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25 September 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 Draft Report - Independent Review of the Building Professionals Act 2015.

As you will be aware, SHOROC made submissions during the consultation process and is pleased to see the comprehensive nature of this report.

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

# Draft Report - Independent Review of the Building Professionals Act 2015

September 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 Draft Report - Independent Review of the Building Professionals Act 2015.

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

The recommended reforms are largely supported and are consistent with SHOROC's earlier submission. Specific comments in regard to recommended reforms are below. In addition, it is noted these recommendations are high level responses and the details need to be further discussed through working and focus groups before changes are implemented, as there may be financial and resourcing burdens on Councils.

## Responses to the recommended reforms

### 1. Create a principles based legislative framework for building regulation

SHOROC supports consolidation of the legislative framework and sees merit in this being consolidated as a separate Building Act, incorporating relevant provisions of the Home Building Act and the building regulation provisions of the EP&A Act, or as part of EP&A Act in a principles based, plain English form. Consolidation would allow a single reference point (in plain English) that is easy to interpret for the average home owner to reduce potential confusion and simplify all elements into one location.

In addition, whilst the review recommends accreditation linked to drafting of CC plans, we would urge that new or redrafted legislation purposely eliminates the not inconsistent test, to ensure that at completion developments achieve the original intention of the consent.

### 2. Strengthen the administration of building regulation and certification

The consolidation of the responsibility for the licensing of building practitioners and the accreditation of certifiers in a single Office of Building Regulation is supported. We welcome the concept of having an independent body which will control licencing, accreditation and the roles of tradesmen, builders and other professionals under the one central body. This will result in cost savings due to less duplication of roles presently undertaken by NSW Fair Trading and the Building Professionals Board.

It is recommended that development and / or building controls administered by the Department of Planning be transferred to the new Office of Building Regulation under the auspices of a new Act as this would minimise confusion with regard to responsibilities. The effect of this proposal would be to create a one stop shop for the building industry which would be favourably received by the public and increase consumer confidence.

Such a consolidated Office would need to be adequately resourced in order to perform the strengthened and expanded role.

### **3. Implement an information systems strategy for the building regulation and certification system**

Supported

### **4. Enhance the accountability and clarify the role of certifiers**

Largely supported. Specific comments below.

- Acting in the Public Interest and partnership agreements

This is critical to the success of a rejuvenated certification system. Certifiers need to be clear who their customer is, i.e. they act on behalf of the consent authority, and always in the public interest. We also believe this message needs to be made clear to the public, likewise clarity on the roles (and limits of the roles) of the certifier and Council.

It is noted in the report that Sydney Metropolitan Councils tend to refer initial compliance matters to the Certifier, whereas this is not so in regional areas. In order to ensure consistency of approach we would advocate a partnership agreement similar to that in existence for Food Regulation.

We would recommend that each certifier also be required by law to enter into a partnership with the regulator or Council, forming an agreement to provide certification services for each Council area they wish to operate in.

- Powers of Council

The recommendation to clearly define the role of Council in its compliance capacity and that of the certifier, including the need to better fund this critical role, is welcomed. What is unclear is whether Council will have a role in investigating the conduct of certifiers and whether funding will support, for example Council proactively checking all Private CDCs, CCs to verify conformity to the SEPP/consent?

In order to better meet community expectations it is essential that Council be granted powers to cause privately certified consents (CDCs) to be revoked/declared invalid where they have been illegally issued, e.g. where the requirements of the SEPP are not met.

The current process of judicial review is too timely and too costly for Councils and can present significant risk where a BPB investigation is ongoing and yet to report its findings. This power could for example be vested in Council (requiring a resolution) or via a regional panel.

Additionally regulations should specifically include the ability for a Construction Certificate (CC) to be challenged by Council or the Regulator.

- Role of the Certifier

The role of the Certifier and the consent authority also needs clarification i.e. is the Certifier obligated to ensure ALL conditions within a Development Consent are being complied with during the development OR is the consent authority obligated to ensure certain conditions are complied with? There needs to be a reporting process and documented evidence that a Certifier has attempted to investigate/resolve a complaint. Currently a complainant will contact Council advising that they have attempted to contact the Certifier but haven't received a response from the Certifier and therefore they come straight to Council.

- Guidelines and fact sheets

Mosman Council also provided the following comments in response to the recommendations in providing guidelines and fact sheets. The category approach is supported and would provide clarity, consistency and manage customer expectations, however the criteria for each of the categories as proposed is not supported and needs to be reconsidered.

- Category 1-

Where a consent or CDC is granted and works are not being built in accordance with the consent, this requires a joint approach, as a PCA alone does not have the tools to issue stop works orders or orders to demolish, or issue a BC or determine a section 96. For these reasons the suite of options are Council's role, and the process needs to start that way from the initial enquiry, not some 28 days after the PCA issues the NOI or Direction. This current process for these types of matters is generating community frustration and contributes to the lack of understanding in the process. If it was to be recommended that all council and PCAs work together on these matters as first response, this may see a return of community understanding in the process, provide role clarity, consistency and transparency.

There is a mix of approaches across NSW Councils in regard to first response to these non-compliances, with some responding initially and others are referring to PCA only to have the matter when unresolved return to council.

- Category 2 and 3

Conditions of the consent that relate to housekeeping of the site, i.e. approved construction hours, noise, dust mitigation measures, traffic and neighbouring properties are matters that a PCA can respond to as first response as long as they are readily available and familiar with the local geographic area. These matters are currently being responded to by council and as these matters are frequent and reoccurring themes they are impacting on councils' resources.

## **5. Establish a partnership model between the State and Local Government in respect to building regulation and certification**

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.

## **6. Achieve and maintain a best practice building regulation and certification system**

Largely supported. Specific comments below.

- Complying Development Certificates. We agree that more needs to be done to support certifiers, through training and guidance and a revised SEPP. Furthermore we believe that an on-line assessment tool should be made available by the Regulator for all certifiers to use (like an enhanced version of the electronic housing code or similar to the Assess product used by Warringah for development assessments).

The pay-off would be the ability to control consistency and compliance with the SEPP and with information being held centrally, would provide for enhanced state-wide reporting and easy release of information to the public. This may also then negate the need for CDC documentation to be submitted to Councils. A precedent already exists for this with the state-wide swimming pool register and the issuing of certificates from that register.

- Recommendations to the fire safety system including the need for level of accreditation to sign off is supported. Further clarification on council's role in collecting these annual schedules is requested for consistency and risk management. In particular the standardising of fire safety certificates and annual fire safety statements is long overdue. There is also a need for uniform recording and registration of properties that are subject to alternate solutions. A concern with alternate solutions is the ongoing maintenance costs passed on to current or future owners. These future owners should be made aware of such ongoing cost impositions.
- Mandatory inspection for all classes of buildings should include a pre-commencement inspection before issuing CC. In regards to risk assessment and need for additional documents a progressive survey should also form part of the PCA inspection checklist based on the development type and DA history, if not a condition on consent.
- In regards to certification for waterproofing this should be required at various stages not only from an accredited installer at installation but from the licensed builder at completion of the development. This is required to ensure other trades are overseen and the water proof membrane is not penetrated/damaged during tiling and plumbing.

## **7. Enhance the professionalization of certifiers through accreditation, education, training and support for certifiers**

Supported. Specific comments below.

- We fully support this ethos and would like to see this go further whereby in the short term the new regulator provides grants to Councils and Private Certifiers to support traineeships. There is already a long service levy, why not a cadetship levy?
- In regard to establishing, maintaining and publicising a single dedicated hotline, the persons giving advice on this hotline should be qualified experienced accredited certifiers/building surveyors.
- The proposal to introduce an expanded education and training role for private certifiers is supported in particular that a private certifier must act in the public interest and be accountable to the consumer and community concerns.
- More work is to be done on improving the attractiveness of this career. The promotion of the career as a certifier should be aimed at year 11 and 12 students whom are making choices regarding their further studies. .

## **8. Refocus of the complaints handling process**

Supported. Specific comments below.

- Referrals by Councils

We believe the new Act must make provision for a fast-track referral/complaint process by Councils, which encourages rather than discourages feedback on recalcitrant Certifiers. It is essential this is linked to faster investigations, as acknowledged in the review, but also with the ability of the Regulator to suspend, limit or place the Certifier under supervision, during the course of serious

investigations. For example, this could mean preventing the certifier issuing CDCs for a specific type of development, or operating within a Council jurisdiction.

Consideration should also be given to granting Councils power to suspend a certifier's ability to operate within their area, where there is sufficient evidence of wrong doing, such as persistent issuing of unlawful CDCs. We would recommend this be by way of a resolution of Council or through an independent regional panel.

- Action against certifiers and builders

We support the proposed extension of licensing to builders beyond class 1 developments, and welcome review of the penalty and offence frameworks. We would also recommend enhancement of the current register of penalties against certifiers, to provide a one stop shop for the community showing all licensed builders, trades and certifiers. The website must be up to date and should include all current accreditations, fines, restrictions and any consents revoked, as well as any pending actions. It would also be useful for the site to confirm Certifier insurance is in place.

## **9. Enhance the sustainability of Personal Indemnity Insurance**

Supported.

## **10. Appropriate resourcing and funding**

Lack of funding is one of the key failings of the existing regime and we fully support the proposal for adequate resourcing.

However, the report refers to fines as a funding stream. Whilst it is the case that fine income is retained by Councils, if this becomes the key funding there is a risk of ambulance chasing, rather than risk-based and proactive education programmes. We believe that a proper funding model must provide resourcing without fines income being taken into consideration. We would urge that detailed research is carried out prior to setting a levy or charge to ensure full cost recovery for Councils, unlike the recent fees set for swimming pool barrier certification.

Of critical importance too is the funding of the Building Regulator, to provide sufficient inspectors/auditors to manage certifier complaints and complete investigations in a short time frame. This is essential to build community confidence in the industry and also to better manage risks, given the certifiers ability to continue operating during an investigation, but also to reduce the impact on the innocent certifier, who may suffer irreparable business and personal impacts from protracted investigations.

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.

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.

## **11. A resourced, committed and accountable implementation approach**

Supported.