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Life. Property. Environment.

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Building Stronger Foundations consultation
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Building Stronger Foundations

Thank you for the opportunity to respond to the *Building Stronger Foundations* discussion paper.

About us

Fire Protection Association Australia (FPA Australia) is a not-for-profit organisation that advocates for improvements to fire prevention and life safety.

As the national peak body for the industry, we provide information, services, and training to fire services professionals and the communities that they protect.

We are supported in this mission by some of Australia's leading fire protection companies and organisations, representing an industry of around 30,000 people.

FPA Australia has also developed and administers the Fire Protection Accreditation Scheme (FPAS), which is being recognised by the NSW Government as evidence of competence for the purposes of identifying competent fire safety practitioners under the *Environmental Planning and Assessment Regulation 2000*.

Accordingly, we have an interest in some of the topics covered by this discussion paper as they relate to fire protection and the recognition of practitioners in the construction industry.

Response to the proposals

FPA Australia believes that the focus of the discussion paper was too limited, and may therefore be overlooking other reform opportunities.

While we will limit our comments here to the contents of the paper, we believe that the Government should consider this initiative as the first of many reforms of the construction industry, not as the solution in itself.

General comments

Designers of fire protection systems are already required to be Competent Fire Safety Practitioners (CFSP), under clauses 136AA and 146B of the *Environmental Planning and Assessment Regulation 2000*.

On 22 February, 2019, the Secretary of the Department of Finance, Services, and Innovation advised that the Government intended to issue an order 12 months hence recognising FPA Australia's FPAS scheme under clause 167A of the Regulation, subject to conditions being met.

This recognition comes under a co-regulatory arrangement that serves as a useful example of how practitioners might be deemed competent by being accredited under a robust industry scheme.

From 2020, practitioners in the fire systems design space will need to be FPAS accredited in order to endorse designs in NSW for some relevant fire safety systems (sprinklers; hydrants and hose reels; fire detection and alarm systems, but not mechanical smoke control systems at this stage).

In anticipation of FPAS's recognition, practitioners are now seeking accreditation.

While FPA Australia supports in-principle the intent to register or accredit other professions, as outlined in the discussion paper, we urge the Government not to alter the arrangements already agreed to for the fire protection industry, lest it duplicate our efforts.

Compliance of plans with the BCA

FPA Australia supports proposals to require design professionals to show compliance with the Building and Plumbing Codes of Australia and relevant standards.

Plans at the CC or CDC stage, however, frequently don't reflect the final construction, so some pre-certification steps may be needed, where:

- designers sign an initial design as compliant with the BCA;
- amendments or variations that occur during construction are either:
 - do not require reconfirmation, because the performance of the design has not changed; or
 - are reconfirmed as compliant when the performance is affected;
- once complete, the design would be updated to 'as-built' and confirmed in accordance with the BCA

before the principal certifying authority issues an occupation certificate.

For the fire protection industry, an individual accredited for FPAS Fire Systems Design would be considered a competent fire safety practitioner (CFSP), and would be responsible for endorsing plans and specifications.

However, there is also a need for a CFSP for fire systems certification, who can advise a building certifier that an as-built system meets or exceeds the performance standards chosen for the original design.

This will help to reduce risk for principal certifiers and ensure that expertise is brought to determining whether a system meets the performance standards of the original design.

This systems certification role was originally planned for the amendment to the *Environmental Planning and Assessment Regulation 2000*, but was removed just before the Regulation was tabled.

Compliance of Performance Solutions with the BCA

FPA Australia agrees that proponents of Performance Solutions should explain how they comply with the requirements of the Building and Plumbing Codes of Australia.

These should be provided as a simple summary of the measures and how their performance should be assessed, rather than subjecting practitioners to lengthy, complicated reports.

For example, fire engineering reports often hold a significant amount of detail without providing any summary to assist with interpretation.

This means that a practitioner who has to assess a building may have to read hundreds of pages just to identify the performance standards of a single Performance Solution.

It is inefficient and time-consuming – in contrast, requiring a summary would help to reduce time and cost, and to improve compliance.

Buildings constructed according to plans

FPA Australia agrees that, in general, builders should be required to demonstrate that their construction complies both with the approved design and the performance requirements of the Building and Plumbing Codes of Australia.

In the fire protection space, however, the introduction of a CFSP for systems certification may be a more effective method for ensuring compliance and alignment with the original designs.

Registration of 'building designers'

Although FPA Australia supports in-principle proposals to register or accredit professionals within the design space, we believe it would best be done in consultation or collaboration with the relevant disciplines.

The Association's FPAS accreditation regime has been established under the Government's co-regulatory arrangements to accredit practitioners for design and fire safety assessment.

This model works because it places an onus on us to ensure a high standard of performance by practitioners, through the use of a Code of Professional Conduct, ongoing training and continuing professional development, and a rigorous audit program.

It means that the Government can outline the standards it wishes to see achieved and FPA Australia is required to deliver those outcomes.

We believe that this model works, and encourage its consideration as a guide for the design disciplines.

At the very least, design professionals should be held to the same conditions as those applied to the fire industry, including:

- having relevant experience for the role;
- providing evidence of that experience in the class and category for which accreditation is sought;
- undergoing an assessment to verify their skills and knowledge;
- signing a Code of Professional Conduct to demonstrate a commitment to ethical behaviour;
- carrying appropriate levels of insurance; and
- committing to ongoing Continuing Professional Development (CPD) to ensure that they maintain their skills and knowledge.

In relation to insurance, for the fire protection industry, accredited individuals must hold:

- \$10 million for Public and Products Liability; and
- \$2 million (inclusive of defence costs) for any claim for Professional Indemnity (for ten years without a gap); or
- \$1 million (exclusive of defence costs) for any one claim for Professional Indemnity (also as above).

This is a similar requirement as prescribed for certifiers, and should be seen as the standard for all accredited or registered professionals.

Duty of care to subsequent homeowners

In general, FPA Australia has no problem with the introduction of an ongoing duty of care for subsequent owners.

However, we are unclear about what will be covered and how it will be apportioned.

For example:

- If there is a failure in a fire system, is this the responsibility of the designer, the installer, or the CFSP carrying out the annual fire safety assessments?
- Against whose insurance would any complaints be levied?
- Who would be covered by the ongoing duty of care – just designers? Or would it include builders?
- If several parties are involved, how will the costs be determined?

If this system is going to succeed, there will need to be accurate records of all of the individuals involved in the work, so that the relevant parties can be easily identified and held accountable for their work.

Appointment of a Building Commissioner

FPA Australia is disappointed that one of the four reform proposals – the appointment of a Building Commissioner and their responsibilities – merited only limited discussion in the paper.

It appears that the intent is for the Building Commissioner to:

- receive declarations from both the designer and the builder about compliance with the BCA; and
- carry out auditing of practitioners to ensure compliance.

However, there is very little detail to explain how that is likely to work.

We are concerned that, if the Commissioner is placed between the designer and the builder, it may lead to additional red tape and construction delays.

It could also put the Government into a position of being gatekeeper, giving practitioners someone in authority to blame if failures occur.

It could be seen that the Building Commissioner may, to some degree, supplant the principal certifying authority without having the expertise or resources necessary to do so.

While an auditing function may be appropriate, assuming the Commission is properly funded, but it is hard to see how the Commissioner would be able to carry out such oversight given the thousands of construction projects that occur across the state each year.

We would like to see more detail about the Commission, its structure, and its role.

If, instead of a focus on auditing, the Commission instead took an active role in building reform, and the creation and implementation of a Building Act, the Government's desire reform may prove to be substantially more achievable.

Models such as the Victorian Building Authority or the Queensland Building and Construction Commission may be worth investigation.

Questions for feedback

BCA compliant plans

1. What kinds of plans should be signed off and declared by a statutory declaration?

All plans and specifications should be endorsed by practitioners, but it is not clear that this endorsement necessarily needs to extend to a statutory declaration.

The fire protection industry uses fire safety certificates, which provide endorsement of new measures, and this may be an appropriate alternative.

Whatever approach is taken, the Government should consider developing processes to allow for the review and endorsement of variations occurring during construction, so that there is a clear evidentiary trail from the initial design to the final certification.

2. Could plans be statutorily declared at the CC/CDC stages? If not, why not?

Plans could be declared at the CC or CDC stages, but would need to be reconfirmed throughout the construction, to account for any variations.

The proposal for a statutory declaration appears to us to be an unnecessary burden – a simple declaration on a standard legal form may be a workable alternative.

Statutory declarations require a witness (usually a JP) and can be quite a detailed process.

If the number of statutory declarations increases significantly, it could delay the construction process unnecessarily and add cost to a development.

3. To what extent should changes to plans be submitted to the regulator?

It is not clear how submitting plans to the regulator will resolve problems with BCA compliance.

The risk may be that it could create delays without delivering much real oversight – creating costs, but not improving outcomes.

The Government should be careful not to over complicate the system and add unnecessary red tape to the approvals process.

4. Should a statutory declaration accompany all variations to plans or only major variations?

As above, we would be wary of requiring a statutory declaration rather than simply requiring the relevant practitioner to issue a declaration on a statutory form.

5. Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?

See answer to question 2, above.

6. What other options could be workable if there are variations to plans?

A self-declaration (by an individual, rather than a company) on a standard legal form could serve the necessary purpose without the need for a statutory declaration.

7. How could the modifications process be made simpler and more robust?

Subject to the impact of any modification, only requiring a declaration at the end of the process, rather than during construction, would simplify compliance.

8. How should plans be provided to, or accessed by, the Building Commissioner?

As there is little detail about the role of the Building Commissioner we are not convinced that the deliver of plans to their office will lead to better outcomes.

We cannot comment on what should be provided to the Commission because we don't know what they would do with them.

9. What types of documents should 'building designers' provide to the Building Commissioner?

See answer to question 8, above.

Performance Solutions

10. In what circumstances would it be difficult to document Performance Solutions and their compliance with the BCA?

All Performance Solutions should be documented clearly and state how they comply with the BCA, as is required by A2.2(2) of the Code.

If practitioners cannot justify a Performance Solution in this way, it should not be accepted.

Building certifiers should not sign off any Performance Solutions that have not been documented.

For fire engineering reports, the consultant/designer should also provide a summary of the Performance Solutions and their performance standards at the front of the report, not bury it in the text of the report.

This would assist anyone undertaking an assessment of the relevant essential fire safety measures for the purpose of an annual and/or supplementary fire safety statement.

11. Would a Performance Solution report be valuable as part of this process? If not, why not?

Yes it would. A Performance Solution report is essential for demonstrating that a Performance Solution meets the Performance Requirements of the BCA.

The [International Fire Engineering Guidelines](#) outline a process that may be a useful model for building designers.

12. Are there any other methods of documenting Performance Solutions and their compliance that should be considered?

Yes, see A2.2 of the BCA.

As noted above, the process in the International Fire Engineering Guidelines is one way to document expert judgement (A2.2(2)(c) of the BCA).

Construction according to plans

13. What would the process for declaring that a building complies with its plans look like?

Again, a self-declaration (by an individual, rather than a company) would allow builders to attest that they have built the building in line with the designs and not departed from BCA requirements.

As this would be attached to the individual, it would prevent phoenix companies from avoiding their responsibilities, as the builder who signed the declaration would be held accountable.

This declaration should be submitted to the building certifier, who should not issue an OC without it.

14. What kind of role should builders play in declaring final building work?

As above, they should confirm that they installed to the approved design and have not departed from the BCA requirements.

15. Which builders involved in building work should be responsible for signing off on buildings?

The project manager responsible for the work, and any trades who perform it.

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?

There shouldn't be. If there is a legally-enforceable, simple declaration form that can be developed, it should be relatively easy for builders to confirm they still conform with the BCA.

Registration of building designers

17. Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?

FPA Australia cannot comment on the effectiveness or appropriateness of the licencing/accreditation schemes of other Associations.

However, as noted earlier in our submission, the NSW Government has proposed to recognise our FPAS scheme as accreditation for fire systems designers and fire safety assessors, and we believe this should continue as planned.

Where other similarly robust regimes exist, these could also be recognised by the Government under its co-regulatory model.

18. What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?

We would recommend, at a minimum, that those roles highlighted in Recommendation 1 of the Shergold-Weir report be considered where not already covered.

19. What should be the minimum requirements for a registration scheme?

The same requirements that the Building Professionals Board has required for other accreditation schemes, namely:

- relevant experience;
- a code of professional conduct;
- uninterrupted professional indemnity insurance for ten years;

- an auditing and complaints management process;
- demonstrated attainment of relevant identified qualifications (or, if none exists, assessment of skills and knowledge); and
- requirements for continuing professional development (CPD).

20. What form of insurance should be mandatory for ‘building designers’? Why?

Like accredited individuals under FPAS, we would recommend that they hold:

- \$10 million for Public and Products Liability; and
- \$2 million (inclusive of defence costs) for any claim for Professional Indemnity; or
- \$1 million (exclusive of defence costs) for any one claim for Professional Indemnity.

Professional Indemnity insurance will cover losses based on actions of another party based on your advice (e.g. building design), which is not covered by Public and Products Liability insurance.

21. What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?

See Q20 above.

22. What skills should be mandatory for ‘building designers’?

A good working knowledge of the applicable regulations, BCA, and relevant standards, and skills in applying this to the work they undertake.

23. Should specific qualification(s) be required?

Yes, qualifications based on the Australian Qualifications Framework relevant to each of the different design functions.

If no such qualifications exist, the individual should have undertaken an assessment to ensure they have the relevant skills and knowledge, and commit to obtaining a relevant qualification if one is developed.

24. Should there be other pre-requisites for registration?

Accredited relevant knowledge, skills, and experience.

25. What powers should be provided to the regulator to support and enforce compliance by registered ‘building designers’?

The regulator, or associations under a co-regulatory arrangement, should conduct auditing and complaints investigation, as required.

This should be supported with guidance materials outlining how the regulator expects the work to be carried out.

Duty of care

26. Which categories of building practitioners should owe a duty of care?

As a principle, all building practitioners should owe a duty of care for their work.

However, this should be proportionate to their contribution to any particular issue.

FPA Australia does not have a particular view as to how this is delivered, but we would be willing to provide advice on a more robust proposal when it might be available.

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?

See response to Q.26.

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

See response to Q.26.

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

See response to Q.26.

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

See response to Q.26.