

## **Comments on the *Building Stronger Foundations* Discussion Paper**

First some general comments. The Discussion Paper:

- places too much responsibility on certifiers and fails to give enough attention to the responsibilities of builders (principal contractors)
- fails to adequately address the problem that future owners are seriously disadvantaged by current legislation
- does not address issues such as phoenix building companies
- is overly focused on multistorey buildings.

### **Changes to plans and specifications to be submitted to the Council**

The regulations need to clearly define what changes to plans need to be submitted to Councils. This would logically be subject to a test and/or a list of changes that require Council involvement. The test cannot be expressed solely as a change in costs (some small changes could have significant consequences). The list could include: substitution of materials (e.g. cladding, load bearing materials), changes in building footprint, and anything that requires an engineering approval. See comments below on “deemed to comply”.

The Building Commissioner should have access to plans and all supporting documents. Documents provided at the DA stage should include the site plan, plans for development including floor plans, heights and intended uses.

### **Making it easier for builders to notify changes**

The processes for handling larger modifications need to be streamlined to encourage builders to notify the Council. In relation to “deemed to comply provisions”, builders and their contractors should not be able to make significant changes without the prior scrutiny of a certifier. The certifier needs to be provided with evidence that the substituted material/building technique meets the BCA and/or relevant Australian Standards. The challenge is to define what constitutes a “significant” change.

### **Tracking all variations**

All variations to the original specifications and plans should be tracked by the builder. This tracking should involve filing certifier reports and photographic evidence, particularly for anything that a certifier will not be able to visually inspect (e.g. waterproofing under tiling, reinforcing, etc) after the work is undertaken. These details should be accessible to buyers.

For example, in one well-known case the builder/developer claimed that a waterproofing compound was added to the concrete delivered to the site, with the implication that this was deemed to comply. However, it appears that nobody saw this happen and it was not documented at the time. These sorts of variations need to be approved by an appropriately qualified person before they happen and documented.

### **Substitution of materials**

Substitution of different materials during the course of construction from those specified in documents previously submitted to Council is also an issue. This is a problem both off and on building sites. For example, when panels, beams, etc are precast or preconstructed offsite, the materials used (e.g. grade of steel, concrete specification) need to be recorded with supporting evidence. Without the certifier being physically present, slump test samples can be substituted and

reinforcing steel provision can be changed or not installed as specified. Even where there is not substitution of materials or building practice (e.g. layout of reinforcing), certifiers can't be on-site continuously, so they need to be confident from the evidence presented by the builder that construction has been undertaken in accordance with specifications and plans. There is a case for certifiers to be required to be on-site at critical moments in a build and these should be defined in regulations.

The Discussion Paper puts too much reliance on the certifiers who, as noted above, cannot be continuously on-site. More responsibility should rest with the builder (principal contractor) and subcontractors.

A subcontractor should not be able to depart from the plans and specifications without first getting approval from the principal contractor who, in turn may need the approval of a certifier and/or Council. Whenever departures from plans/specification are contemplated in a building project, the onus for demonstrating that the changes meet the requirements of the BCA should be on the party proposing to make the change.

### **Licensing of tradespeople**

Work by unlicensed (for which, generally read "untrained") workers is an issue. This licensing needs to be uniform across Australia. For example, the application of waterproofing on balconies, etc should require completion of Certificate IV training in all states and territories. The use of unlicensed workers undertaking electrical work for Canberra's light rail has recently been reported. Cables were installed in ways that did not meet the Australian Standard. When the certifier expressed concerns, his services were terminated, and another certifier contracted. This sort of behaviour highlights the problems of unlicensed workers, the lack of transparency, reliance on private certifiers and the lack of concern about meeting standards.

### **Legislative changes are needed**

The case law referred to in the Discussion Paper highlights a major problem in relation to duty of care, in particular, to subsequent purchasers. This needs to be remedied through legislation, as it has in other fields of consumer protection. Take for example the Takata airbag problem. When the Government eventually got tired of waiting for the voluntary recall to work, it was decided to require car companies to fix the problem. This has happened regardless of whether the car was still owned by the original buyer or whether it had been resold.

All state and territories should legislate an ongoing duty of care on the part of developers, builders, and certifiers for at least ten years. The limitation to six years for major defects and two years otherwise is quite inadequate. In the case of my purchase at Dulwich Hill we only knew for certain that there was no water proofing under the tiles on a balcony above the bedrooms when we eventually got to see under some tiles that were removed by the upstairs owner. Despite efforts by the Body Corporate, it took eight years for the defects in this building to be fully understood.

There is also a need for legislation to make exclusions or limitations on liability for building defects in sales contracts illegal.

There is also a need for legislation to address the problem of phoenix building companies that go into liquidation to avoid liabilities, only to re-emerge soon after with a very similar name and the same directors. This can be handled through bonds (that must be maintained and are not released until the end of the warranty period). Alternatively, obligations could be put on directors.

When problems with development emerge, some developers take various steps to delay action beyond the end of the warranty period. They frustrate the efforts of owners' corporations to commission reports and file claims. This also needs to be addressed through legislation.

### **Protection for apartment buyers**

Apartment buyers have to rely on the builder, certifiers and regulators to ensure that what they are buying is fit for purpose. These buyers cannot be expected to have a knowledge of the BCA or the numerous technical requirements that apply to construction practices (e.g. applying waterproofing compounds to balconies). Persons who buy off the plan should have a legislated right to send in their own building compliance experts during construction. All buyers should be able to view online any conditions of Council approval.

Owners' corporations should not have to litigate to get repairs. I did not have to litigate to get my Takata airbag replaced and nor should owners with legitimate issues. The Building Commissioner should have the power to review a problem and order repairs to be undertaken.

### **Local government responsibilities**

The Discussion Paper reports that 25-30 per cent of certifiers are to be audited each year. This target is too low, given the current situation and is not going to engender public confidence. This audit strategy should not be limited to certifiers – builders should also be audited. Council teams and the Building Commissioner need to be better resourced.

In the Erskineville case reported in the media last week, the Council that put clean-up conditions on the building approval should have inspected the site before construction commenced. It is not appropriate for a private certifier to be able to give approvals for construction on sites where there has been contamination.

### **Undue focus on multistorey buildings**

The Discussion Paper focuses on multistorey because of their "increased risk profile". However all apartment buyers deserve protection regardless of the number of storeys in the building involved. In the case of the three storey Dulwich Hill apartment block mentioned above, repairing defects is expected to cost the twenty owners more than \$1 million.

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