



AUSTRALIAN  
CONSTRUCTORS  
ASSOCIATION

**NSW GOVERNMENT - BUILDING  
STRONGER FOUNDATIONS  
DISCUSSION PAPER**

**SUBMISSION BY AUSTRALIAN CONSTRUCTORS ASSOCIATION**

**July 2019**

# **NSW GOVERNMENT - BUILDING STRONGER FOUNDATIONS DISCUSSION PAPER**

## **The Australian Constructors Association**

The Australian Constructors Association (ACA) represents the leading construction companies operating in Australia. In combined annual terms, ACA members have a turnover that exceeds \$50bn in Australia (over \$100bn when combined with international operations) and employ in excess of 100,000 workers with many more employed through subcontractor organisations.

### **General Comment**

The ACA appreciates the opportunity to comment on the Discussion Paper, and supports the actions of the government in seeking to identify and resolve the key impediments to a sustainable building industry in the state, and one in which the public can rightly have confidence.

The ACA also commends the NSW Government for its support of the recommendations in the Shergold/Weir report and its commitment to working with other governments and with industry in developing a consistent Australia-wide approach to implementing the report.

In terms of the current state of the industry in NSW and the issues for reform identified in the Discussion Paper, the ACA takes the view that the NSW Government and the industry should start from the perspective that they must implement reforms that effectively and expeditiously respond to the following major challenges that require immediate action:

- Rebuild public confidence in the industry's capability to construct compliant buildings, and
- Establish a landscape in which insurance in its relevant forms can be obtained to ensure that the interests of the public and industry participants are protected.

There have been many reports over the last two decades that clearly demonstrate that the building industry requires effective oversight to ensure that public confidence is maintained. Loss of public confidence costs jobs, lowers economic development and lowers government revenues from areas such as stamp duty and payroll tax that in turn adversely affect the ability to build public infrastructure and provide essential services.

Action that needs to be taken to address the current crisis must be clear, direct and definitive. That is why industry has recently pressed governments to implement the Shergold/Weir report in a consistent manner, Australia-wide.

### **ACA Approach to the Building Stronger Foundations Discussion Paper**

While the *Building Stronger Foundations Discussion Paper* seeks to address some of the issues affecting industry at this time, the Paper does not form a holistic approach to the range of pressures currently facing the industry and the community.

In this submission, the ACA will address what it considers to be the key responses to the current issues facing the industry. However, we do not respond at this time to all the questions posed in the Discussion Paper as many of the questions are considered to be more appropriately responded to as part of the development of a regulatory impact statement following passage of relevant legislation. The ACA would be prepared to respond on those issues at that time.

The ACA submits that the government should be cautious in making wholesale change to the structure of how the industry operates in practice when potentially many issues of concern may be addressed simply through the return to a more effective regulatory regime.

By way of example, the residential industry has been operating under a licensing regime since 1971 and under the Home Building Act since 1989. Successive governments have not seen fit to adjust much of the legislation over the intervening years (e.g. the statutory warranty and licensing provisions). The ACA poses the question as to whether the government would achieve industry compliance if there were a robust 'cop on the beat' as has been the case in the past.

Further, making a range of changes (depending upon how far they extend) may result in a variety of unintended consequences, e.g. it is possible that some changes could result in many industry participants leaving the industry as the changes may make their businesses unviable either in terms of long-term liability issues or through inability to obtain insurance.

In addition, the Government needs to be careful to ensure that unnecessary costs are not imposed on industry participants or the community through overly bureaucratic requirements. An example of an overly bureaucratic requirement could be the proposal for contractors to supply the Building Commissioner with copies of all approved plans and specifications. The ACA asks what the Building Commissioner will do with the many thousands of bulk documents that he or she will receive, and whether the Commissioner will be provided with the necessary resources to audit all or any of the projects being constructed in accordance with the plans provided.

### **NSW Compliance Requirements Regarding Plans and Specifications**

In terms of the content of the *Discussion Paper*, the ACA supports the NSW Government approach to requiring the following:

- Building designers to declare that the building plans specify a building which will comply with building regulations, including the BCA.
- Design practitioners to demonstrate how performance solutions would satisfy the requirements of the BCA.
- Builders to declare that buildings are constructed in accordance with building plans.
- Establishment of a new registration scheme for currently unregistered designers and commercial builders who intend to make declarations.
- Ensure that building practitioners owe a duty of care to owners' corporations and subsequent residential homeowners, as well as unsophisticated development clients.  
NB: The ACA submits that this responsibility should be subject to owners being obliged to ensure that they have kept building maintenance and repairs up to a statutory level to ensure that the impact of any defects is not exacerbated by non-action by building owners.

### **Appoint a Building Commissioner to Act as the Consolidated Regulator**

The ACA does not support the proposal regarding appointment of a Building Commissioner. Rather, the ACA recommends that the Government appoint a Building Commission as recommended in the 2002 report of the Campbell Inquiry.

The ACA understands that the position of Building Commissioner will have limited resources with no operational responsibility to provide adequate industry regulation to address the issues industry currently faces, rather it is likely to be limited to an advisory capacity.

Further, the reference to powers of the regulator contained in the *Discussion Paper* do not seem to add any, or any significant, additional powers to those that are already available to government. Accordingly, the ACA queries the need for a Building Commissioner if the functions of that entity are already essentially able to be undertaken by the existing regulator under existing laws.

Notwithstanding the above comments regarding the deficiencies in the proposed Building Commissioner role, the ACA submits that the regulation of the industry requires an effective and proactive regulator 'cop on the beat' approach that achieves the following:

- **Effective licensing of industry participants with appropriate levels of control to prevent inexperienced entities from constructing buildings outside of their areas of competence.**
- **Exclusion of persons and entities that are not of good repute having regard to character, honesty and integrity.**
- **Strong disciplinary action to rid the industry of those who continually fail to comply with their licensing and/or legislative responsibilities**
- **Proactive compliance auditing of the industry that sends a clear message that the regulator will stop non-compliant buildings from being completed and sold to unsuspecting members of the community.**
- **Capable and experienced staff able to work with the industry and its supply chain to address the problem of non-conforming building products and the non-compliant use of complying building products.**
- **Effective industry education.**

The ACA submits that the government regulator currently in place already has the powers required to achieve the above, but we query whether the current regulator has the financial resources and capability to implement the existing regulatory regime.

By way of example, if the government regulator were provided with a group of appropriately qualified building inspectors, it would be possible for rolling audits to be conducted on most (if not all) high rise apartment buildings under construction. Such action ought to quickly identify those buildings that are not being constructed in accordance with approved plans and specifications and appropriate action, including stop work orders, taken.

While the bulk of participants in the industry do their best to comply with their legal and related responsibilities, there has always been an element of the industry that has been prepared to take advantage of opportunities to cut corners to achieve higher profits. Unfortunately, this means that the building industry across the country has never been able to successfully operate in a compliance environment where a regulator could take a 'hands off' approach to regulating the industry. Yet, governments regularly withdraw resources from their regulatory agencies in the mistaken belief that all is well and will remain so.

**What is needed is a strong regulator that has the power and capability to work collaboratively with industry in a co-regulatory model.** Governments across the country need to learn this lesson if they are to assist the industry to achieve the best outcomes that it is capable of for the community, and it needs to be accepted that reducing red tape can be counterproductive in some instances.

The issues currently facing government and industry in NSW in regulatory terms were well documented in the report of the Campbell Inquiry in 2002, and the proposals to establish a Building Commission recommended in that report are as relevant today as they were at that time.

While there has been substantial criticism of private sector building certification, even the Campbell Inquiry noted that Council based certification also had its compliance and operational problems.

**The establishment of a Building Commission that is properly resourced on an ongoing basis will have the immediate effect of re-establishing public confidence in the industry as well as the government's ability to effectively regulate it. Proceeding with the currently proposed Building Commissioner is potentially 'too little too late' as the appointment as envisaged may not alleviate the problems faced by the industry and the community arising from the incidence of building defects in apartment buildings and the increasing unavailability of professional indemnity and building insurance.**

## **CONCLUSION**

The ACA has set out in this submission the key performance indicators for an effective building regulatory system for NSW. That system should be structured around a Building Commission that is provided with the necessary resources to fully and rigorously oversee the operation of the industry.

The ACA does support what the government is seeking to achieve by way of improvements to the licensing regime and by placing responsibility for compliance at the feet of the entities that should be responsible for it.

The ACA does not support the concept of the Building Commissioner because it is apparent that the Commissioner will not have direct operational powers and few staff.

26 July 2019