



23 July 2019

Building Stronger Foundations consultation
Regulatory Policy, Better Regulation Division
Department of Finance, Services and Innovation
2-24 Rawson Place
HAYMARKET NSW 2000

Dear Sirs,

SUBMISSION ON BUILDING REGULATIONS

I have set out below my brief comments relating to the current problems in the building industry and proposals for modifying regulations to achieve better outcomes. I have done this under the following headings:

1. My Background
2. Current Regulations
3. The Critical Issues
4. Discussion Paper

1. My Background

I graduated as a civil & structural engineer in 1969, and from 1970 to the present have worked continuously as a consulting engineer in the building and construction industries. For about the last 30 years a large part of my practice has involved forensic engineering including failure investigations, building disputes, and associated inputs such as the preparation of expert reports for litigation purposes.

This has given me some significant insights into the circumstances that give rise to problems in the building and construction industries, and the ultimate causes of those problems.

2. Current Regulations

Where building work in NSW is required to be carried out in accordance with the requirements of the NCC, it is already heavily regulated.

Designers have to certify that their design complies with the provisions of the NCC, and discipline certificates have to be issued confirming that periodic inspections have indicated compliance, prior to the Principal Certifier issuing the occupation certificate.

These parties are required to have completed training specific to their role as certifiers and be qualified and registered in this regard.

In addition, a licencing system applies to builders and tradesmen.

Hence the first question to be addressed is why the existing regulatory regime has failed to prevent problems in the industry.

If the existing regulatory regime has failed to prevent the “crop” of problems in the industry, will increased regulation achieve any better result?

It is also necessary to consider why, in say the civil construction industry, there appears to be fewer problems despite much less regulation.

3. The Critical Issues

In looking at problems in the industry, the critical issues relate to the structure and functioning of the industry and of particular projects.

In this regard, it is necessary to look at the following:

- a) Relationships and motivations of the parties.
- b) Project structures.
- c) Independence and resources of the “gatekeepers”.
- d) Matching of authority and responsibility.

Relationships and Motivations

The situation where a client is constructing a building for its own use and hence looking on the project as a long term investment, is completely different to one where the client is constructing a building for immediate re-sale for profit.

In the first case the client is likely to be heavily influenced by the skills and reputation of the parties engaged. Professionals are likely to be engaged as advisers to assist the client to obtain the quality of outcome desired.

In the second case some clients will be motivated primarily by cost considerations and will adopt project structures and appoint constructors and designers primarily on the basis of cost. Often this leads to unreasonable time and cost pressures, which in turn give rise to errors and associated problems.

Put simply, the conduct of the client is a primary factor in relation to the risk profile of a project. This needs to be addressed as part of any meaningful action to improve confidence in the industry.

Where projects are being built for quick resale, as is the case with most apartment buildings, measures are needed to ensure that the developer client retains a long term financial interest in the performance of the development.

While some developers are highly professional with a good reputation to protect and stand by their product, others have a very short term focus.

Measures are needed to ensure that the client developer does adopts organisational structures intended to avoid or limit any ongoing liability exposure.

Project Structures

Over time, the traditional approach where a client engages a design team which then provides full service to the client for development approval, detailed design, tendering, contract award, contract superintendence, and inspection and certification, has given way to a range of alternative project structures.

In some cases the client appoints a project team through to development consent stage and then at some stage novates the design team over to the builder with the work carried out under a design-construct structure.

This can give rise to conflicted design responsibilities, with designers answerable to a builder client strongly motivated to reduce costs and often to use alternate building techniques and materials to achieve this outcome.

Design-construct projects are commonly progressed on a “fast-track” basis, and often promoted on the promise of reduced development timeframes. These compressed timeframes allow much less time for design detailing, co-ordination and review. This often leads to rushed decisions and associated errors.

In many cases the parties are capable and competent but simply operating under too much time and resource pressure, such that errors are almost inevitable.

In addition, project contract structures (at various levels) often incorporate onerous, oppressive and in some cases unconscionable provisions which attempt to split the risk-reward balance such as to impose unreasonable risks onto parties without the capacity to assess and manage those risks. This results in unreasonable and in some cases extreme pressures which adversely affect the quality of the outcome.

Put simply, the project structure adopted is a primary factor in relation to the risk profile of a project. This needs to be addressed as part of any meaningful action to improve confidence in the industry.

Independence and Resources

Parties expected to play a key role in ensuring that quality standards are upheld (such as principal certifiers and discipline certifiers) need to have the independence and resources necessary to properly execute that role.

The question to be addressed is whether this can be practically achieved where that party (eg the certifier) is engaged or employed by the party whose work is being monitored. In this case the certifier obviously is not truly independent.

The current system where the Principal Certifier is engaged and paid by the Developer or Builder involves an obvious conflict of interest, and exposes the certifier to undue pressure. The system needs to be changed so that certifiers are engaged and paid independently to the Developer and/or Builder.

The terms of the engagement also dictate the resources available to the certifier. The cost structure of the retainer may well act to inhibit the application of the desired level of resources.

In a globalised world where materials and components can be sourced from anywhere in the world, many situations can arise where deficiencies in those goods cannot be detected by the application of the resources available to local builders and certifiers. There is a clear need to government involvement in the process of monitoring and controlling imported goods.

Authority and Responsibility

A common problem with regulations is that they attribute responsibilities to certain parties, without ensuring that those parties also have the authority and resources to fulfil those responsibilities. The result is that the regulations are simply ineffective.

For example, a professional cannot certify that construction work complies with relevant standards and design requirements unless the professional has seen all aspects of the construction work. This cannot be done through periodic inspections. Where the professional's construction stage input is limited to periodic inspections, then any certification of necessity has to be qualified.

In summary, seeking to impose on any given party the responsibility for an outcome will not be effective without also ensuring that the party has the authority, independence and resources to be able to fulfil that responsibility through the normal reasonable application of its specialised skills and expertise.

A fundamental re-think of the roles of the many and varied parties involved in a building project is required, so that regulations attribute responsibility to the parties with the necessary level of control and authority.

4. The Discussion Paper

The discussion paper does not, on my reading, appear to address the critical issues as discussed above. My concern is that the matters raised will simply involve more regulation, more complexity, and new problems arising in part from the increased complexity of the working environment.

It is not clear what further registration requirements will achieve. In my areas of expertise I have not found that failures and problems have arisen because the personnel were not suitably qualified for the task in hand. More often the problems arise from excessive pressure on time and cost and the confused communications that arise in such circumstances.

Note that every registration requirement imposes additional cost and complexity on the industry. The aim should be to minimise cost and complexity by NOT adding further or new requirements. Any change should involve replacing existing regimes with simpler more universal nationally recognised provisions.

It is not clear what benefit arises from the proposed declaration process relative to the current certification process.

There is also a major problem with state based registration requirements. Australia is a very small country in terms of population, and as a result the cost of different state based registration (and associated bureaucracies) is disproportionate. There is extensive exchange of personnel and goods across state borders, and this is desirable for the effective functioning of the national economy.

Any registration requirements must in my opinion be national. The NCC is a national document and all technical disciplines should involve only a national qualification / registration system.

The only exception is perhaps the Principal Certifier, whose role involves to a much greater extent interaction with State based planning regulations. There may be a case for State based qualification or registration of Principal Certifiers.

The insurance requirements arising from the proposals in the discussion paper need to be sorted out before any legislative changes. Insurers are not bound to provide cover and where new regulations impose excessive risk on certain parties then insurers (especially in the current environment) are likely to simply walk away. It is also necessary to take into account the claims made nature of PI insurance, which means that a party with cover when starting a job may not be covered at some time in the future when a problem arises.

There is simply no point mandating insurance requirements if no insurers will offer a suitable product at an affordable price.

There needs to be recognition that the design of modern buildings involve a complex interplay between the inputs of the professional design team (architect, engineers etc) and a multiplicity of design and construction components, where the supplier is typically responsible for the design, manufacture and installation of those components (eg windows).

In relation to the duty of care discussion points, great care is needed when interfering with the existing law of contract and tort. The usual regulatory assumption that the consumer is always the at-risk party is not reliable, as builders and professionals can be subjected to and seriously damaged by unreasonable and misguided claims. Attempts to “top up” existing legal provisions with additional statutes have not worked well to date because of the increased complexity and corresponding confusion. Better to do nothing than to make things worse.

I trust that the above comments are of some assistance.

Yours sincerely,

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