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Building Stronger Foundations Consultation
Regulatory Policy, Better Regulation Policy, Better Regulation Division
Department of Finance, Services and Innovation
2-24 Rawson Place
HAYMARKET NSW 2000

BCR@finance.nsw.gov.au

SUBMISSION - BUILDING STRONGER FOUNDATIONS DISCUSSION PAPER (JUNE 2019)

BACKGROUND

After a number of examples of building failures and of dangerous flammable cladding on buildings being reported across Australia, Governments at both the national and state levels have issued reports about how to rebuild confidence in the building industry.

The Federal Building Minister's Forum commissioned Professor Peter Shergold AO and Ms Bronwyn Weir to look into the effectiveness of compliance and enforcement systems for the building and construction industry across Australia, particularly in relation to high rise residential buildings. The *Shergold Weir Building Confidence Report* (the 'Report') was issued in March 2018

In February 2019, the NSW Government released its response the Report. Further to this response, in June 2019, the NSW Government released the *Building Stronger Foundations Discussion Paper* (the 'Discussion Paper') for consultation. This Discussion Paper sets out four key reforms and asks 30 questions.

The Urban Taskforce Australia represents property developers and financiers of property as well as the chain of disciplines involved in the development industry. While our main focus is in New South Wales, we are a national organisation.

Our feedback and comments with respect of this Paper are outlined in this submission.

EXECUTIVE SUMMARY

The Urban Taskforce believes the recent examples of major defects in a number of Sydney residential buildings ranging from 2 storeys, to 4, to 10 and 36 storeys are unacceptable, and we support the NSW Government's approach to reforming the processes of building across the State. We also understand that there must be national consistency of reforms across Australia.

We support the Building Stronger Foundations recommendations that came from the government's response to Shergold Weir Report. In particular, we support the proposition that all Building Designers must 'declare' that their plans conform to the Building Code of

Australia (BCA), and that builders must 'declare' that buildings have been built in accordance with the 'declared' plans.

We also support the other three recommendations, that all Building Designers be registered, that all Building Designers and builders have a 'duty of care' to future owners and a NSW Building Commissioner be appointed to regulate the building industry in NSW.

The Urban Taskforce believes there are also further reforms that would rebuild confidence in the industry. This includes having an independent engineer check structural plans and, insuring there are independent checks of critical points during the construction process.

The Urban Taskforce is concerned that some suggestions in the 'response' could be unworkable. The proposal for all 'declared' plans to be submitted to the Building Commissioner could lead to an excessive number of plans for all buildings in NSW being caught up in a checking process. We are also concerned an unintended consequence of the focus on certifiers is that their Professional Indemnity Insurance is increasing dramatically to the point that the business of private certification may become economically unviable. We are concerned that reforms do not build a large public service bureaucracy to replace the private sector.

Other areas that may need further investigation are to examine the Design Construct process where mid-way in a project a builder comes on board with their own consultants to finish the design and documentation for the project. This potential change of architects and engineers could lead to significant changes to the 'declared' plans and a confusion of authorship and accountability of the plans.

DETAILED RESPONSE TO THE BUILDING STRONGER FOUNDATIONS DISCUSSION PAPER

This section of our submission responds to the recommendations within the Discussion Paper and the targeted questions.

COMMENTS ON THE FOUR KEY REFORM PROPOSALS

The NSW Government February 2019 response to the Shergold Weir Building Confidence Report outlines four key reform proposals. The reforms proposed are to require all Building Designers to 'declare' that the plans comply with codes and that builders declare that the building is built according to the plans. The second is to register all Building Designers, the third that all involved have a 'duty of care' and the fourth that a Building Commissioner be appointed.

The Urban Taskforce and the industry more generally support these reforms. The biggest threat to occupants of an apartment building is to find that the structure is broken as has happened at Opal and Mascot Towers. In this regard, any future changes to the sign-off and review processes should be outcome orientated and focused on ensuring structural integrity. In Victoria all structural plans must be reviewed and approved by an independent structural engineer. In this regard, there needs to be a rigorous inspection of the actual construction of structure.

COMMENTS ON THE TARGETED QUESTIONS

Questions: Declaring that plans comply with the BCA and other relevant requirements

1. *What kinds of plans should be signed off and declared by a statutory declaration?*
2. *Could plans be statutorily declared at the CC/CDC stages? If not, why not?*
3. *To what extent should changes to plans be submitted to the regulator?*
4. *Should a statutory declaration accompany all variations to plans or only major variations?*
5. *Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?*
6. *What other options could be workable if there are variations to plans?*
7. *How could the modifications process be made simpler and more robust?*
8. *How should plans be provided to, or accessed by, the Building Commissioner?*
9. *What types of documents should 'Building Designers' provide to the Building Commissioner?*

It is understood that the Discussion Paper proposes that for variations to plans, the extent to which changed documents should be statutorily declared is likely to depend on the nature of the change. Under the proposal, 'Building Designers' will be required to declare that their plans and performance solutions comply with the BCA, and documentation will be required to be made available to the building regulator on request. A 'Building Designer' represents practitioners who provide designs, plans and specifications for buildings that are required to comply with the BCA, including architects, builders, draftspersons and some categories of engineers.

We are of the view that it is not practical, timely or cost effective for every plan or variation to be statutorily declared, in addition to the necessary sign-off requirements already prescribed by the EPA legislation. Particularly as it is proposed to have statutory declarations during and after CC/CDC stages. It is critical that any changes to onus and responsibility of sign-off be efficient and support the viability of the building and development sector.

It would be more appropriate to require sign-off on plans at key approval stages where documentation is likely to be more developed and closer to what the final structure should look like, that is as documentation often changes between DA and CC stages. Any statutory declaration should be limited to plans prepared at CC or CDC stage, and that these should only apply to major variations.

There are some foreseeable obstacles that would prevent a person from submitting a statutory declaration for variations. A single entity providing a statutory declaration for 'their respective discipline' would have to condition the statutory declaration only for their works, excluding other disciplines and any other coordination with disciplines that they have no control over which would leave a significant grey area for both designers, subcontractors and builders. Statutory Declarations may require authority approval and cause additional delays.

Provision of a change register pro-forma that forms part of approval applications, approved by the PCA could be developed. This should not be an overly onerous task as design practitioners typically document changes to designs in some form, e.g. notes in revision tables, specific design change registers, compliance reports etc. Increase penalties for those who do not comply

Further information and advice is also required around the processes for statutory declarations, and how any breach to a declaration would be remedied, as well as how any of these proposed new processes are designed so to mitigate any adverse impacts to the timeliness and costs to delivering new homes which would have a knock-on effect to the market, housing affordability and future home-owners.

The Discussion Paper proposes the introduction of a Building Commissioner and function as a 'consolidated building regulator'. It is understood that the Building Commissioner would have the power to audit the documentation to ensure compliance.

In principle, the Urban Taskforce supports the proposal of a new Building Commissioner. However, we raise the following issues:

- a) currently, councils and certifiers review plans, under the Discussion Paper another layer of checking is proposed, and significant concerns are raised that this additional checking process could add months to the planning approval process before construction begins. It is proposed that maximum timeframes for undertaking checking be imposed;
- b) it is critical that the role/s and function/s are resourced appropriately should all declared plans be reviewed as is being proposed. Should this not be suitably resourced, there will be a number of negative unintended consequences to the development sector which will slow the delivery of much needed new housing across the State.

It is noted that the Building commissioner must have a computer system that can accept unlimited sized electronic files, not in restricted file size online, with a ticketed submission and a mandatory time that the Building Commissioner is to respond with a date stamped response of acceptance.

Questions: Explaining through documentation how any performance solutions used in the design and construction of the building comply with the BCA

- 10. In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?*
- 11. Would a performance solution report be valuable as part of this process? If not, why not?*
- 12. Are there any other methods of documenting performance solutions and their compliance that should be considered?*

Clearly performance solutions that fit within the BCA could have a greater risk of failure as they are one off solutions designed for a specific case. It is important that performance solutions go to extra extremes of justification to prove they will be safe and fit for purpose.

Where a performance solution is proposed for structure there should be an independent review of the methodology.

Questions: Declaring that buildings are constructed according to building plans

13. *What would the process for declaring that a building complies with its plans look like?*
14. *What kind of role should builders play in declaring final building work?*
15. *Which builders involved in building work should be responsible for signing off on buildings?*
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?*

The declaration of a compliant building, as previously stated, should occur towards the later stages of the building and construction process that is consistent with CC which will ensure better alignment between the approved concept and the final product constructed. It is critical that the builder declare that the building is constructed in accordance with the declared plans and this will involve sign offs during construction in relation to structure, site remediation and of construction that may be hidden by subsequent construction.

It may be appropriate for the builder to have a senior 'clerk of works' or certifier to keep records that construction conforms to declared designs.

Questions: Registration

17. *Are existing licensing regimes appropriate to be accepted as registration for some builders and Building Designers, such as architects, for the new scheme*
18. *What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?*
19. *What should be the minimum requirements for a registration scheme?*
20. *What form of insurance should be mandatory for 'Building Designers'? Why?*
21. *What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?*
22. *What skills should be mandatory for 'Building Designers'?*
23. *Should specific qualification(s) be required?*
24. *Should there be other pre-requisites for registration?*
25. *What powers should be provided to the regulator to support and enforce compliance by registered 'Building Designers'?*

It is understood that there is a proposal for Building Designers' who perform a declaration function to be registered. Introducing a registration scheme is intended to enhance accountability by ensuring that practitioners have the relevant skills, hold appropriate insurance, and can be held accountable for their actions including being subject to appropriate disciplinary action. Registration should include Continuing Education requirements so that designers are up to date with legislative changes and changing practice methods.

The Urban Taskforce supports the establishment of a national professional registration for all Building Designers, a framework which clearly identifies their capabilities with respect to qualifications and experience, as well as their discipline/s and associated building types. It may be considered appropriate to model the new registration arrangements on the NSW Architects Registration Board and the *Architects Act 2003*. It is suggested that at a minimum, Building Designers be qualified by a University established or recognised under the *Higher Education Act 2001*, or equivalent body in the international context, or relevant Group Training Organisation / TAFE. Demonstrable experience and copies of qualifications should be required to be presented to the Building Commissioner and updated regularly.

There are several forms of mandatory insurance that should be required by Building Designers:

- Public Liability Insurance;
- Professional Indemnity, and
- Workers Compensation.

The minimum requirements for these insurance arrangements should include:

- a policy limit as dependent on scope of works and based on risk profile of the discipline. Those involved in larger projects will need higher levels of Professional Liability Insurance cover.
- the policy should be in place prior to any services being commenced and must be maintained for 6 years after the completion of the project / works,
- disclosure of any exclusions under the policy that is outside standard insurance terms,
- the policy is to include contractual and proportionate liability extension to ensure that there is no gap between a claim settlement at the insurer level and a potential adjudication by a court where the court, using proportionate liability, would give more of a claim to the insured than agreed under an insurance claim,
- the policy is to cover the insured and any third parties engaged by the insured,
- if the insured does not want to extend cover to third parties they engage, then a requirement that the insured pass on similar/same obligations downstream, and
- Provision of Certificate of currency confirming cover, this is to list insured, policy period, limit of cover, applicable deductibles, and noting any exclusions or

specific endorsements imposed by the insurer that is outside normal insurance coverage. The Provision of Certificate of currency to be done annual at renewal, noting the requirement for 6 years post completion of works.

Several enforcement powers should be provided to the regulator to support and enforce compliance by registered 'Building Designers'. For Instance, Audits of registration, similar to that undertaken by Architect Registration boards. Ongoing requirements for CPD, perhaps competency assessments every 5 years. In addition, the role of the regulatory authority should be expanded to facilitate swift dispute resolution in cases of differing interpretations of standards (becoming more common with third party building inspectors being engaged by Owners Corporations). This would protect both the builder/designer, and Owners Corporations and building owners alike and prevent costly mediation processes

Questions: Duty of care of building practitioners

26. Which categories of building practitioners 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?

28. How will the duty of care operate across the contract chain?

29. What types of consumers should be owed a duty of care?

30. On what basis should a particular consumer be afforded the protection?

A very significant aspect of the proposed reforms concerns changes to the duty of care owed to building owners and the degree of protection afforded to building owners. At present, a duty of care is limited to certain protections for building defects which is predominantly in the form of statutory warranties.

To address this concern, the NSW Government proposes to amend the law to ensure an industry-wide duty of care is owed to homeowners, owners' corporations, subsequent titleholders and small businesses so that a broader range of building and construction practitioners are held to account for defective work, and to provide stronger protections for individuals to whom the practitioners will be liable. The duty of care is intended to apply to builders, developers, Building Designers, architects, contractors and other building practitioners.

The NSW Government has recently amended the Building Professionals Regulation 2017 to allow for exclusions to Professional Indemnity Insurance, as prompted by confirmation by insurers that new policies, post July 2019, will exclude indemnity for certifiers on work that relates to non-compliant and non-conforming cladding in building work. The amendment intends to ensure certifiers can continue to be compliant and remain accredited under the Building Professionals Regulation even if PI insurance is unavailable. The amendment will not alter the obligations of all building professionals to undertake work that fully complies with other NSW laws, and the BCA and relevant Australian standards. The NSW Government intends to remove the amendment in less than 12 months with the expectation that other reforms will be introduced over this period to improve the insurance market.

Duty of care should apply to all works documented and constructed, to ensure full compliance with all relevant Local, national and Statutory regulations in force at the time, particularly

Architectural, Structural and Fire Safety. The Developer of a building should have a duty of care as they are the ones in a contractual relationship with the purchasers. The builder must also have a duty of care as well as the range of subcontractors involved in construction.

The Urban Taskforce supports that Home Owners and Owners Corporations should have recourse against builders if they are found to have acted negligently. Duty of Care should be owed to Owners & Owners Corporations. We are of the opinion that Owners and Owners Corporates should be able to experience quiet enjoyment of their property without any major unforeseen expenditure in line with original offering for 2 years minor issues and 6 years for structure

The Urban Taskforce is always willing to work closely with the Government to provide a development industry perspective on these issues.

Yours sincerely

Chris Johnson AM

Chief Executive Officer

Urban Taskforce Australia