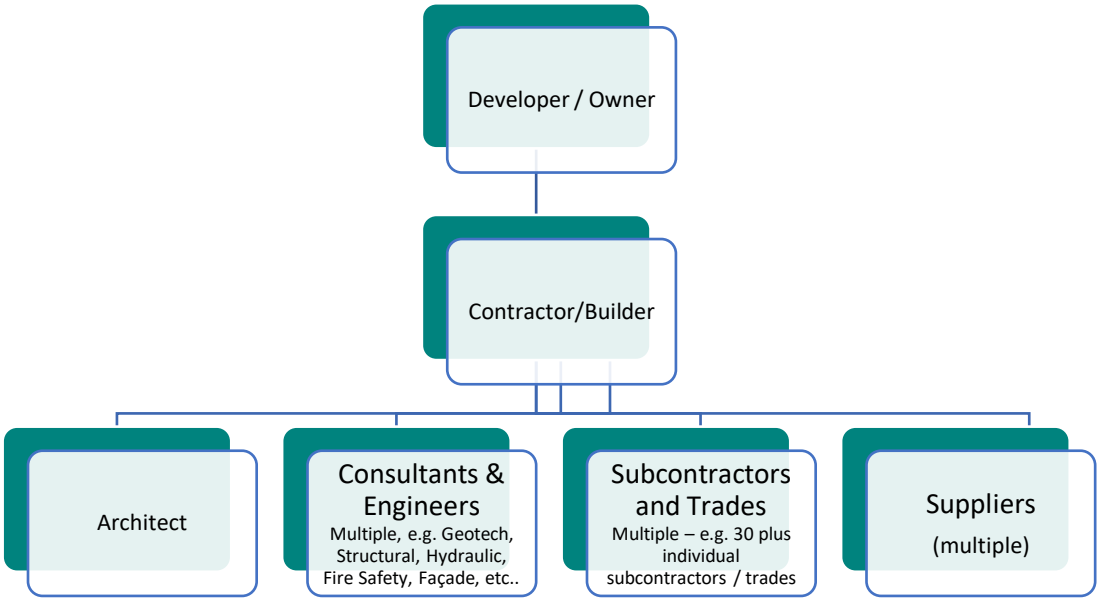
We strongly believe that owners and end users of buildings should have certainty that their building complies will all applicable codes and regulations and that there is adequate and appropriate enforcement of those codes and laws. We believe that reforms are necessary to better manage building quality, and this includes the certification process. However, in order to ensure that current problems in the process are addressed a clear understanding of the building and construction process is needed to ensure that intervention is appropriate and will achieve the desired outcomes.

Understanding the building and construction industry

The culture in every building and construction project starts at the top i.e. the commissioner of the project. They establish the priorities for the project. The extent to which time and cost is valued over other factors such as, quality and sustainability, will have a significant impact on the outcomes of the project.

The project commissioner will typically hire a contractor to deliver the project for large high-rise buildings (see chart below). The contractor then subcontracts the designers with additional sub-consultants and sub-contractors hired as necessary. All will be working under various forms of contractual terms and conditions.

This means that there are multiple participants coming in and out of the project to perform a range of services and/or tasks.



The skill level of these participants spans a wide range from professionals, technicians, skilled trades, and casual trades. Across this group there are significant differences in education, training, professional standards and knowledge of the building regulations and codes.

Post the design phase the level of influence that the Architect and Engineers (the consultant designers) have on the construction is often minimal. The design is passed to the Contractor/Builder and they then have responsibility to deliver the build according to the design. However, as the build progresses multiple decisions can and do get made that alter the design incrementally. These incremental decisions and changes when combined can have significant consequences.

Without a definition of 'building designer' there is an assumption that the responsibility for these incremental changes fall to the Architect and/or Engineers, however the Architect and Engineers may have no knowledge that changes to the design have been made, unless the Contractor/Builder refers back to them. If the change is substantial then it is likely that the Architect and/or Engineer(s) will be notified, however incremental changes are often not considered significant enough.

The National Construction Code (NCC) includes a definition of a professional engineer, however there is no similar definition of a builder, which specifies the qualifications and experience that a builder must maintain. This means that there are building subcontractors and trades making decisions that can affect not only the construction but also the design without any training in the NCC or professional standards. This is where risk of failure creeps in.

In any reforms to the building regulations it should be made clear that the Architects and Engineers are only be required to certify that their original design complies with the relevant Codes/Regulations. All changes to the original design must be verified with an appropriately qualified professional and if the Contractor/Builder (or their subcontractors/trades) approve any changes then they should be caught within the definition of 'building designer', because they are influencing the design and therefore the outcome of the project.

Consult Australia's response to the Inquiry Terms of Reference

Our response to the Inquiry into the regulation of building standards, building quality and building disputes covers the following in the Terms of Reference:

1.a. The role of private certification in protecting building standards; and

1. e. The current status and degree of implementation of recommendations of reports into the building industry including the Lambert report 2016, the Shergold/Weir report 2018 and the Opal Tower investigation final report 2019.

THE ROLE OF PRIVATE CERTICATION (1.A.)

The Building Confidence Report by Dr Shergold and Ms Weir for the Building Ministers Forum (February 2018)[1] considered private certification in some detail. The focus of their consideration was to ensure the integrity of private building surveyors. It was the recommendations of that report that integrity can be,

"achieved through statutory controls to mitigate conflict of interest (Recommendation 9), a code of conduct (Recommendation 10) and mandatory reporting obligations (Recommendation 11)."

This can be further enhanced by,

"*increased collaboration between state and local governments and private surveyors in their enforcement role (Recommendation 5).*"

[1] Building Confidence Report February 2018.

Consult Australia supports these recommendations. We believe that appropriate regulatory oversight is key to rebuilding public confidence. The Building Confidence Report highlights the key problems here, in that there is a lack of clarity regarding ownership of complaints, and a lack of timely follow up and enforcement.

We note that since the Committee's Inquiry was established the NSW Government has issued a number of reforms, one of which is to require sign-off to be provided by way of statutory declaration. Consult Australia supports a system of certification but does not believe that a statutory declaration will provide any greater certainty to the end user. As the Building Confidence Report highlights, it is the integrity in the system that needs resolving, rather than applying an approach that is 'more of the same'.

It is of great importance that the roles of each party in the process of development, design, and construction is considered to ensure that any system of regulation, compliance and enforcement is appropriate and proportionate. Any sign-off requirements should apply to designers, contractors/builders and developers in accordance with their role in the project. This in turn provides greater certainty to the Building Certifier.

Design certification and statements of compliance are enough for the Building Certifier accepting the design for the purposes of the Construction Certificate (CC) or the Complying Development Certificate (CDC). However, these design certificates and statements do not provide any meaningful protection to the end user, because the project has not reached detailed design or construction completion. On Design and Construct (D&C) projects (described on page 3 of this submission) the design process is ongoing throughout the construction. In fact, the detailed design (a major cause of defects) is typically absent from CC documentation and is finalised in a just-in-time manner as construction proceeds.

It should be noted that "for construction" documentation does not mean that the documentation is complete. It is commonplace that the documentation by the architect or engineer needs to be supplemented by documentation from a specialist trade thus completing the documentation to a level that the building can be constructed. Minor modifications to the design documentation are common during construction and should not need to be re-submitted to the regulator provided they have been approved by a competent professional.

Excluding design development, changes to the design occur continuously on a project and it is the approval for any changes by an appropriately qualified person and the final sign-off that is key to providing end user certainty.

The final design documentation used for construction should have a final sign-off and an accompanying list of design documents for submission to the Building Certifier and in the event of a query as to whether the change is minor or major, the Building Certifier should advise. The emphasis should be on completeness of design and clarity as to who has responsibility for which elements.

Ensuring all parties involved have adequate training in the National Construction Code (NCC) and the necessary experience and qualifications is therefore important. The Contractor/Builder's role in delivering a compliant building is critical, yet they may not have appropriately skilled people on the building site to ensure that all requirements are being met. There are typically not enough qualified engineers on site and this needs to change. Certification from the Contractor/Builder that the work is constructed in accordance with the plans and specifications is critical.

The Contractor/Builder should be front and centre in declaring their work is constructed in line with the documentation and to appropriate standards. This will require appropriate skills and education of the contractors, including engineering and building qualifications of an appropriate level of rigour.

Consult Australia believes that there are existing systems in other jurisdictions that have a robust approach to certification. We encourage the NSW Government to consider these systems and particularly encourage greater consistency with other jurisdictions in Australia, because the greater consistency of regulations across Australia will increase knowledge and standards. Professionals and businesses (of all sizes) working across Australia are then not required to understand a multiplicity of rules, thus risk is decreased.

Examples of good practice in other jurisdictions:

Queensland
In Queensland Building Act 1975 and Regulation enables competent persons and Queensland Building Services Authority (QBSA) licensees to give help to building certifiers in the assessment of a building application and inspection of building work.

Competent persons give design/specification help and inspection help by certifying that:

- Form 15—A building design or specification will, if installed or carried out under the certificate, comply with the relevant building laws; or

- Form 16—That an aspect of building work complies with the building approval and the relevant building laws.[2]

Form 15 is a design certificate for construction and Form 16 a construction certificate confirming that the design is as built.

Victoria
The Victorian system of 3rd Party Peer review could be considered for inclusion in any NSW reforms, for large complex projects.

A peer review can be helpful in upskilling the profession. It should be based on a risk matrix, which the Building Certifier can use to determine whether to trigger the peer review.

New Zealand
Form PS1 requires the engineer at the design stage to state the level of construction service required. This is dependent on the size of the project, the importance of the project, the complexity of the works and the experience and demonstrated skill in quality management of the Contractor/Builder. Hence this category ranges for CM1 (low risk with minimal site inspections) to CM5 (full time staff on site for a major project).

A summary of the system is outlined below:

1. Competent design professional – this is defined as a professional qualification and proven current competence through registration on a national competence register, such as Chartered Professional Engineer or a Registered Architect.
2. The standard forms are:
    - PS1 – similar to a Form 15 in Qld and Form 1503 in Victoria – this is a design certificate;
    - PS2 - a design review certificate which could be viewed along the lines of a peer review certification;
    - PS3 - construction certificate – provided by the contractor;
    - PS4 - construction review (which is like a Form 16 in Qld and 1507 in Victoria) - this is a construction certificate.
- Construction monitoring services - defines CM1 to CM5.

Consult Australia members can provide further information on each of these systems to assist the NSW Government look at the processes in further detail.

A key issue that has not been explored is who has the authority to stop work on site when non-compliance is found and remediation requirement. The contractual terms and conditions do not give this authority to the consultants or subcontractors. If any parties working under contract to the Contractor/Builder, or direct with

[2] www.hpw.qld.gov.au/sitecollectiondocuments/newsflash258.pdf

the Developer, stop work they will then may be liable for causing time delays and liable for costs under their contract. This issue should further be explored in any proposed reforms in NSW.

IMPLEMENTATION OF RECOMMENDATIONS OF REPORTS INTO THE BUILDING INDUSTRY (1.E.)

Consult Australia has been a participant in the Building Ministers' Forum and in line with many other industry groups welcomed and congratulated the Forum for agreeing at their July 2019 meeting to taking a national approach to the implementation of the Building Confidence Report.

A productive, competitive and healthy building and construction industry must have certainty in its operating environment. This requires transparent and informed policy making by governments, and consistent enforcement application, where intervention is deemed necessary. Above all else this provides public confidence in the policymakers, regulators, and the industry.

It is with disappointment therefore that Consult Australia notes that the NSW Government intends to push ahead with its reforms set out in its Building Stronger Foundations Discussion Paper[3].

Consult Australia does not support the reforms proposed in the Building Stronger Foundations Discussion Paper and urges the NSW Government to implementation of the Building Confidence as agreed to at the Building Ministers Forum.

A copy of our Submission to the Building Stronger Foundations Discussion Paper is attached as an appendix to this submission.

CONTACT

We would welcome any opportunity to further discuss the issues raised in this submission. To do so, please contact:

Nicola Grayson
Chief Executive
Consult Australia
nicola@consultaustralia.com.au

Linda Gaunt
State Manager NSW
Consult Australia
linda@consultaustralia.com.au

[3] Building Stronger Foundations Discussion Paper, NSW Better Regulation Division, Department of Finance, Services and Innovation.