

Productivity Commission

Performance Benchmarking – The Role of Local Government as a Regulator

NSW Councils versus Private Certifiers – Comparing apples with apples in the provision of building certification services

The year 2010 saw the introduction of the requirement for accreditation of all building surveyors and building professionals who were employed at local councils throughout NSW.

Prior to this only private certifiers were required to be accredited by the Building Professionals Board (BPB) in order to issue a construction certificate, complying development certificate, occupation certificate, to conduct critical stage inspections or to fulfil the role of being the Principal Certifying Authority (PCA), but now any person who undertakes one or all of these functions must be accredited by the BPB.

At first glance, the accreditation of council employees would appear to open up to the public and the building industry consistent, fair and equitable options for obtaining building certification within NSW but further analysis indicates that, like most things, it comes down to the old sayings of “buyer beware” and “you get what you pay for”.

The purpose of this submission to the Productivity Commission is to raise the level of awareness needed within a competitive and vibrant market place to ensure consumers are getting value for money and have a more comprehensive understanding of what service to expect from accredited certifiers. A building project is often the most money a person will spend on anything within their lifetime and it is only natural and right for consumers to expect an accredited certifier to provide good service and value for money along with every other profession and trade involved in their building project.

I am of the opinion that the role of local government in providing discretionary competitive services in this market is often in direct conflict with their mandatory regulatory functions and is not conducive to effective and efficient service delivery outcomes.

To begin with, for any development involving building work (other than an exempt development) a PCA must be appointed in respect of that building work. In this regard, it is important to remember that it is the person having the benefit of development consent, or a complying development certificate, who is solely responsible for appointing the PCA. The appointment of the PCA cannot be made by either the builder or by any other person who is to carry out the building work unless the builder, or such other person, is the owner of the land on which the work is to be carried out.

In appointing a PCA a choice needs to be made as to whether to appoint the consent authority (this may be a Minister, Planning Assessment Commission, Joint Regional

Planning Panel or other Public Authority other than the council), or it can be the local council or it can be a private accredited certifier.

A difference to consider at this point is that the council, must, if appointed as the PCA, accept that appointment whereas any consent authority other than the council or a private accredited certifier may refuse the PCA appointment if they choose to do so.

This happens to be the only mandatory provision contained within the NSW legislation that actually stipulates a council must participate within the building certification process.

Notwithstanding this stipulation that councils must accept the appointment of PCA when it is made, they do have the discretion to contract out this role to another certifying authority acting on their behalf. However, the vast majority of councils in NSW have chosen not to take this option and instead choose to compete with the private sector for the provision of certification services in their own right.

It is most common practice that the PCA is also normally the same accredited certifier that actually issues the construction certificate or complying development certificate although provision does exist for these to be issued by an accredited certifier who is not the PCA.

When choosing the PCA the same essential factors that ordinarily influence any decision making process should be taken into account in regard to the quality of service expected from the chosen accredited certifier including the time taken to deliver those services, the qualifications and abilities of the accredited certifier and the cost of certification services provided.

The quality of service expected may be primarily attributed to the experience and qualifications of the certifier providing the service and their level of accreditation as provided by the BPB. Generally speaking the more complex the building project the higher level of accreditation of the certifier required. Levels of accreditation range from the lowest at Level 4 to the highest of Level 1 but it also must be remembered that until 2013 there are actually two different accreditation schemes in place. One scheme for council accredited certifiers and another scheme for private accredited certifiers and the differences between these schemes should be carefully considered in regard to competitive neutrality principles and the impact on associated comparable costs, at least until March 2013.

For example, as a basic minimum, to become a Level One private accredited certifier the following items must be suitably addressed to the satisfaction of the BPB:-

- Payment of a \$1500.00 application fee
- Demonstrate compliance with the core performance criteria by attending a Certification Short Course at the University of Technology, Sydney or by undertaking

- the Boards Accreditation Exam or by passing alternative testing methods
- Provide certified copies of your qualifications that must be either a post graduate or graduate degree in building surveying or building, construction or construction management or a degree in civil engineering from a university
- Provide an annotated resume of the previous three years history of all work undertaken demonstrating the required experience for a Level 1 certifier including experience with alternate building solutions and alternate fire engineering building solutions
- Provide a detailed summary of at least 6 projects demonstrating involvement in Level 1 building aspects including buildings over 25m and alternate building solutions.
- Provide a Referee's Statement from at least two accredited certifiers
- Provide a certificate of currency of professional indemnity insurance

Furthermore, to remain accredited the private certifier must also apply to the BPB to be re-accredited annually which further involves:-

- Payment of an additional \$1500.00 re-accreditation fee
- Proof of completion of two mandatory CPD training courses provided by the BPB annually on Legislative Requirements and Professional Practice
- Proof of completion of a minimum of 20 CPD points per year from a recognised institution noting that the two BPB mandatory courses do not count towards such points.

On the other hand, as a basic minimum, to become a Level One council accredited certifier the following items must be suitably addressed to the satisfaction of the BPB:-

- No fees required for council accreditation application (council accreditation is free)
- Provide a statement to the effect that the applicant has three years practical experience relevant to Category A1 and a copy of either a qualification equivalent to that required for Level 1 private accreditation or:-
 - A Bachelor of Applied Science(Environmental Health) with an attainment in Building Subjects, or
 - A Bachelor or Masters Degree in Architecture, or
 - Local Government Act, 1919 Ordinance 4 Certification as a Building Surveyor or Assistant Building Surveyor, or
 - AIBS National Accreditation, or
 - BSAP Accreditation, NSW or National, or
 - A Diploma in Building Surveying from TAFE (including all previous versions of this qualification).
- Provide a brief summary of three years practical experience relevant to Category A1 noting that this does not have to be within the previous three years.

- Provide a declaration that the particulars within the summary are true and accurate
- Furthermore, to remain accredited a council certifier does not need to apply annually for re-accreditation but must undertake the following CPD training:-
 - During the first year of accreditation a minimum of 4 hours.
 - During the second year of accreditation a minimum of 6 hours.
 - During the third year of accreditation a minimum of 8 hours.

To achieve the above the certifier can undertake informal personal study such as reading professional journals, manuals books and the like relating to building surveying. However, no evidence of completion of the above is required to be submitted to the BPB at any stage.

A council certifier is only permitted to work within local government and their accreditation is not recognised as being suitable for employment within the private sector. A private certifier, on the other hand, can work anywhere within NSW including being employed by one or any number of councils at the same time.

The above brings into question as to whether or not council officers are capable of administering and enforcing regulations to the same level as the private sector given the significant differences in the skills and qualifications required to become, and then remain, an accredited certifier.

Another important issue to also consider is that of the personal liability of the accredited certifier and the consequences of being found guilty of any wrong doing, misconduct or malpractice.

While both private and council certifiers must be covered by professional indemnity insurance in order to practice and are subject to the same judicial process for breaches of the legislation, only a private certifier can be personally fined by the BPB or the Administrative Review Tribunal (up to a maximum of \$100,000.00) or ordered to pay compensation (up to a maximum of \$20,000.00).

This is because council certifiers are actually exempt from having to pay any fines for any offences or to pay any compensation for damages under Clause 20E of the Building Professionals Regulation, 2007.

This raises further questions as to the comparison of the level of care associated with the consequences of poor or non-compliant service delivery between the public and private sector. Is a private certifier more or less likely than a council certifier to provide a higher level of care in service delivery with a much bigger 'Sword of Damocles' above their head and the possibility of personally having to pay for a fine or compensation?

To this end, the worst possible outcome for a private certifier following an adverse finding of

professional misconduct by the BPB is:-

- Loss of accreditation and out of a job, and
- \$100,000 fine from the Board, and
- \$20,000 compensation for damages from the Board, and
- Liable for further damages, actions, liabilities, claims and demands through civil action under any other Act.

Compare this to a council certifier in exactly the same circumstance:-

- Loss of accreditation and simply unable to issue construction certificates, complying development certificates, compliance certificates, occupation certificates or conduct critical stage inspections as an accredited certifier;
- Still able to carry on working at council as a building surveyor and to continue to be involved in associated industry matters including, but certainly not restricted or limited to:
 - issuing development approvals and applying conditions of consent for all classes of building,
 - certifying building works on behalf of the Crown under Section 109R of the Environmental Planning & Assessment Act.
 - assessing complying development applications against SEPP or DCP criteria,
 - doing public, semi-public and private swimming pool inspections and issuing notices under the Swimming Pools Act and Public Health Act,
 - doing building inspections and issuing Section 149 Building and Planning Certificates under the EP&A Act,
 - investigating building and development complaints,
 - commenting on BCA matters regarding development application referrals,
 - attending to counter enquiries regarding all building and development matters,
 - formulating alternate building solutions including alternate fire safety solutions on all classes of building,
 - issuing bushfire attack level certifications for complying development,
 - providing bushfire assessments and commenting on Section 79BA bushfire assessments,
 - doing driveway crossing inspections and issuing Section 138 roadwork approvals under the Roads Act,

- doing food shop approvals and inspections,
 - issuing BASIX Certificates,
 - acting as a Premises Access Consultant and advising on undue hardship applications under the DDA or Disability (Access to Premises – Buildings) Standard 2010,
 - doing BCA assessments on heritage buildings,
 - doing Places of Public Entertainment approvals and inspections,
 - doing beauty and hairdressing salon approvals and inspections,
 - doing places of skin penetration approvals and inspections,
 - issuing notices and orders (including on-the-spot penalty notices) under the EP& Act and LG Act as they relate to building demolition, rectifications or alterations,
 - enforcing compliance with conditions of development consent and all related matters,
 - issuing Section 68 approvals for stormwater, sewage and drainage works under the LG Act,
 - issuing approvals and doing inspections on caravan parks and manufactured home estates,
 - representing council in court as an expert witness,
 - laying of informations and proceeding with prosecutions on behalf of council under all relevant legislation,
 - submitting complaints to the BPB about the activities and conduct of private certifiers.
- No fines or payment of compensation for any damages.

In regard to the costs and the time taken to deliver certification services there are a number of items that should also be taken into consideration. These include answering such questions as:-

- Does the certifier look upon the person having paid for their services as a client deserving respect and care or as just another applicant to be treated indifferently with no concern as to repeat business or customer relations? In other words, is the certifier aware of the differences in being a service provider and a regulator at the same time and how do they manage these simultaneous roles?
- How soon does the project need to start and how fast can the certifier deliver the required certification while still ensuring a quality product that certifies building works carried out in accordance with the approval will comply with the provisions of the Building Code of Australia?

- Does the certifier have competing duties and responsibilities outside of building certification?
- Can you rely on the certifier's administrative support system and procedures to ensure that applications, information provided and requests for inspections do not get lost and are actioned as a priority if required?
- Can the certifier provide additional services such as out of normal hours inspections or can you book a specific time to have an inspection conducted?
- How soon after an inspection should you expect notification as to the result?
- Can you contact the certifier at any time or, if not, is it reasonable to expect a same-day response?
- Can the certifier provide services across a geographical region other than just within a single local government area?
- Is it unreasonable to expect a consistent interpretation of the rules and regulations on a day to day basis and to consistently deal with the same person?
- Can you negotiate with the certifier in regards to fees and charges?
- Can the certifier provide any other useful services such as pre-purchase inspections, BCA and fire engineering consultancy advice, bush fire assessment reports, BASIX certificates or Section J reports?

While most councils have chosen to compete with the private sector, most do not actually recognise or admit that they are providing a competitive service when it comes to certification and are able to ignore national principles of competitive neutrality. This is not illegal according to the NSW Department of Local Government as, according to their guidelines, councils are given a clear discretionary option of having to comply or not. So if price is the primary consideration in appointing a certifier then using the council can certainly be of significant benefit.

For example, some councils provide cut price services that may include significant discounting and/or approval fast-tracking if lodging the construction certificate application and appointing council as the PCA at the same time as submitting the development application.

Some developers may also feel that if they do not use council for their certification they may be somehow victimised with unwarranted conditions of consent or perhaps that their next application will take longer to approve. Perhaps in most cases this may not be true but if there is any perception that this may be so then councils can be seen to be using their position to gain an unfair competitive advantage over the private sector.

The NSW Building Professionals Act and Regulations also provide clear indications as to what constitutes a 'conflict of interest' in regard to certifiers being involved in the design of a development and then subsequently certifying the associated building works. In many councils however, particularly in rural areas where human resources are constrained, it is

common practice for the same building surveyor/accredited certifier to approve of a development application, apply conditions of development consent to such an approval, issue the subsequent construction certificate, conduct all of the mandatory critical stage inspections regarding the building works associated with the development, investigate all complaints about the conduct of the development and then issue a final occupation certificate at the completion of the project authorising the occupation and use of the development. If, throughout this process, there was any element of non-compliance with either planning or building legislation or a breach of any code of ethics; who would ever know unless the building owner eventually made a complaint to an external authority such as the BPB or the Department of Fair Trading?

Conversely, private certifiers must provide the local council with a copy of all documents associated with their certification for archiving within council's records. Interestingly, in 2010/2011 the BPB investigated 28 complaints received from councils about private certifiers of which 50% were dismissed. Complaints from councils to the BPB about private certifiers constituted just over 25% of the total number of complaints received. Does this indicate that councils can take advantage of the opportunity they are given to keenly audit the documentation submitted by their private sector competitors and to then gleefully report any element of non-compliance with either planning or building legislation or a breach of any code of ethics to the BPB? Is this, in any way, perceived the option to competing with the private sector rather than concentrating on improving efficiencies, applying business strategies and market analysis of opportunities to achieve appropriate productivity and service delivery outcomes?

Note that, in the absence of any similar opportunity being afforded to the private sector to audit or review the conduct of council certifiers, there were no complaints received by the BPB within the same period about council certifiers. Only the foolhardy would suggest that council certifiers are not making the same mistakes and mis-interpreting the same myriad of rules and regulations to the same extent as their private counterparts in the provision of exactly the same certification service. The only difference appears to be the level of scrutiny, transparency and accountability being applied.

Many councils are also able to keep certification service fees and charges to a minimum because they can supplement service provision from consolidated revenue and not charge the full costs associated with providing certificates and conducting inspections. No one seems to care if councils run their building certification service at a loss and that, as a consequence, there are fewer books in the library, no full-time life-guards at the beach and the public toilets in the park have been closed for the last 6 months because there just isn't enough money to go around! Perhaps this is also a contributing factor to persistent annual council rate increases and the consistent council complaints about state government rate-pegging restrictions.

Private certifiers on the other hand do not have a council rate base to rely on as a supplementary income to support their certification business and must cover a wide variety of overheads, just like any other normal small business operation, including some taxes, such as GST, and other expenses for which local councils are just either simply exempt or are not held accountable for paying; not to mention the additional insurances, CPD requirements, mandatory training and accreditation expenses that council certifiers are not subject to.

Compare a council with a private accreditation company and the following implications:-

- No accreditation or re-accreditation expenses for council.
- No registration, accommodation, travel expenses associated with CPD training for council.
- Salaries – a level 1 private certifier should expect a salary of \$120,000p.a. while a council level 1 certifier would be lucky to be on \$80,000p.a.
- Administration staff – do certifiers have dedicated admin support and how is this costed?
- Motor vehicle expenses, insurances, registration, servicing, parts and repairs
- Fuel costs.
- Office rental, water, sewage, gas and electricity costs, parking expenses.
- Tools of trade, computers, desks, stationery, personal protective equipment, uniforms.
- Postage, insurances, accountancy fees.
- Payroll tax, company tax, fringe benefit tax, BAS.
- Superannuation contributions, leave loadings, sick leave entitlements, long service leave, maternity and paternity leave, emergency leave.

Consider also the additional time, expense and stress levels of having to deal with BPB complaint investigations imposed upon private certifiers. Notwithstanding the BPB statistics that indicate in 2010/11, 72% of complaints were either dismissed or no further action was taken, the level of intense detail and legal implications required to respond to each complaint is extremely stressful and time consuming for the certifier involved.

It is also important to remember that an accredited certifier, council or private, is considered under the legislation to be a 'Public Officer' and is therefore required to act in the best interests of the public at all times. However, certifiers' appear to be unique in their role of certifying building works while being paid money from an individual to provide certification services specifically for that individual. This anomaly is in complete contrast with local government's traditional regulatory building and development functions whereby such individuals have never been defined as "clients" who have paid for, and therefore rightly demand, quality service delivery in return for the money they have paid.

In regard to enforcing legislation, the limit of a private certifier's regulatory power though is the Service of a Notice of Intent to Serve an Order. Only a council can actually serve the final Order and enforce the conditions of the Order. Only a council can issue fines or proceed with prosecutions and, unlike private certifiers, only councils have the ability under the legislation to charge a fee for such enforcement costs. This means that councils don't have to consider such costs in providing a quote for their certification services.

In general then, it should not come as any surprise to find that private certifiers charge more for their services than council certifiers and, as a result, councils currently enjoy the largest market share of the certification industry.

The BPB statistics however, indicate that the amount of certification services being done by the private sector is steadily increasing annually while that done by local government is steadily declining.

Sooner or later a decision must be made as to the benefits of local government being involved in competitive regulatory functions and the difficulties associated with providing a level playing field across both sectors so that outcomes, rather than processes, are more specific, measurable, accountable, relevant and timely. Council's should be free to concentrate on their core functions and responsibilities in regard to comprehensive 'community' based services rather than being given the discretion to compete haphazardly with private accredited certifiers for the delivery of paid services to specific individuals.

The business of running a business is not the business of local government!

11.9.11

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Member AIBS, Member AIEH, Member MBA, Member HIA, Member AAC, Member WOBO.

National Accredited Building Surveyor: 7071

NSW Accredited Certifier: BPB0258

Attachments:

BPB – A snapshot of complaints and certification 2010/11 dated August 2011.