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Building control in Australia: experiences with private sector involvement

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Abstract

Facing issues with regulatory enforcement through municipal agencies, governments in Australia have reformed the enforcement of public building regulations. As a result, the private sector has been introduced in building regulatory enforcement regimes with differences amongst jurisdictions. In this paper account is given of the present day situation in four Australian states. This by introducing both the formal structure of, and experiences with the building regulatory enforcement regimes in the states analysed. Discussion of the formal set-up is based on secondary accounts and discussion of the experiences is based upon a series of interviews with over 60 key-persons in the jurisdictions mentioned.

Keywords: Australia, Building regulations, Building control, Private sector involvement

1. Introduction

1.1 Building regulatory regimes in Australia

The Constitution of Australia lays down the powers, roles and responsibilities of the Commonwealth Government. Subjects that are not dealt with in the Constitution are deemed the responsibility of the states and territories. The states are: West Australia, South Australia, Victoria, New South Wales, Queensland and Tasmania; the territories are Australian Capital Territory and Northern Territory.

As the Constitution does not cover issues as safety, health and amenity of people in buildings these are responsibility of state and territory governments. Traditionally state and territory governments laid down different Acts of Parliament resulting in eight different Building Acts and eight quite distinct building regulatory regimes [1]. With the introduction of the performance based Australian Building Code (ABC) in the 1990s the Commonwealth Government tried to realize more unity in building regulatory regimes throughout Australia. Yet, the BCA is advisory legislation only and has no legal force unless adopted by state and territory jurisdictions. Nevertheless, all states and territories have adopted the BCA; the majority in the form ‘as amended from time to time’, which ensures that any changes to the BCA are automatically included in their legislation. Within the BCA, states and territories have the

freedom to make adjustments to suit local needs – and in present day situation each state and territory has an ‘own’ Building Code, though all based on the BCA.

Responsibility for enforcement of the Building Codes lies with the state and territory governments as well. Traditionally most states have passed on many of their building regulatory powers to their municipal councils, which effectively enacted their own building regulatory regimes by way of council by-laws [2] [3], whereas territorial governments set up own building enforcement departments. The Commonwealth Government has introduced model legislation governing the administration of building regulations, but only the jurisdictions of Victoria, Tasmania and the Northern Territory have adopted it to any significant degree, most other jurisdictions prefer to retain their own administrative frameworks [4].

Until the mid-1990s building control was only to be carried out by municipal building control authorities in the states and by governmental authorities in the territories. Yet, in 1993 the state of Victoria opened up their building regulatory enforcement regime to private sector involvement [5] and other jurisdictions followed. Currently, building control in the territories is solely carried out by private participants; the states of West-Australia and Tasmania are currently making a shift from a sole public regime to a regime in which private sector involvement is possible; and in the states of South Australia, Victoria, New South Wales and Queensland a regime exists, in which a choice can be made between public building control or (a certain degree of) private building control [6].

1.2 Scope of this paper

In this paper I will give account of private sector involvement in building regulatory enforcement regimes in Victoria, South Australia, New South Wales and Queensland based on an explorative and inventory case-study research. I will introduce a short overview of the formal set-up of the building regulatory enforcement regimes in the jurisdictions mentioned; followed by a discussion on experiences with the regimes. The former is based on a desk study which had a strong focus on existing literature on the topic – government reports, websites of public and private organizations, journal and conference papers; the latter is based on a series of interviews with over 60 key-persons in Australia’s building control industry, such as building control surveyors – both public and private, policy makers at both state/territorial and municipal level, scholars at different universities and representatives of the construction and architecture/advisory trade. I have carried out these interviews in March-April 2007 and will, in this paper, only deal with the experiences and objectives mentioned. The overall outline of this research is based on Yin’s methodology on multiple case-studies [7] and Dunn’s methodology on monitoring policy outcomes and evaluating policy performance [8]. Finally, I will draw conclusions on private sector involvement in Australian building regulatory regimes.

2. Victoria

2.1 Private sector involvement

Most building work in Victoria requires both a Planning Permit and a Building Permit. In order to get a Planning Permit an applicant has to apply at the local council's planning department – in some circumstances application has to be made at State government level. When applying for a building permit choice can be made between involving the local council or a private certifier. After application for a Building Permit assessment of building plans against the building rules will be carried out. Building work can be started once a Planning Permit and a Building Permit are supplied. During construction site-inspection have to be carried out in order to control if a building is constructed in accordance with the building regulations and issued permits. Finally, after completion a building is not allowed to be occupied before a final assessment has been carried out and an Occupancy Certificate (OC) or Certificate of Final Inspection (CFI) is issued.

Until the introduction of the 1993 Building Act (BA93) local councils were the sole providers of building permits in Victoria. With the BA93 new legislation was introduced at that time to enable competition and allow private building surveyors to carry out plan assessment, issue Building Permits, inspect buildings under construction and issue CFIs. This regime is known as 'private certification'. Private building surveyors need registration in order to be allowed to carry out work. The criteria for registration are: have the required experience; have a degree/diploma in building surveying; and hold a policy for statutory professional indemnity insurance – different types of registration relate to different types of building activities one is allowed to handle. The private certifier is proportionate liable¹ for work that is carried out based upon his/her involvement in a project with a limitation period of ten years. Registration can be obtained from the Victorian Building Commission; an independent statutory authority, funded through a building permit levy, established to oversee building control in Victoria. Furthermore, the Building Commission audits private certifiers and has authority to discipline private certifiers.

2.2 Experiences with present day regime

Applicants appear to prefer private certifiers when applying for a building permit. The preference for private certifiers is believed to come from relations private certifiers can build up with their clients; the high level of service private certifiers provide – speed; specialization; broader knowledge; working hours/accessibility; and their incentive to keep things going. Councils might still be suffering from the stigma of being cumbersome and public officials of being not proactive. Furthermore, experiences from planning assessment – which has to be dealt

¹ Proportionate liability is a legislated requirement by which, under circumstances, a person whom a court finds liable for another person's damages can only be required to pay that proportion of the total amount of damages for which they are held by the court to be personally responsible.

with by councils – might be reason for applicants to choose a private certifier for the building permit assessment. Typically, private certifiers appear to get involved in larger development projects, such as commercial and larger residential projects. Small construction work, such as fences, house extensions and alterations, typically appear to go to councils. Reasons might be found in the fact that applicants for this type of work, mostly owner-builders and mum-and-dads, have the perception that the council is the place to go to when it comes to applying for a building permit.

The two-tier regime of public and private building assessment was valued positively. Nevertheless, when asked for, some objections were made. Dominant issues named as most serious or second most serious obstacles are commercial pressure and identity; other dominant issues named as obstacles are insurance, and the thin line between controlling and consulting. Commercial pressure was referred to as possible obstacle on different levels. First, as it is believed private certifiers might be less fanatical to act in the public interest solely than municipal building officials – private certifiers are believed to keep a business point of view in mind. Second, client binding might be a risk when a private certifier gets too dependent on a client or a small number of clients – to keep his client a private certifier might choose to cut corners. Third and final, it was noted that competition might erode standards as margins are small. Identity was seen as probable obstacle as the private certifiers still are perceived as biased; the regime of disciplining private certifiers is not widely accepted as strong as it takes long before an offender gets disciplined and penalties are relatively low; there are still issues of non-acceptance between private and municipal building control surveyors; and building control is not seen as a full professional industry, as for example architecture is. Then, insurance was named as obstacle as the costs of getting insurance are serious; and bringing in insurance companies has changed the level-playing field in interest groups, which influence government. Finally, the thin line between controlling and consulting was named as some interviewees believed this line might get crossed by private certifiers when they get involved too much during the design phase. With exception to the insurance issues, which were named by private actors only, all obstacles were named by both public and private actors.

3. South Australia

3.1 Private sector involvement

Like in Victoria, most building work in South Australia (SA) requires approval. In SA this is a Development Approval, which is made up out of a Development Plan Consent (DPC) and a Building Plan Consent (BPC). A DPC can only be obtained from a public body, mostly local councils, whereas application for a BPC can be made with either a public body or a private body. Then, construction work can be started after both a DPC and BPC are issued. During constructing public building control authorities carry out statutory on-site audits. Private actors often do carry out on-site inspections as well and supply the relevant authority with Statements of Compliance. Before occupation a Certificate of Occupancy is needed in order to state the

finished building complies with both regulations and issued permits. This certificate is issued by public building control authorities.

Private certification was introduced in SA in 1993. Under the present day Development Act private certifiers can perform the same duties as councils in relation to the building plan assessment. They may assess proposed developments against the building rules, assign classifications, grant Building Rules Consents, impose conditions under which the building work must be constructed (if necessary) and may require essential safety provisions. Private certifiers must hold registration and license issued by the Registration Authority – the Minister for Urban Development and Planning. Evidence of registration will be in the form of a Certificate of Registration. In order to be registered, the private certifier must meet the following criteria: be accredited at the level of Building Surveyor by the Australian Institution of Building Surveyors (AIBS); have the required experience – eight years post graduate experience in architecture, civil engineering or building surveying; and hold a policy for professional indemnity insurance as prescribed by the regulations. Different types of registration relate to different types of building activities one is allowed to handle. Private certifiers are audited by a state governmental agency – Planning SA.

3.2 Experiences with present day regime

Under the new regime applicants appear to have a distinct preference for private certifiers regarding BRC assessment. The preference for private certifiers is believed to come from relations private certifiers build with their clients; the high level of service private certifiers provide – speed, specialization; and negotiable fees that undercut councils' fees on larger development. Typically, private certifiers appear to get involved in bigger development, such as commercial and large housing work. Smaller development, such as house extensions, alterations and small structures, appears to get checked by councils. This occurs because the legalized fees a council has to charge are not cost-effective – the private certifier charges market based, though higher fees for this type of work; private certifiers do not appear to prefer this type of work; and type-specific applicants prefer council to private certifiers.

Generally the two-tier regime of public building control and private certification was valued positively. But, when asked for, some objections were made; none of these were dominant. The perception of building control by both public and construction industry was mentioned: community's expectations of the building control surveyors', either municipal or private, tasks and responsibilities are often higher than realistic; the construction industry appears to under value the building control surveyors' role. Furthermore, concerns were made regarding municipal revenues. Councils appear to end up with the non-profitable jobs and loose profitable jobs to private certifiers. Commercial pressure on the private certifier was mentioned an obstacle as it might lead to compromises to meeting the client's expectations.

4. New South Wales

4.1 Private sector involvement

As with both preceding cases, in New South Wales (NSW) approval is required for most building work. Within NSW a Development Consent and a Construction Certificate are needed before starting construction. The former can only be applied for and issued by public authorities, mostly local councils, the latter can be applied for and issued by either a public authority or an private certifier. Once construction work has commenced statutory on-site inspections have to be carried out. Like in Victoria this can be done by a public authority, mostly local councils, or a accredited certifier. Compliance Certificates will be issued to state that compliance with regulations and issued Construction Certificate has been shown. It is not allowed to occupy a finished building without an Occupancy Certificate. Application for this certificate can, again, be made with a public authority or private certifier.

Until 1998 councils had the sole responsibility for approving development. Under present legislation, regarding building work, private certifiers are able to check that development proposals comply with required technical standards (such as the Building Code of Australia) and regulations. Certifiers are required to be accredited by an authorised body in accordance with the standard set out in the accreditation body's approved accreditation scheme. Furthermore, certifiers have to demonstrate a series of competences to gain accreditation; mostly regarding education and experience. Certifiers have to hold mandatory professional indemnity insurance with a run-off period of ten years. The private certifier is proportionate liable for work carried out based upon his involvement in a project with a limitation of ten years. And finally, certifiers have to be re-accredited every year; undertake continuing professional development required in order to be re-accredited every year; and also hold professional indemnity insurance. Accreditation can be obtained for different types of construction work. Accredited certifiers are subject to a regime of complaint investigation and determination and a regime of auditing by the Department of Planning (Building Professionals Board).

4.2 Experiences with present day regime

The new regime appears to have resulted in a split-up: generally larger development, such as commercial works and the higher end of the domestic market, appears to be assessed by private certifiers, whereas smaller development, the lower end of the domestic market, appears to be assessed by councils. Developers/contractors/design teams appear to prefer private certification, whereas mums-and-dads and owner-builders appear to prefer council building control surveyors. This preference for private certifications appears to come from familiarity between a private certifier and her/his clients; the high level of service private certifiers provide – speed, qualified people; the possibility to negotiate on fees and service with a private certifier. The ordinary citizens' preference for municipal involvement appears to come from unawareness or

unfamiliarity with private certification; traditional comfort in council; lack of private certifiers in country sides, which gives applicants no choice but to go to council. Due to political issues it might sometimes be more convenient to use council building control authority.

The new regime was generally valued (highly) positively as was regarded to have improved standards of building surveyors. Then, the competition between the public and private sector for clientele appears to have resulted in an improvement in the standards and professionalism of council officers. When asked for, some objectives were however made. Dominant issues named as most serious and second most serious are conflicts of interest and changes in design during development; other dominant issues named were identity, clarity of regulations, and insurance. Conflict of interest was referred to as potential obstacle to both public and private actors. Private certifiers were perceived as being subject to commercial pressure; council employees were perceived as being subject to political pressure. Changes in design during development were referred to as obstacles, as these changes might lead to a re-assessment of the Development Consent, which might slow down work. Identity was named as obstacle as building control often only comes into sight when things go wrong. Lack of clarity in the regulations was named as obstacle as it is not clearly specified what ‘satisfactory’ means, especially regarding alternative solutions. Checking compliance might therefore be difficult. Finally, insurance was named as a possible obstacle as the insurance industry can place a lot of pressure on the surveying process by not offering adequate insurance policies that are needed to set up a robust building assessment regime. Both public officials and private certifiers mentioned conflicts of interest and changes in design during development as obstacles; identity, unclarity in regulations and insurance were named by public officials only.

5. Queensland

5.1 Private sector involvement

The building regulatory framework in Queensland shows a likewise set-up as NSW’s. Building design assessment; issuing of Building Approvals; statutory on-site inspections; issuance of Construction Certificates to indicate compliance with regulations and Building Approval has been shown; and issuance of an Occupancy Certificate can be carried out by public authorities, mostly local councils, and private certifiers.

In Queensland all building certifiers, both municipal and private, must be registered with the Building Services Authority (BSA) – a state governmental body – as accredited building certifiers. Private certifiers are regarded building certifier whose BSA licence is specifically endorsed to allow them to work in any local government area. Criteria to become certified relate to education and experience. There are two different levels of licence for private certifiers related to the size of projects they can undertake. Private certifiers are required to hold

professional indemnity insurance. The private certifier has joint and several liability² for work carried out based upon her/his involvement in a project. BSA audits private certifiers and investigates complaints.

5.2 Experiences with present day regime

Under the new regime applicants appear to prefer private certifiers regarding building control. Private certifiers appear to be better in providing a more cost-effective, faster, more specialized, and more available service than councils.

Private certification was generally valued positively. However, when asked for, some objectives were made. Dominant issues mentioned as most serious or second most serious are commercial pressure and insurance; other dominant issues mentioned are the builder's role in choosing a private certifier; loss of feedback to State government; planning issues. Commercial pressure was referred to as obstacle on different levels. First, private certification was sometimes referred to as a pure commercial, money driven activity; private certifiers keep their personal interest in mind prior to keeping the public interest in mind. Second, in Queensland the private certifier has obligation to enforce. This might imply bringing an offender to court. When done so the private certifier has to fund the trial. Private certifiers appear to take provisions in contracts to stay out of court issues by making it possible to end contracts. Third and final, it was noted that client-binding and clients that shop for certifiers that suit their need, puts pressure on the private certifiers. Insurance was also referred to as obstacle on different levels. First, as private certifiers run a high risk regarding professional indemnity insurance – personal fees get raised when insurance company has to pay out – private certifiers tend to be risk averse and have preference for known deemed-to-satisfy solutions, instead of innovative performance based solutions. Second, because insurance is mandatory the 'good guys' appear to suffer from the 'bad guys' as fees get raised when many pay outs have to be made throughout the industry. Then, builders were mentioned as obstacle as it is often the builders who choose the private certifier, or 'advise' a client to choose a certain private certifiers; clients are therefore often not aware which private certifier they have chosen. Loss of feedback was mentioned as obstacle as under the old regime council employees knew what was going on in the field and could inform State or Commonwealth Government if issues rose. It is believed this feedback got lost under the private certification regime. Planning issues were mentioned as obstacle as councils appear to use additional planning related regulations to get back grip on the building control process. Finally, private certifiers appear to look upon owner-builders as risky and more difficult to deal with – fees for controlling small types of work are relatively high. Issues were mentioned likewise by both public and private actors interviewed.

² Joint and several liability is a common law requirement under which a person found by a court to be partly liable for another person's damages, can be required to pay any amount of the total damages which any other party also found to be liable proves unable to pay.

6. Discussion and conclusion

Different new building regulatory regimes have been introduced throughout Australia to allow for private sector involvement in the enforcement of building regulations. Although the different regimes do show many similarities – participation criteria and responsibilities for carrying out administrative duties – differences can be found in the details – especially regarding the extent of responsibilities and state supervision of the private regime. Victoria appears to be most progressive having a private regime in which private actors have same responsibilities as public actors and are overseen by an independent statutory authority. South Australia appears to be least progressive, as private actors have only responsibility to carry out building design assessment.

Experiences with the private regimes appear to show, to a certain degree, similarities. First, in all states a preference for private sector involvement to traditional public building control appears to exist. Yet, this preference often comes from professional applicants and a split up appears to have occurred: large commercial buildings are being assessed by private actors leaving small building activities, the less lucrative ‘mums-and-dads’ jobs, to local councils. Second, private sector involvement appears to have improved the quality of building control in the states analysed and appears to have speed up the design and construction assessment process. Third, throughout all states analysed interviewees – in private and public organizations – mentioned commercial pressure on private certifiers as main obstacle of the regime. Fourth and final, throughout the states interviewees mentioned the role insurance plays within the regime and the shift of power that appears to have occurred as the regime often strongly relies on the insurers’ willingness to participate.

To conclude, from analysing different organizational structures of private sector involvement in building regulatory regimes in Australia it appears introducing market forces in enforcing public building regulations can speed up the plan and construction assessment processes and thus construction. Yet, private actors appear to have a strong focus on the profitable commercial construction market, which might implicate public building control – i.e. local building control authorities – stays necessary to deal with less the profitable, but often the ordinary citizens’ work. Then, private certifiers are believed to be prone to commercial capture. Supervision appears necessary to keep private certifiers trustworthy as issues of accountability appear to rise. This again might implicate that governmental involvement in building regulation enforcement stays a necessity, yet on a different level. Further research is needed to get more insight in and find solutions to these accountability issues.

Acknowledgements

This paper was originally intended for the BEAR2008 conference. However, I was carrying out a comparable empirical inquiry on Canadian building regulatory enforcement regimes when the BEAR2008 conference was held – February 2008. I presented a first insight in this Canadian on the ECPR2008 conference in Utrecht, the Netherlands, June 5-7. A paper in which I compare

some Australian regimes with Canadian regimes can be downloaded from:
<http://regulation.upf.edu/utrecht-08-papers/jvanderheijden.pdf>

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