



Hon Bill Johnston MLA
Minister for Mines and Petroleum; Commerce and Industrial Relations;
Electoral Affairs; Asian Engagement

Our Ref: 71-08588
Your Ref: Petition No 81

Hon Matthew Swinbourn MLC
Chair
Standing Committee on Environment and Public Affairs
Legislative Council Committee Office, Parliament House
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Dear Mr Swinbourn

PETITION NO 81 – CITY OF MELVILLE AND BUILDING LEGISLATION

Thank you for your letter dated 1 November 2018 referring to Petition No 81 – regarding the City of Melville (the City) and building legislation.

I provide the comments below on the terms of the petition and the submission from the principal petitioner.

Terms of petition

Petition No 81 requests the Legislative Council to inquire into the conduct and performance of the City, the adequateness of the current building legislation and whether the City should pay compensation to the owners of 37 Harris Street, Bicton.

Based on the findings of Department of Mines, Industry Regulation and Safety – Building and Energy Division (Building and Energy) (formerly the Building Commission) investigations into Mr Crawford's complaints, it appears that the City responded to Mr Crawford's concerns in accordance with the requirements of the *Building Act 2011* (the Act).

With regard to the adequateness of the current building legislation, I am satisfied that the Act contains sufficient provisions to enable a local government permit authority to enforce compliance in relation to buildings approved under the Act or under the previous legislation, the repealed Part XV of the *Local Government (Miscellaneous Provisions) Act 1960*. I have provided responses to Mr Crawford's specific concerns about the legislation in my comments below.

In relation to the question of compensation, it would not be appropriate for me as Minister for Commerce and Industrial Relations to comment on this matter.

Findings of Building and Energy investigations into Mr Crawford's complaints

Mr Crawford's issues began in 2014 when he discovered that a retaining wall within his unit complex at 37 Harris Street, Bicton, was structurally unsound. This prompted a dispute with his neighbour that was heard in the Fremantle Magistrates Court.

Mr Crawford first came to the attention of the then Building Commission in relation to this issue on 6 September 2016, when he complained about a building company he suspected was responsible for building the faulty retaining wall. He supported his complaint with a structural engineer's report which confirmed the retaining wall was structurally unsound.

The complaint was refused as it was established that the company nominated by Mr Crawford as carrying out the work was not in fact responsible and that the work had been carried out in 1995. The Building Commissioner determined that the lapse of time since the wall was constructed would make an investigation difficult to justify, having regard to the prejudice a delayed investigation has on a respondent.

Mr Crawford subsequently referred his concerns to the City. Based on Mr Crawford's email, the City concluded that as the structural engineer could only gain access to and take samples from the part of the retaining wall in Mr Crawford's unit, it had no evidence that the retaining wall that extended into his neighbour's unit was structurally inadequate, despite it being a continuation of the same wall. It appears the City took no action in relation to Mr Crawford's complaint concerning the retaining wall at that time.

Mr Crawford also referred concerns to the City regarding other alleged defective building work at his unit. He claimed the carport brick piers did not contain a required reinforcing bar and the carport roof support beams were not tied down properly. He also alleged that the stairs in the two storey units were not built to Australian Standards and were unsafe.

Mr Crawford wrote to the City five times between 28 August 2016 and 20 October 2016 requesting that the City use its enforcement powers to compel the builder to remedy the faulty building work.

On 22 October 2016, Mr Crawford raised similar concerns with the City's Mayor and councillors. On 31 October 2016, Mr Crawford received a further structural engineer's report concerning the structural adequacy of the carport piers and roof beams, which were not adequately connected.

On 16 December 2016, the City wrote to Mr Crawford to advise it had consulted with the builder of the development seeking acceptance of an undertaking to carry out remedial works. It appears the builder was unwilling to do so.

In a letter to Mr Crawford dated 16 December 2016, the City confirmed it would act on the structural engineer's report supplied by Mr Crawford and that it may issue proposed building orders on the property owners.

Section 110 of the Act provides that a building order to rectify defective or unsafe building work may be issued on the builder only if a building permit is in effect. Given the construction occurred in 1995, this was not an option available to the City.

In situations where the permit authority has been made aware that an unsafe situation exists, and no building permit is in effect, section 110 empowers the authority to issue a building order on the property owners to remediate the situation.

Accordingly, the City issued proposed orders to the building owners on 19 January 2017 and following submissions by owners, final building orders were issued.

Mr Crawford appealed the building order to the State Administrative Tribunal (SAT) where the order was varied by consent but still required Mr Crawford to rectify the faulty construction work to comply with the approved plans in relation to the retaining wall, carport, main roof and stairs.

On 1 March 2017, Mr Crawford lodged a further disciplinary complaint with Building and Energy against the actual builder of the units. On 26 October 2017, the Building Commissioner refused this complaint due to the prejudice a delayed investigation would have on the respondent, who maintained he no longer had records to support a defence to a complaint against him of negligence or incompetence. The Building Commissioner formed the view that it will be very difficult to find credible evidence of non-complying building work given the time which has elapsed since the work was undertaken.

Mr Crawford was made aware of his right to appeal the Building Commissioner's decision to refuse a disciplinary complaint in the SAT.

Comments on Mr Crawford's concerns in petition

In the submission, Mr Crawford suggests a number of changes to the building legislation, in particular to the Act.

He suggests the Building Commissioner should have:

- a stronger oversight role of local government permit authorities and have a role in resolving disputes between aggrieved parties and permit authorities;
- powers to allow auditing or performance monitoring of permit authorities in order to gain transparency; and
- disciplinary powers in relation to structural engineers and broader powers relating to building surveyors.

While most of the suggestions relating to the “powers of the Building Commissioner” will be considered as part of the next review of the Act, the Building Commissioner is currently consulting with the Western Australian Local Government Association (WALGA) and local governments about the roles and responsibilities of local government permit authorities in relation to monitoring and compliance under the Act.

Mr Crawford also suggests an amendment is needed to the *Building Services (Complaint Resolution and Administration) Act 2011* (the CRAA) to enable Building and Energy to pursue delinquent builders when conduct occurred prior to the commencement of that Act.

There is currently no time limitation associated with the pursuit of a disciplinary matter under the CRAA. The disciplinary complaint lodged by Mr Crawford was refused based on the builder’s alleged misconduct occurring in excess of 20 years prior to lodging his complaint. The Building Commissioner determined, at the time, that it was not feasible nor in the public interest to pursue the complaint given the significant passage of time which has elapsed since the construction occurred.

Mr Crawford suggests there is virtually no legislation regulating the construction of retaining wall structures. Regulation of building and construction in Western Australia is based on risk. While a building permit is not normally required for a low-risk free-standing retaining wall, a permit would usually be required for a retaining wall that is attached to or incidental to a building, as such a wall would meet the definition of “incidental structure” in section 3 of the Act (incidental structures normally require a building permit). Regardless of whether a building permit is required, all building work must comply with the applicable building standards (the primary applicable building standards are the technical requirements set out in the National Construction Code).

Mr Crawford suggests there should be a legislative requirement to obtain consent from affected adjoining owners prior to issuing building or demolition permits for retaining walls and party walls. Part 6 of the Act already precludes a builder from adversely affecting land beyond the boundaries of the works land, unless the adjoining owner has provided consent or a court order has been obtained to do so.

In light of the protections provided by Part 6 and the fact that construction of a retaining wall will not usually have an adverse effect on a neighbour’s land, it would not be appropriate to require a builder to obtain the neighbours’ consent every time they build a retaining wall. By contrast, the demolition of party walls is rare and requiring consent in that situation would not impose a significant regulatory burden on demolition contractors. Mr Crawford’s suggestion will be considered when the Act is next reviewed.

As you would be aware, there are many different issues which are currently affecting the building industry. The McGowan Government is committed to several reforms which are of high priority. Some of these are:

- security of payment for sub-contractors;
- reform of plumbing legislation;
- review of the building approvals process for residential buildings; and
- review of the Home Indemnity Insurance scheme.

Implementation of the recommendations of the Report by Professor Peter Shergold AC and Ms Bronwyn Weir: *Building Confidence – Improving the effectiveness and enforcement systems for the building and construction industry across Australia*, is also a priority for the government.

Many of Mr Crawford's suggestions have merit and will be considered when the Act is next reviewed. A review of the Act is, however, not a priority at this stage.

Yours sincerely



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21 NOV 2013