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FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
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Submission Cover Sheet

Inquiry into Building Quality in the ACT

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Georgina Pinkas - Submission to the Standing Committee on Economic Development and Tourism Inquiry into Building Quality in the ACT

Introduction

I wish to thank the Committee for its self referral of this very overdue enquiry. The submissions to the enquiry, which I have read, demonstrate the personal tragedies faced by many Canberrans from the non regulation of the building delivery in the ACT. Articles in the Canberra Times emphasise the size and cost of the issues.:

- 13/4/2018 "Shoddy construction costing ACT millions". It reports that shoddy construction work could have cost the ACT more than $1.4m last year. This article announced the enquiry and the Committee's discussion paper
- 25/3/2018 "Building, planning complaints up by 40%". Complaints were up 40% on 9 nine months into the year compared with the full year figures for the previous year. The Master Builders' Association called on the ACT Government to better resource Access Canberra to help deal with complaints and resources should be increased in line with "a growing Canberra and more building activity in the Territory."
- 22/3/18 "Call for Action on Building Reforms" Among others the Master Builders' Association was reported in the article as saying "it is an almost daily occurrence to hear about these things (stories about poor quality apartments) in our office."

I am fortunately not a victim of poor building practice, but I was working in ACT Building Control (Bepcon) when, lemming like, we followed other jurisdictions down the hole of private certification. It was obvious that the model was flawed. The theory was that private certification would ensure builders could access speedy inspections without being delayed waiting for the government inspector. Limited budgets at the time meant that insufficient inspectors could be on hand to respond with urgency.

The proponents of the scheme, some now amongst its greatest critics, have told me it was expected to work as 10% of the certifiers' work would be audited. The concept, that certifiers would be appointed by the owner ensuring quality, was flawed from the initial concept stage. Most residential buildings, whether single residences or multi units, are not built by the eventual owner occupier.

They are either built by a builder, who owns the lease and on sells it to the occupier, or by a developer who owns the lease and commissions a builder to undertake the work. Either way in most cases the certifier is rarely appointed by the occupier owner. The scheme therefore lends itself to a relationship between certifiers and developer/ builders with the certifiers depending on them for their work.

With the introduction of the scheme, many Government building inspectors became private certifiers earning much higher payments than under the previous provisions of their Government salaries. In addition, the significant lost revenue to Government from the privatisation was, at the time, cut from Bepcon's budget by Treasury. This resulted in less than anticipated resources to audit the certifiers.

To have an audit program dependant of budget allocations in the days of efficiency dividends is fraught and naieve to think a 10% audit standard was achievable. It wasn't.

I have subsequently witnessed the growing tragedies for home owners as we flounder in a building regulation scheme which is inadequately resourced, stretched by a major change from mainly single standalone houses to more complex high rise multiunit developments. To add to this is the much more complex requirements for fire, environmental and safety provisions in buildings. It would be interesting to do an audit on building defects in high rise buildings built prior to the introduction of private certification and those built post.

My other experience relevant to this inquiry is my role as manager of our family building business and 5 years working as political adviser to the then ACT Minister for Planning who has responsibility for building contral.

Comments on the Discussion Paper

It is helpful to have the Discussion Paper to help focus on the Committee's intended deliberations. While appreciating the work in the paper, I have one major concern in that it is economic focussed. I think a bigger concern to the inquiry, and our political representatives, should be the financial and traumatic impact on your constituents. Impacts on the ACT Economy are in my view secondary to this. The paper is therefore lacking in not drawing on this impact of the current regulatory framework.

- Economic Costs
  Added to the legal costs would be those legal costs incurred by people trying to get rectification. Not only is it a "deadweight loss to the economy" but more importantly a huge loss to the affected members of the ACT community. It also restricts their capacity to participate within the broader economy. While appreciating the role of the Committee is Economic Development, it cannot be divorced in its considerations to the emotional and financial effect of residents.

- Functions of the Registrar
  I have not recently read the relevant Act, but it is essential that the Registrar has the powers to revoke licences. Whatever the powers, it is obviously not a sufficient deterrent to the worst of the licencees. Ordering direct training as referred to in the discussion papers is not going to stop those who deliberately flout the regulations. There is too great a financial reward to worry about such minor penalties.

- Licencing
  With the plethora of multi storied buildings being constructed all over urban Canberra, it is essential that the Construction Occupations (licencing) Act is extended to cover key safety providers such as architects, engineers, water proofers and fire proofers. However, the real issue here is supervision of works. The Clerk of Works system worked well in the past ensuring complex buildings were well supervised. Penalties for non compliance in licenced trades/professions should be sufficient to deter wilfull and/or repeated non compliance with either severe financial penalties and or criminal penalties. As wilfull non compliance is in effect fraud and theft, criminal penalties are appropriate as an option.

Given reciprocal arrangements with other jurisdictions with respect to licencing, greater penalties are needed to deter mal practice to those not sitting exams.

- Building Disputes
  Submissions to the Inquiry illustrate the minefield of building disputes. It is an area that demonstrates the need to have independent certifiers ie those not in any commercial relationship to the builder. The ACT Government should have a clear flow chart how consumers can address building complaints ie who to contact and when. Much time is wasted exploring options for redress or rectifi9cation. Legal action should be a last resort as often, besides huge costs which are unaffordable to many, results depend on the skilful arguments of legal representatives and not necessarily on technical facts.

  Statutory warranty period should relate to when the complaint is first lodged. The clock should stop at that point until the issue is resolved.

  A possible incentive for speedy resolution is a penalty for delays in resolving issues if the claim is supported.

  I would have thought the period of statutory warranty should start when the Certificate of Occupancy is issued as that is when the build is completed.

- Examples in other states
  I strongly support:
  the SA extended warranty scheme; and
  the Queensland comprehensive registration scheme for engineers and its extraterritoriality.
  I thought the ACT also had this demerit scheme?

- Conflict of interest
  There is no doubt that this exists and is a major part of the lack of building compliance together with inadequate resourcing of

audit and regulatory processes. Experience and modifications of certifier services interstate have demonstrated this is a universal issue where private certification was introduced.

Response to the Terms of Reference

1. The Certification Regime for the Building and Construction Industry

It has been stated that some jurisdictions have reverted to strategies to break the link between the certifier and the owner (usually the developer or builder) by either allocating certifiers to builders or by having the option to either contract a private certifier or a government one. I do recognise that there are difficulties in achieving this approach. As this is a function of municipal governments, it is not easy to find examples of how this is put into practice. There are many possibilities but a Web search has not shown me one that could work well. Idealy we should revert back to a public inspector scheme, however, private certifiers would be unemployed unless they were contracted to Government. A Grandfathering scheme could be set in place where no new private certifiers were registered. A major issue is having enough skilled people to be public inspectors. Government could fund courses as current lack of skilled certifiers is a constraint on the performance of the industry.

A system which allowed private and public certifiers based on choice of the owner would not rectify the issue. Owners who were commissioning a developer or builder may use the public certifier, it is unlikely that many ongoing developers/ builders would give up the commercial ties with their specific certifier.

I would be interested to see how the scheme, where private certifiers are allocated randomly, worked. Are certifiers fees set by the allocating body? My understanding is that currently in the ACT fees are set by the Certifier. If they were to be allocated by the Government to jobs then that may be problematic from a workload and a fee perspective.

I am not in a position to comment on the role of Certifiers in approving the initial plans. I do know, however, that there are many dissatisfied people living near new buildings who are concerned with this process. It seems from reading their complaints that plans are approved but not always built to the approved plan. Amended plans are submitted once the non approved part is built, ie post

building approval. Except in minor cases this should not be allowed and the builder is required to demolish the unapproved work. While initially this would be costly to enforce with legal challenges etc, once builders knew it was happening they would not build noncomplying buildings in the first place. I witnessed this happening when a house in Hall was required to be partially demolished. For a time it was a warning to others. Strong action has to be taken to prevent wilful disregard for the rights of neighbours and the building approval regime.

There have been many complaints about the lack of planning for large high rise buildings with no consideration of how they sit in the broader landscape and built environment. At one stage the Planning Authority referred major buildings to a quality reference panel made up of non public sector experts with skills in areas such as environmental sustainability, town planning, landscape architecture and architecture. This panel provided a means to achieving high quality innovative design and considered the building in its context to other buildings and the landscape setting.

I am unaware if there are issues with respect to approval of initial plans by certifiers. If there is then it too should be addressed by education, stronger penalties for noncompliance and random allocation of certifiers to jobs breaking the nexus between the developer/builder and certifier.

Obviously many builders are not complying with approved plans given the issues raised by people buying off the plan and the large number of applications to amend plans to align with work after the construction has been undertaken. Some statistics in this area would be useful to understand the size of the issue. As outlined in my comments above, requiring builders to demolish major unapproved work and higher penalties would do much to stop this practice.

As far as I am aware the building legislation is quite specific in terms of standalone residential single dwelling houses but does not specify sufficient stages of inspections for multiunit developments.

Besides the conflict of interest in the relationship between the certifier and the builder/ owner, there is also the problem of developers phoenixing companies. It is essential to have legislation which makes the actual builder and owner liable. For major buildings the appointment of an independent Clerk of Works with legal responsibility for the whole project would address some issues. It is not just a matter of licencing. I have been told by one tiler that a well known poor standard developer wanted him to take short cuts in tiling terraces. He refused and ended up walking off the contract.

All reforms to building construction require additional resources. Allocating more funding at the front end will stop the huge costs and stress incurred for rectification after the building is finished. There is no use getting a commitment from Government to adequately fund such reforms. Budgets are cut for so called efficiency dividends, for other priorities etc so there can be no guarantee of adequate long term funding. Funding is subject to the priorities of the Government of the day. The introduction of the private certifier with the expectation of 10% audits, failed due to severe budget cuts which prevented sufficient audits and compliance actions.

Industry bodies, such as the MBA have urged Government to put more funding into building regulation services. Such work should not be a charge to the tax payer generally but funded by the Industry through development fees and charges which currently go into consolidated revenue.The only way to ensure adequate funding for building approval and compliance is to fund it from a user pays trust. Funds available will reflect the level of work as construction work peaks and drops. There may be some concerns expressed by Treasury on this proposal, however, this is the only way that adequate funds can be guaranteed for ensuring building quality. The fund could be topped up by penalties charged for noncompliance. Ultimately fees paid by the owner, builder and/or developer into the fund will ensure greater compliance, less rectification, less costs to owners for rectification and reduced litigation. Either way there is a cost. By not providing funds to ensure quality approvals and construction at the beginning of the process, then there is a greater cost at the end. I propose that a building quality board be establish to manage all approval construction and compliance regulatory processes funded on a user pays basis by building development.

Ideally reverting to public certifiers is the best way to ensure independent assessment and approval, There are hurdles to overcome to achieve this and elements of the building industry will no doubt oppose it. The main reason given to me for the introduction of private certification was that builders had to delay work waiting for inspectors. Under a trust arrangement, builders needing urgent inspections could pay a higher fee.

Previously building contracts for single dwellings were produced by the Master Builder’s association. They specified all construction details including finishes. There contracts made clear the agreements. I think it is essential to have standard contracts to cover common elements with the capacity to add items. The ACT has a legislated tenant’s contract so the principle has already been established for a contract for buildings.

Much of the faults in building can be attributed to poor supervision, low inspection **requirements** and poor compliance with regulations and plans.

Strengthening approval, compliance and rectification processes and penalties, will address many of the current issues. There is a need to be up to date on new products and standards which require refresher training. However, licencing can be carried too far. There is no need to licence a carpenter or a tiler if they are properly supervised.

While industry training is required, care needs to be taken to ensure such training is not used as a revenue generator for the Industry body.

Summary

- Private Certification has failed in the ACT as evidenced by the large number of buildings failing and the large number of applications for rectification of work not done in accordance with the approved plans. The ACT is the only jurisdiction to not have some public building inspectors. The failure is due primarily to lack of funding to ensure compliance.
- Rectification at the end of the building process is costly and stressful. Penalties need to be significantly increased to deter noncompliance. Consideration should be given for criminal penalties for repeat offenders Demolition should become mandatory for major departures from approved plans. While onerous and costly initially for the Government in legal terms, this will ensure such practice stops in the longer term
- Licencing needs to be broadened to cover engineers, architects and waterproofers and fire retarders ie major structural and safety occupations. Over licening for tilers and carpenters is not required. Works inspection and supervision is.
- Phoenixing could be addressed by having clerk of works who have legal responsibility for the delivery of the work and more regular inspection stages to ensure sound building practices.
- The Building Act should be amended to specify and make it mandatory for more inspection points in multiunit developments.
- Training should be mandatory for new standards and products and industry courses should be considered to be funded by government industry and participants in TAFES/
- Financing via building industry user pays principal into a trust managed a building Quality board.

I would welcome the opportunity to discuss my submission in person with the Committee

Gina Pinkas
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