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12 June 2015

Mr Michael Lambert  
BP Act Review  
GPO Box 39  
Sydney NSW 2001

Dear Mr Lambert

**Submission on the Independent Review of the Building Professionals Act 2005**

SHOROC is a partnership of Manly, Mosman, Pittwater & Warringah Councils led by a Board of the council Mayors and General Managers. We advocate for our region, coordinate regional planning, and build partnerships to improve the strategic capacity of our member councils. Collectively we represent a population of around 290,000 residents who contribute \$22.5 billion annually to the NSW economy, and a region of approximately 288km<sup>2</sup> in north east Sydney.

On behalf of the four SHOROC councils enclosed is our submission to the Independent Review of the Building Professionals Act 2005.

It is clear there is a need for reform of building regulations in NSW and we welcome this review and its aims to reform the Act, the certification scheme and building regulation in general.

Should you require any further information on this matter or to arrange a meeting to discuss the reforms with our member councils please contact me on (02) 9905 0095 or [admin@shoroc.com](mailto:admin@shoroc.com).

Yours sincerely



Ben Taylor  
Executive Director



## SHOROC Submission

# Independent Review of the Building Professionals Act 2005

June 2015

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## Introduction & background

SHOROC is a partnership of Manly, Mosman, Pittwater & Warringah Councils led by a Board of the council Mayors and General Managers. We advocate for our region, coordinate regional planning, and build partnerships to improve the strategic capacity of our member councils.

Collectively we represent a population of around 290,000 residents who contribute \$22.5 billion annually to the NSW economy. Our region covers an area of approximately 288km<sup>2</sup> in north east Sydney and is characterised by its outstanding natural environment, vibrant community and businesses, and large influx of tourists and weekend visitors.

Local government plays a pivotal role in planning and building regulation and we welcome the opportunity to provide a submission on the review of the Building Professional Act 2005 Discussion Paper.

This submission brings together the advice of officers from the SHOROC member councils into a single submission.

There is a clear need for greater confidence in the building regulatory system and improved outcomes. Building regulation and certification ensures that building and subdivision standards are met by developers. It is agreed that this independent review is timely given the regular, often negative, feedback from communities, council officers and industry experts.

## 1. Governance structure of building regulation and certification (Q1-9)

### Administrative and legislative structure

SHOROC supports consolidation of the legislative framework and sees merit in this being consolidated as part of EP&A Act given the existing system is fragmented and imprecise. Consolidation would allow a single reference point (in plain English) to reduce potential confusion and simplify all elements into one location. However, further detail would be required before full support can be given.

SHOROC is supportive of change with strengthens, expands and adequately resources the role of the Building Professionals Board (BPB) and provides for more focus on regulation of certifiers and building rectification rather than the largely administrative role at present.

To improve and simplify the system, SHOROC supports that a revamped or consolidated BPB (or NSW Building Commission) absorb related aspects including licencing from NSW Fair Trading and building related matters from the Department of Planning and Environment. Such a consolidated BPB would need to be adequately resourced in order to perform the strengthened and expanded role.

Currently there is a view that NSW Fair Trading and the BPB are not as effective as they ought to be and there is a need to ensure any consolidation results in greater effectiveness. In fact, any review of many of the residential flat buildings completed in the last 10 years throughout Sydney will confirm this. Many contain faulty waterproofing, faulty wire systems, render falling off, excessive cracking and other poor workmanship issues. It is doubtful that the certifier is responsible in the vast majority of cases. Additionally, while it may seem that these matters are resolved via issuing 'Rectification Orders', they are generally not satisfactory from Council experience and the standard of building work shows no clear signs of improvement to date.

As it presently sits, due to the current structure and resourcing the BPB can be a "bottleneck" for handling of complaints lodged against NSW accredited certifiers. Statistically, it would appear there is a need for improvement of the BPB's complaint handling turnaround times. If consolidation was to go ahead, complaint handling practices and procedures of the BPB and/or any other eventuating Department must be reviewed, fine-tuned, and streamlined to ensure and guarantee efficacy (and remove red tape).

A 'One Stop Shop' for building practitioners, building matters and the like, may be more effective and add significant value to the process. The value of building work constructed per annum in NSW would clearly seem to justify serious consideration in this matter.

Further there is a requirement to remove the double up for investigation, provide greater clarity and certainty, particularly for the consumer, and remove question of responsibility during construction and also during the defects liability period.

Mosman Council advise that there is a need for strengthening of the role to enable complaints to be investigated fully and appropriate disciplinary action to be determined and followed through. Staff consider that the investigation of complaints regarding certifiers, which are often referred by local councils or adjoining residents to the BPB, is poor due to lack of resourcing. In addition, staff consider the BPB Disciplinary Committee is not in a position to question the level or extent of the BPB investigator's actions and as a result Council staff are also required to undertake a full investigation, including interviewing persons of interest. This can often result in matters not being referred by Council staff for investigation by the BPB. Council can also be placed in the position of seeking rectification or upgrading of building works whilst bearing all the associated costs to rectify errors made by Certifiers. Based on previous instances, experienced by Council officers, it is evident that penalties and disciplinary actions by the BPB are not sufficiently severe to deter repeat offenders.

A suggestion as part of this consolidation is that the BPB should initially modify its register of accredited certifiers to link directly with its register of disciplinary action. In the longer term, create a single register that enables consumers to check a certifier's accreditation and whether the certifier has had any disciplinary action taken against them at the same time.

#### State and local government partnership

SHOROC considers there is merit in a partnership model between the State and local government in the area of certification and building regulation enforcement. However the terms of reference for such a model need to be developed through a consultative process. Clearly defined roles need to be established to ensure there is no duplication of roles and the community is clear as to who is responsible for what. The funding model for regulatory activity would also need to ensure sufficient funds are available for the designated State and Local agencies to resource the delivery of their regulatory responsibilities.

In addition, council certifiers need their role clarified to confirm their separation from the wider responsibilities of compliance functions. General environmental, hours of work and associated concerns are best addressed by Council regulatory officers who are both readily available to and familiar with the local geographic area.

#### Role and Competence of Private Certifiers

The vast majority of private certifiers are competent and responsible and carry out their duties in accordance with their statutory obligations. However, there have been numerous instances where councils have been forced to act as a result of errors made by private certifiers. These errors not only relate to minor developments but to multimillion dollar commercial developments. In some instances buildings have been incorrectly certified as complying with the Building Code of Australia (BCA) and the *Swimming Pools Act* which jeopardises the life and safety of the occupants of the premises. This is having a significant impact on council resources and a substantial financial impact on the owners of these properties.

Councils have the responsibility of rectifying these problems even when they have no involvement in the certification process for these developments. In this regard, councils are required to enforce the requirements of the consent or issue orders where a private certifier refuses or fails to adequately act on complaints. Legal action often needs to be instigated at Council's expense.

## 2. Use of e-technology to improve access to information, processing of transactions and management of systems (Q 10 & 11)

SHOROC supports the proposal for an electronic system for development applications, complying developments and building certification as this would generate useful information for government and the industry and improve regulatory performance. This would provide consistency, greater accessibility for consumers and records and information management.

This system would need to be available to the general public so that they can be better informed of approvals associated in their locality. At present a great majority of all enquiries regarding approvals are directed through local Councils. This system should be developed, implemented, and maintained at a State level, in consultation with Councils, to ensure consistency across Local Government Areas and to maximize the benefit and capacity of the system to collect useful data.

## 3. Building regulation and certification process (Q12 – 18)

Comments:

- The introduction of a clear and integrated approval process is required to regulate unauthorised building works. However, this approach should not be seen as a method of avoiding compliance with development consents. This should include a retrospective approval process for unapproved building works.
- Do not support the proposal to limit development approval to a concept approval as site specific constraints require specific conditions and these need to be applied, where appropriate. Resident and council views need to be reflected in the approval and this consideration would not be possible from concept plans. While this is a model that other stakeholders including developers may prefer, the community supports more transparency and scrutiny up front, and it is considered this cannot be delivered under such a model.
- While standardisation of some conditions can be explored to provide greater consistency and certainty, there must always be allowance made for specific conditions to be imposed to cover those unique issues that arise from time to time on development sites.
- Support with respect to the issuing of completion certifications, the application of occupation and compliance certificates to certify whether building work is consistent with development consent of complying development certificate.
- Support that improvement in the process of certification, to allow commencement of building work, be provided by standardising the information to support the CC/ CDC, standardising the report to support alternative solutions with content confirmed by the certifier; and replacing the not inconsistent test with the consistent test for both CCs/ CDCs and OCs
- Support combining the roles of the accredited certifier and the principal certifying authority, so that building work is certified by the one building certifier.
- The introduction of the Building Manual is supported in principle. However, further information on the content and the application of these documents is required to improve the quality and accessibility of key building information for Class 1b-9 buildings. The issue of who is responsible for updating and maintaining the manual years down the track must also be resolved. A manual that is not updated will present a source of confusion moving forward, and the maintenance of the manual needs to be centralized and appropriately resourced.

- Support reform of the fire protection system certification, including the proposed revised role for NSW Fire and Rescue.

#### 4. Supply, accreditation, accountability & oversight of certifiers (Q19–32)

Comments:

- Clarification of the roles and responsibilities of councils, consent authorities, building certifiers, builders and land owners through the building regulation process is supported. Reviewing the roles of the certifier should be a priority. It is imperative that this role be clarified and defined. More clarity and professionalism will also encourage entry graduates.
- Support the use of an evidence-based framework and guide for the review of the accreditation scheme.
- Support improved transparency of the performance of a certifier with a practice guide. Currently there is no practice guide for certifiers in NSW. A document such as this would assist in addressing much of the confusion that exists in the community and industry regarding misinformed expectations about what the certifier does and does not do. It is considered any practice note/guide must be supported by legislation and the role of certifiers must be clear and unambiguous in any practice note. These could be given some legal weight if adopted in a manner that might be termed a 'building principle' (similar to 'planning principle' as established by the Land and Environment Court) therefore applying to situations that arise frequently and also applied to assist in reaching a decision in any other particular case.
- Support an expanded program of proactive investigations and audits by the BPB. The current time frame of 12 months to over 2 years to investigate complaints is not appropriate. The BPB needs to be resourced to be far more proactive in enforcement of the legislative requirements by taking up front action and not pass these matters onto council. Consideration should also be given to not referring to the program as investigations as this implies that it is a disciplinary process as opposed to giving guidance on best practice.
- Support introduction of demerit system to eliminate repeat offenders. Penalties and disciplinary actions against private certifiers who incorrectly certify developments as being compliant must be sufficiently severe to deter repeat offenders. The bar needs to be set high with a low number of demerit points available before sanctions are applied, given nature of the industry being legislated and consequences of issues going wrong.
- Support online system for lodgement of complaints.
- Support establishment of education and training programs providing technical advice, provided the advisory line is adequately staffed and resourced to deal with all enquiries from council, certifiers, home owners etc.
- It is not a 'level playing field' between councils and private certifiers. Council is often the 'certifier of last resort' to manage more difficult and problematic cases, compromising the ability of councils to provide effective, efficient, adequately funded and competitive services. Councils can also be seen as the authority to resolve complaints against private certifiers. In addition while effectively private and council certifiers carry out the same regulatory role, processes in local government may limit council certifiers providing an equivalent service. Some councils have established separate business units with council accredited certifiers to work across different councils to address this issue.
- Support implementing an industry insurance scheme to cover the gap in insurance cover from certifiers leaving the industry or where the certifier changes for a particular project
- In regard to the question of whether there is a 'last person standing' problem arising from the different liability cover between builders and certifiers, advice suggests it is council always 'left standing' well

after the certifiers and builders have moved on. The problem then arises when the public and home owners approach Council to resolve matters in the absence of the builders and certifiers. There is a need for the BPB to be strengthened and resourced to address these issues as Council has limited scope under the current framework.

- Support simplification of the requirement for swimming pool fencing certification, moving from three standards to one. At present the three different legislative requirements are too confusing for home owners, purchasers, certifiers, pool fencing suppliers and council. One standard for all pools will ensure both safety and consistency is enforcing compliance achieved.
- In addition, Mosman Council provides the following comments:
  - Consideration is to be given to where enforcement powers need to sit, and whether they should rest with council to allow better management from the front end over this process. As current attempts by PCAs to resolve a matter adds to confusion and increases time frames to the process. It should be noted also that at times council officers are not able to act upon a notice to issue an Order issued by a PCA as there are errors within the notice.
  - Council does not support the discussion to remove from the legislation the Issuing of a Notice to give an Order as this Notice does have a role to play when matters proceed to court, as procedural fairness has been demonstrated before an Order was given.
  - The industry needs to carefully consider the recent court judgement that a CC, as approved, is able to be relied upon for construction regardless of the inconsistencies with the consent. As to rely on the CC and not the consent, would be seen from the community's perspective, as a process that is not transparent and unfair. As based on the current approval process for DAs many residents and community groups have had input into the assessment process and observed the determination of the consent. To permit non compliances with consent under the issuing of a CC, when works commences would generate community disappointment and unrest in both processes. In regards to an Order 15 EPA 1979 if the consent is no longer able to be relied upon then these needs to be reviewed.
  - A PCA prior to issuing a CC should as part of the CC checklist, be required to review the section 79c assessment and/or the council report for the DA, to gain a better understanding of the key issues, such as site constraints, residents responses and other authorities' input to the assessment, prior to issuing a CC.
  - Experience shows that the same issues raised at DA stage by residents will be raised during construction. The PCA would be better placed to understand key issues and reasons for the condition's being incorporated within consent before being nominated for the CC.
  - Council is not comfortable with the discussion around PCAs issuing Directions. Immediate confusion arises with terminology as legislation currently calls up a Direction can be issued under the Swimming Pools Act, and suggests this proposed enforcement be renamed. It was also raised that a new working group be established immediately to review better regulation and compliance before any final decisions are made.

## **5. Resourcing and funding arrangements for the building regulation and certification system (Q 33)**

Care needs to be given in transferring any additional functions to local government without funding provisions. Recent examples demonstrate full consideration is rarely given to resource implications and the limited additional revenue options available to local government.

A recent example provided by Mosman Council is the amendments to the Swimming Pools Act 1992 which required each property containing a swimming pool that is sold or leased to obtain a valid compliance certificate. This function was placed in the hands of local government without any regard to the impact on the resources available to implement such an inspection program. The fee available to council to recover the cost of this service is inadequate when compared to the fee that a private certifier can charge. The disparity is clearly demonstrated where council can charge \$150 for an application for a compliance certificate and \$100 for a second inspection. No further fees can be charged. Private certifiers have indicated that they would charge around \$800 for such a service.

Calculations must be based on full or substantial cost recovery. Funds need to be equitable and not burden councils collecting the fees and passing them onto the BPB.