

Wednesday, July 24, 2019

NSW Dept of Finance  
By email [BCR@finance.nsw.gov.au](mailto:BCR@finance.nsw.gov.au)

Dear Sir/Madam,

**RE: Building Stronger Foundations – Discussion Paper**

Steve Watson & Partners is one of the largest Private Certification Practises in NSW and Australia. We employ 35 staff in NSW and over 60 nationwide. Accordingly, we are extremely well placed to provide comments on the Discussion Paper.

We agree that accountability should be at the centre of any reform process. Ensuring accountability of all key personnel in the industry is crucial to restoring the public's confidence in the entire system. However, the registration of building designers and engineers is just the beginning. It is essential that all key personnel contributing to the construction of a building must be licensed and insured.

At the moment, and this is not the first time, the private sector insurance system has failed private certifiers and the building industry, and hence consumers.

It is somewhat optimistic to say that simply assigning more responsibility and liability to various professionals and contractors alone will solve the current insurance crisis. It is quite likely that the actual effect would be to simply provide a streamlined pathway to embroil more parties in litigation; and ultimately that the insurers will respond as they have historically done, which is to withdraw themselves from the fray, or more accurately, to maintain their current distance.

It is clear to those of us who have been in this game a long time that multiple state governments and the insurance industry have failed practitioners in the certification system, and that this has occurred repeatedly at different junctures over the last two decades. The original (and sensible) 1998 requirement for NSW certification practitioners to carry PI insurance with 10 year run off cover was dropped in 2002 when the insurance industry refused to play ball. Other states followed suit at the time. Later, Home Owner's Warranty (HOW) insurance was dropped for high rise apartments for the same reason. Now the regulations have been further softened to permit exclusions on PI policies for Certifiers, leaving practitioners and consumers terribly exposed. In each instance, Government has failed to take any steps whatsoever to bolster the system or repair the gaps caused by these insurance market "failures".

The proposal to allocate responsibility and liability to individuals throughout the design and construction chain is an excellent idea, if it is supported by an insurance framework which can be relied on in perpetuity. The current system has been demonstrated to be anything but that.

In order to meaningfully implement the recommendations of the Lambert and Shergold Weir reports regarding extending the regulated accountability framework for construction professionals, Australia needs a government backed PI insurance system which includes as a minimum:



- Government sponsorship, co-partnering, underwriting or oversight such as afforded medical and CTP (green slip) and other insurances considered key to the operation of our society.
- Run off cover as originally required by the various state's regulations, with a retirement arrangement that will cover practitioners and continue to protect consumers once practitioners retire and/or surrender their accreditation.
- Meaningful liability caps covering all types of claims.
- Meaningful Home Owners Warranty insurance for all apartment buildings.
- Potentially further extending the personal liability and insurance requirements to
  - Builders and Developers (as is in part the case in Victoria) as well as consultants as suggested in your word document.
  - Trades such as roofers, water proofers and gyprockers (and others) who are responsible for construction of the waterproof, fire and acoustic rated construction elements which have also been problematic over the years.
- A requirement that any such system includes Certifiers and their existing potential liabilities.

I would welcome the opportunity to discuss this further should it be appropriate. If you have any queries please do not hesitate to contact me.

Kind regards,

Steve Watson  
Managing Director  
Steve Watson and Partners Pty Ltd

Question	SWP response
<p>1. What kinds of plans should be signed off and declared by a statutory declaration?</p>	<p>As a starting point the plans required by Schedule 1 of the Environmental Planning &amp; Assessment Regulation.</p> <p>It needs to be different requirements for</p> <ul style="list-style-type: none"> <li>• Houses and Associated development (Class 1 and 10 Buildings under the BCA, and low rise Class 2 or 3 Buildings)</li> <li>• Commercial Development (Larger Class 2-9 Buildings)</li> </ul> <p>What stage for Accredited Certifier involvement -</p> <ul style="list-style-type: none"> <li>- post planning approval &amp; lodgement of the Construction Certificate application form</li> </ul> <p><b>Residential</b></p> <ul style="list-style-type: none"> <li>- Site plan of the land (Schedule 1 subclause (1)(a)) <ul style="list-style-type: none"> <li>(a) the location, boundary dimensions, site area and north point of the land,</li> <li>(b) existing vegetation and trees on the land,</li> <li>(c) the location and uses of existing buildings on the land,</li> <li>(d) existing levels of the land in relation to buildings and roads,</li> <li>(e) the location and uses of buildings on sites adjoining the land</li> </ul> </li> <li>- Sketch of the development (Schedule 1 subclause (1) (b)) <ul style="list-style-type: none"> <li>(a) the location of any proposed buildings or works (including extensions or additions to existing buildings or works) in relation to the land’s boundaries and adjoining development,</li> <li>(b) floor plans of any proposed buildings showing layout, partitioning, room sizes and intended uses of each part of the building,</li> <li>(c) elevations and sections showing proposed external finishes and heights of any proposed buildings (other than temporary structures),</li> </ul> </li> </ul>

**Question****SWP response**

(c1) elevations and sections showing heights of any proposed temporary structures and the materials of which any such structures are proposed to be made (using the abbreviations set out in clause 7 of this Schedule),

(d) proposed finished levels of the land in relation to existing and proposed buildings and roads,

(e) proposed parking arrangements, entry and exit points for vehicles, and provision for movement of vehicles within the site (including dimensions where appropriate),

(f) proposed landscaping and treatment of the land (indicating plant types and their height and maturity),

(g) proposed methods of draining the land,

(h) in the case of development to which clause 2A applies, such other matters as any BASIX certificate for the development requires to be included on the sketch,

(i) in the case of BASIX optional development—if the development application is accompanied by a BASIX certificate or BASIX certificates (despite there being no obligation under clause 2A for it to be so accompanied), such other matters as any BASIX certificate for the development requires to be included on the sketch.

- A4 plan of the building that indicates its height and external configuration, as erected, in relation to its site
- if the development involves any subdivision work, preliminary engineering drawings of the work to be carried out
- if the development involves building work to alter, expand or rebuild an existing building, a scaled plan of the existing building
- Layout and Detail of any Smoke alarms or heat alarms, emergency lighting or interconnected systems required in the building
- Wet Area Waterproofing Details
- Framing Details and Plans
- If the proposal relates to a Complying Development Certificate (Schedule 1 (5)), the following
  - development compliance with building heights, building height planes, setbacks and building envelope controls (if applicable) marked on plans, sections and elevations



Question	SWP response
	<ul style="list-style-type: none"><li>○ Detailed sections of facades (to identify articulation requirements)</li><li>- Landscape Plans</li><li>- Schedule 1(3) Details relating to the status of the existing building in relation to asbestos or any other non-conforming building product.</li><li>- Any alternative solution relating to the compliance of a matter with the NCC/BCA.</li><li>- If the development involves the erection of a temporary structure, the following:<ul style="list-style-type: none"><li>○ Certification that specifies the temporary structure is designed to meet the appropriate live and dead loads,</li><li>○ A list of any proposed fire safety measures to be provided in connection with the use of the temporary structure.</li></ul></li><li>- If the development is proposed to be carried out on land that is identified as being on contaminated land, a statement issued by a qualified person certifying that:<ul style="list-style-type: none"><li>○ The land is suitable for the intended purpose of the development having regard to the contamination status of the land, or</li><li>○ (the land would be so suitable if the remediation works specified in the statement were carried out.</li></ul></li><li>- If a development standard applying to the development requires that development must be set back from any registered easement:<ul style="list-style-type: none"><li>○ A copy of the certificate of title for the lot on which the development is to be carried out, and</li><li>○ If the land is subject to a registered easement—a title diagram for the lot and any adjoining lot that benefits from the easement,</li></ul></li><li>- Details of any vehicular access and parking requirements referred to in AS2890.1:2004.</li></ul> <p><b>Commercial</b> Architectural</p> <ul style="list-style-type: none"><li>- Detailed Floor plans</li><li>- Elevations</li><li>- Sections</li><li>- Fire Door Details / Schedules</li><li>- Fire rated construction/ compartmentation plans</li><li>- Schedules/specifications</li></ul>



Question	SWP response
	<ul style="list-style-type: none"><li>- Stair details</li><li>- Balustrade details</li><li>- External wall details – Combustibility and Weatherproofing Drawings</li></ul> <p>Structural plans</p> <ul style="list-style-type: none"><li>- Key Structural plans and details</li><li>- Fire rated structural elements</li></ul> <p>Mechanical plans</p> <ul style="list-style-type: none"><li>- Smoke Control Mechanical Plans</li><li>- Ventilation plans</li><li>- Fire/smoke damper locations</li></ul> <p>Fire Services</p> <ul style="list-style-type: none"><li>- Fire hydrant system</li><li>- Fire hose reels</li><li>- Sprinkler System</li><li>- Smoke detection and alarm plans</li></ul> <p>Hydraulics</p> <ul style="list-style-type: none"><li>- Drainage</li><li>- Water supply</li><li>- Sewer</li></ul> <p>Services Penetrations – Fire Protection plans</p> <ul style="list-style-type: none"><li>- Mechanical Fire / Smoke Dampers</li><li>- Hydraulic</li><li>- Electrical</li><li>- Data</li></ul>
2. Could plans be statutorily declared at the CC/CDC stages? If not, why not?	Yes, Prior to issue of the CC or CDC, to ensure that subject to the post-determination of development consent to ensure consistency to planning provisions.
3. To what extent should changes to plans be submitted to the regulator?	Any matter that affects compliance with the BCA should be submitted to the regulator.



Question	SWP response
4. Should a statutory declaration accompany all variations to plans or only major variations?	Yes, statutory declarations should be provided for any variations for any matter that affects compliance with the BCA. This would be up to the discretion of the Designer as to what variations have an effect.
5. Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?	No, if item 4 applies.
6. What other options could be workable if there are variations to plans?	Not applicable. See above. Provision needs to be made to allow for the issue of 'Post installation statutory declarations' by an accredited building designer. But as for certifiers if there is no vehicle for this post construction variations then there will be more focus on ensuring building to plans before works occur. But there will be an impact on projects not able to be completed if there is no vehicle for this
7. How could the modifications process be made simpler and more robust?	Enable accredited 'building designers' to review and certify modifications throughout the project verifying compliance is maintained with building codes and as constructed.
8. How should plans be provided to, or accessed by, the Building Commissioner?	Via an online system, submitted by 'building designer'. Lodgement by the Certifier is unnecessary double handling / uploading, provision of statutory declarations should be all that is expected to be provided to the certifier at CC/CDC stage and OC stage
9. What types of documents should 'building designers' provide to the Building Commissioner?	See the list of documents provided in Question 1 above. Post-construction builders and 'building designers' statutory declaration for declared BCA compliant plans as well.
10. In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?	The AAC sees no circumstances where it would be difficult to document performance solutions.  BCA A2.2 & A5.2 and BCA 2019 Schedule 7 outline process for documentation / process  Clause 144A of the EP&A Regulation is also clear to be expanded to include the minimum documentation for all Performance Solutions, to non-fire safety items  Essentially, the documentation should document the following: <ul style="list-style-type: none"><li>• Description of the Building and Property the subject of the solution</li><li>• BCA Performance Solution being addressed</li><li>• Outline of the issue including the DTS Clauses not being met</li><li>• Proposed Performance Solution</li></ul>



Question	SWP response
	<ul style="list-style-type: none"><li>• Documentation of requirements for design, construction and ongoing management</li></ul>
11. Would a performance solution report be valuable as part of this process? If not, why not?	Yes, a performance solution report is a critical part of BCA compliance.
12. Are there any other methods of documenting performance solutions and their compliance that should be considered?	<p>No. The existing methodologies under the <i>NCC Part A5.2 Evidence of suitability – Volumes One and Two</i>, to be documented as part of the approval process.</p> <p>The requirements of Clause 144A of the EP&amp;A Regulation could also be expanded to non-fire safety performance solution</p> <p><a href="https://ncc.abcb.gov.au/ncc-online/NCC/2019/NCC-2019-Volume-One/Section-A-Governing-Requirements/Part-A5-Documentation-Of-Design-And-Construction">https://ncc.abcb.gov.au/ncc-online/NCC/2019/NCC-2019-Volume-One/Section-A-Governing-Requirements/Part-A5-Documentation-Of-Design-And-Construction</a></p>
13. What would the process for declaring that a building complies with its plans look like?	<p>A copy of the most recent declared plans and the statutory declaration from the builder. For larger Class 2-9 buildings this should also include commissioning and certification by building Practitioner’s (designer) for as a minimum the following:</p> <ul style="list-style-type: none"><li>• Wet Fire Services</li><li>• Dry Fire Services</li><li>• Mechanical Services (Fire and non-Fire)</li><li>• Fire Alarm systems</li><li>• All Measures on the Fire Safety Certificate</li></ul>
14. What kind of role should builders play in declaring final building work?	<p>Co-ordination and responsibility (including Insurance to third party) for the delivery of the design to completion in accordance with the design.</p> <p>Whether this is a person, or ongoing insurance similar to Home Owners Warranty for wider parties</p> <p>And should not be limited to the Builder, the wider requirement for Engineers or registered building Practitioner’s to undertake commissioning and statutory declarations for parts of the building, third party would be needed however it is the AAC opinion that the original designer would meet this, rather than the contractor would be sufficient for this, to ensure constructed in accordance with the design</p>



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	Needs to be extended to include installers.
15. Which builders involved in building work should be responsible for signing off on buildings?	All contractors/builders undertaking construction activities should be involved in confirming that are required to comply with the BCA
16. Are there any circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans? If so, what are those circumstances?	<i>No comment</i>
17. Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?	<p>No, existing licensing regimes don't have regulated Professional Indemnity insurance</p> <p>The AAC strongly recommends that the current BPB Accreditation scheme for designers / players in the market should be mandated for the categories already regulated Albeit with a transition period to ensure adequate numbers in the industry</p> <p>The Worst thing that could be entertained would be multiple schemes from multiple bodies , which would be overwhelming for the industry.</p>
18. What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?	As a minimum it should be all of the Accreditation Grades in the Building Professionals Board's classes of accreditation
19. What should be the minimum requirements for a registration scheme?	<p>The registration scheme <b>must</b> have regulated Professional Indemnity insurance, it must have ongoing run off cover for a min of 10 years to align with the Accredited Certifiers, and must be career long registered so that closing and opening of business cannot be undertaken to avoid responsibility.</p> <p>The registration scheme should include suitable qualifications and experience as determined by the Building Commissioner</p>
20. What form of insurance should be mandatory for 'building designers'? Why?	<p>Professional Indemnity Insurance and Public Liability must be mandatory for 'building designers'.</p> <p>Insurance should be available via a scheme underwritten by government in order to ensure there are not further market failures in the future that leave practitioners and consumers exposed. This scheme must include the following elements as a minimum:</p>



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	<ul style="list-style-type: none"><li>• Government sponsorship, co-partnering, underwriting or oversight such as afforded medical and CTP (green slip) and other insurances considered key to the operation of our society.</li><li>• Run off cover as originally required by the various state’s regulations, with a retirement arrangement that will cover practitioners and continue to protect consumers once practitioners retire and/or surrender their accreditation.</li></ul> <p><b>SEE COMMENTS IN COVERING LETTER</b></p>
21. What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?	<p>The same level of insurance should apply for any accredited persons, i.e. the same value, same length of cover, same retroactive dates, etc.</p> <p>Insurance must be regulated under the Building Professionals Regulation 2005, or subsequent legislation, and appropriate caps on liability should be levelled across the industry to ensure protection for consumers without encouraging spurious claims from non-pay no fee law firms. The Current Certifier insurance of \$10 and \$20 million PI encourages claims, and is way too high for the associated risks, once more are insured the capping of liability must occur to around the \$1-2 million mark across all in the industry</p> <p>A state-sponsored scheme must be implemented and must include Run-off cover as originally required by the various state’s regulations, with a retirement arrangement that will cover practitioners and continue to protect consumers once practitioners retire and/or surrender their accreditation</p>
22. What skills should be mandatory for ‘building designers’?	<p>The mandatory skills for ‘building designers’ should be determined as per the Accreditation Scheme by the Building Commissioner.</p> <ul style="list-style-type: none"><li>• Education / Training</li><li>• Experience</li><li>• Ongoing CPD Scheme</li><li>• Test of knowledge – Exam or documented submission etc</li></ul>
23. Should specific qualification(s) be required?	Yes, as per the Accreditation Scheme by the Building Commissioner.
24. Should there be other pre-requisites for registration?	Yes, as per the Accreditation Scheme by the Building Commissioner.



Question	SWP response
25. What powers should be provided to the regulator to support and enforce compliance by registered 'building designers'?	The compliance enforcement powers of the regulator for registered 'building designers' should be dictated by the Building Professionals Act & Regulations to have the same level of investigation, enforcement and education.
26. Which categories of building practitioners should owe a duty of care?	All building practitioners, including 'building designers' and builders should owe a duty of care.
27. What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?	The duty of care should apply to all types of work and be commensurate with the service that they provide. The Legislation should not allow the contracting out of the Civil Liability Act in NSW, to ensure that any legal claims are put to those at fault and not a scatter gun approach to maximise payouts Principal Certifiers should owe a duty of care only to the extent that it would be owed by a Public Authority under Part 5 of the NSW Civil Liability Act 2002.
28. How will the duty of care operate across the contract chain?	Legislation should prevent building practitioners to contract out of their duty of care, nor be able to not have a reliance on third parties through the life of the building if wronged.
29. What types of consumers should be owed a duty of care?	No comment
30. On what basis should a particular consumer be afforded the protection?	No comment