

24 July 2019

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

Dear Sir/Madam,

**Re: Response to 'BUILDING STRONGER FOUNDATION DISCUSSION PAPER OF JUNE 2019'**

I refer to the discussion paper calling for submissions which is titled 'Building Stronger Foundations – Discussion Paper of June 2019 ("the Paper")'.

For your purposes I enclose my curriculum vitae. It shows that I have been practicing as an Architect for over 20 years. In that time, I have been the recipient of over 30 Architecture awards, 16 of which relate to residential flat buildings and all of which relate to buildings that have been constructed and where I have been involved in the construction process. I therefore have a measure of experience in the procurement of work in NSW and have worked in all types of procurement processes from 'Design and Construct' (D+C) processes, to being novated by a builder and also administering contracts myself.

Following is a series of quotations from the Paper with commentary below.

*The BC Report identified that, particularly for design practitioners including architects, designers, draftspersons and engineers, there was a systemic failure to expressly legislate "that the duty of the designer is to prepare documentation that demonstrates the proposed building will comply with the National Construction Code" (p. 28). The BC Report noted that this can leave the certifier as the main professional responsible for ensuring that design documentation complies with the NCC.*

*The BC Report found that this issue, and the lack of compliant design and documentation, had led to the incidence of defects in buildings. It observed that practitioners were improvising or making poor decisions in absence of specialist advice provided at the right point in the design-and-construct process. It identified "water ingress leading to mould and structural compromise, structurally unsound roof construction and poorly constructed fire resisting elements" (p. 3) as common defects across construction. The BC Report also referenced similar shortcomings in relation to the use of combustible cladding (p. 31). The impact of these issues was outlined at various points in the BC Report: "The nature of design-and-construct project means that many aspects of the design change after the initial approval is obtained. This often leads to just-in-time supply of documentation and squeezes the compliance checking processes ... there is often a significant difference between the as-designed building documentation and the as-built building" (p. 10).*

## RESPONSE

This is a limited appraisal of fault and misunderstands the role of the Architect and their duties. It should be considered here, that present arrangements are geared towards the observed failures. Frequently decisions made concerning the design of buildings, their elemental parts and their structure are based on cost savings, in an under-regulated environment. Builders are not trained in the considerations of design, which includes the selection of materials and their appropriateness. Builders are often positioned to cause or instruct Architects against the Architects own advice.

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In these situations, the designers are usually acting under substantial pressure to exchange specified materials to cheaper alternatives. The result of which is that the builders take on the role of “designers” in D+C processes, in an unregulated capacity without any of the responsibilities associated with that status.

Further, the D+C process is fundamentally a toxic environment. Due to the authority of the builder over the Architect, any non-compliance to requests by the builder, risks the Architect’s termination or replacement of the Architect. This process positions the builder to make significant decisions relating to the design and selection of materials where builders are not trained to do so. Thus, compliance with the BCA is not the primary issue, but rather, focus must be transferred to the prevalent substitution of substandard structures and products under an environment of profit-focused bullying.

A key accelerant in the issue is the disconnect between designer and client directly caused by the D+C arrangement, whereby the Architect is engaged under a novated agreement to the builder. As the builder has usually signed a ‘maximum price’ contract they are motivated to redesign and substitute almost anything without the need to seek architectural approval, in order to ensure enterprise.

*1. Requiring ‘building designers’, such as architects, engineers and other building practitioners who provide final designs and/or specifications of elements of buildings to declare that the building plans specify a building which will comply with building regulations, including the BCA. These design practitioners would need to demonstrate how performance solutions would satisfy the requirements of the BCA. Builders would also have to declare that buildings are constructed in accordance with building plans.*

## RESPONSE

Most projects require this to occur already and yet the system has evidently failed. This is not something that will cause any difference to the current crisis and demonstrates a limited understanding of the present circumstances and the basis by which the system has failed. Presently, when the Architect is not involved in the administration of the contract, there is no regulated individual who ensures the quality of construction and who is able to reports on defective work in the course of construction. Therefore, it must be understood that the problems do not lie in the design, but rather errors that are made in the construction of the design and the alteration of the design during construction stages. To simply require a BCA compliance check is a superficial antidote and would not have aided in minimising risk in my opinion.

*2. Introducing a new registration scheme for currently unregistered designers and commercial builders who intend to make declarations. Only authorised practitioners would be entitled to declare plans, how any performance solutions comply with the BCA and that a final building complies with its plans.*

## RESPONSE

There is presently a rigorous registration scheme that is a pre-requisite to becoming an Architect. This process sets the minimum standards of the profession and ensures an appropriate standard for certification of construction matters, yet increasingly the ‘registered’ and ‘authorised practitioner’ (the Architect) is removed from being required during construction. When such a system already exists, it is absurd to seek a new regulatory registration process. The concept of employing Architects to check defects as a mandatory, industry-wide, requirement must be considered. Presently the Architect ‘as certifier of works’ is standard in the construction of high-specification houses (due to the level of quality required), which sets a suitable precedent for how a traditional approach could be effective industry-wide and broader in its use.

Architects should be required by law to certify designs. This would require that an Architect confirms that the works are constructed in accordance with their design or as appropriate and that the works are not defective. BCA compliance is only one matter for consideration. What is imperative are questions of appropriateness of construction, choice of materials and defective

work which are at the core of this crisis and are currently not covered by this provision. Thus, this provision as noted may be inadequate and is likely to fail in rectifying the issues outlined in my opinion.

*3. Ensuring that building practitioners owe a common law duty of care to owners' corporations and subsequent residential homeowners, as well as unsophisticated development clients.*

## RESPONSE

This already exists in the Architects' Act. The matter does not rest here. Where the matter is failing is in the fact that Architects are not required to be engaged throughout the construction, process, resulting in limited regulation of construction quality in the critical stages of a buildings resolution. Architects are the only experts that are trained for these matters, have a regulated environment in which they must work and are required to have independence and duty of care. The Architecture profession is deprioritised in most construction projects.

*4. Appointing a Building Commissioner to act as the consolidated regulator for the construction industry, with powers to investigate and take disciplinary action against building practitioners that engage in improper conduct.*

## RESPONSE

This role would develop into an 'Ombudsman Role'. The Building Commissioner must therefore be trained in the area. It is important that the Commissioner is a person required to be independent and for whom there is a duty under regulation to be independent. Experienced Architects and Engineers are the only people able to be Commissioners under this regime in my opinion, and as such the legislation should include this provision. There may need to be two Commissioners in this role, respectful of the existing industry procedures. Builders are not able to be in this role as they usually do not have the broad formal qualifications as would be required for such purposes.

## Questions in the Paper

Reference is made to the questions in the Paper which are responded to below.

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

The three areas of concern are those areas that affect the quality of the construction viz:

- / Construction Details and Documentation
- / Variations to Design Detailing being acceptable
- / Defects List
- / Final Defects List (after final inspection has been concluded where defects are rectified)

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

Yes, but there would need to be caveats based upon what is included in the design documentation and what is able to be included in the design given the commission of the designer and the limitations therein.

A more important condition here may be to require designers by way of the legislature, to complete documents which the industry calls 'Issues for Construction' and these documents can then be the subject of a statutory declaration. This will have an impost of a minimum set of documents required and this will affect fees. At present, most Architects and Engineers are under a regime of partial services without a requirement for a continuous engagement.

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

Ideally, the regulator/authority should never see changes to plans. This would be time exhausting and would create substantial project and development chokepoints.

Architects and Engineers have the capacity to be responsible for these changes. A statutory declaration as to appropriateness of any changes will put these experts in a position of responsibility which is appropriate. At present, the changes to designs are usually Developer or Builder driven and implemented with little or no regard for the advice of the designer (causing sub-standard substitutions and unsatisfactory alternatives to be constructed for finishes etc.)

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

Statutory declarations should be completed for all variations as part of the procedure of construction contract administration. Only independent experts should be allowed to create these (Architects and Engineers), not profit driven Project Managers and Builders who are commonly inclined to change materials and details without an understanding of the flow-on effects to quality.

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

The concept of non-experts providing statutory declarations is difficult to justify. The obstacle prohibiting the creation of statutory declarations is only the limitation on who is able to credibly provide them and who is able to be reprimanded if they are incorrect.

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

Architects, traditionally, have administered contracts and are experts who are able to offer variations in a certificate under most contracts, a process which requires

Architects to be both independent and fair, as outlined in the legislative Architects Act. Other experts are not required to work under this high level of regulation. A solution would be to utilise this pre-existing system, which would require variations to be approved by a Chartered (Registered) Architect and that person can be de-registered if they are not impartial and independent in their certification.

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

Please refer to 6. above. It would require a return to the responsibility of the Architect to be in control of what is being constructed but also it would require the profession to be independent and at the centre of the construction process. Presently the profession is anecdotal and developers and builders are making decisions about variations without the scrutiny of experts.

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

There should be a registration of building plans for construction lodged electronically for all construction projects in NSW.

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

Detailed Documentation plans, elevations, sections and drawings of all details that have to do with structure and waterproofing and facades at a scale of 1:100, 1:50, 1:20 and 1:10.

**10. In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?**

None.

**11. Would a performance solution report be valuable as part of this process? If not, why not?**

Yes. The expert of this process should provide a report. This is a process that already exists in all developments, it would simply require the submission of this report to a regulated certifier.

Lodging this with a third party however, may be a further requirement that assists in the registration of all 'performance solutions' and calls for a tighter scrutiny in dealing with these documents.

**12. Are there any other methods of documenting performance solutions and their compliance that should be considered?**

Including further options here may be unadvisable as there is enough in the present system to cater for the various possible outcomes required.

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

It would look like the traditional Final Certificates in contracts prepared by Architects.

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

None. The final building work should be checked by a third party. Traditionally this was the role of an Architect, to collect all the relevant reports and certify that the building is devoid of defects. Usually there is a long period for the rectification of any defects that appears to be missed in most development projects. There is also a period,

traditionally, called the 'Defects Liability Period' (DLP) that is not included in many development projects. The DLP was usually one year and the developer was withheld final payment until the rectification of defects was certified by the Architect.

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

None. There is a conflict of independence in signing off one's own work. See the answer for 14. above.

**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?**

Builders cannot declare that the building is constructed in accordance with their own plans if it is not the case. In most cases, the building is slightly different to the plans and this is important to note. It would be almost impossible to seek that a builder can make a credible judgement on the minor variations imported into a building as constructed and as to whether those changes were material to the design intent or not. Traditionally an Architect is able to make a statement that determines minor variations and whether those variations are a material issue to the end result.

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

Architects are already registered to be involved in the review and certification of buildings. They are usually not included in this process as Architects are seen as ones that 'slow things down' and are 'intransigent' on the issue of adopting cheaper finishes. Architects, however, are already required to have these skills under the Architects Act.

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

Architects and Engineers are already required to be registered and they are also required to be knowledgeable in their respective fields. The ad hoc nature of Architects and Engineer's involvement caused by the 'Design and Construct' and 'novation' process should be limited in any new legislation.

The reasons given for limited involvement of Architects and Engineers through to a project's completion, as suggested by developers and builders, is often due to the associated fees and exhaustive scope of documentation. Though it must be noted that often the fee's associated with architectural and engineering services are relatively small in comparison to the overall development budget, and further effective involvement of these professions can have a significant bearing on the overall quality of construction. The removal of these services at critical stages should be considered one of the root causes of the diminution of quality.

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

As is the minimum requirement for Architects and Engineers presently.

**20. What form of insurance should be mandatory for 'building designers'? Why?**

If builders are to regard themselves as experts, then Professional Indemnity Insurance should be required. At present, builders are not required to be licenced, they are not required to have any tertiary education and further they are not required to have any minimum level of professional knowledge. It would therefore be problematic to have these concerns regulated and insured. As such it would be prudent in this scenario to

require minimum standards for licencing, including a requirement to understand the importance of and integrate expert advice.

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

For Builders, liability should be equal to the PI insurance imposed on professionals such as Architects and Engineers (often client require a minimum of say \$10m or \$20m cover) The minimum requirement for a builder's insurance and liability should be placed on an individual as would be a guarantee.

For Developers, personal guarantees should exist in the same way.

A minimum of 20 years' policy would make sense as this is the life of the building. A reasonable amount is per the current status of liability which is for 7 years from the date of occupation.

**22. What skills should be mandatory for 'building designers'?**

The mandatory skills known to Architects and Engineers who are registered.

**23. Should specific qualification(s) be required? Building Stronger Foundations: Discussion Paper Page 31**

No. It is important the building designers are generalists.

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

Yes. Registration as a Chartered Architect and/or Engineer.

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

The power to veto any decision made by the regulating body of Architects and Engineers. It should be the power of a court of appeal.

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

All the present categories required by Architects and Engineers.

**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?**

It should be all work. There should be a need to ensure that all work is of a standard that is required by reasonable workmanship. This can be the custodianship of Registered Architects and Engineers.

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

The traditional duty of care of Architects and Engineers worked within a system of accountability for almost a century in this country before the processes that attempted to make construction more economic were imported. The diminution of the roles of Architects and Engineers and their novation to Builders who instruct them to create details which are against the experts' advice is at issue. Builders, in a 'Design and Construct' environment take the role of 'designer' and this is a conflict as they cannot be independent if; on the one hand they are seeking the cheapest outcome and on the other hand they are not required to have a duty of care because they are not the experts. Removing the requirement for Architects to be controlling defects is the weakening of the link in the quality of construction in this state.

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

All consumers and all people are owed a duty of care. It makes no sense to say that experts do not owe a duty of care to third parties.

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

Consumers should be afforded protection on the basis that they act in good will in the purchase of products and should be afforded protection if that product has not been constructed to industry standards, has not been made of materials that have longevity and is prone to defects in the future.

**CONCLUDING STATEMENT**

I hope the above makes clear that there is a sophisticated series of expert regulation regimes that already exists and this regime of Architects and Engineers registration bodies and requirements for care etc., is able easily to be imported into the legislation almost immediately.

It is important to note that the failure of the construction industry is embedded in the fact that defects are not considered by anyone presently. Architects plans are not required to be constructed and builders can change the details of any development without being certified.

The process of a traditional approach of accountability has gradually been dismantled by those that require buildings to be constructed cheaper and quicker. The situation of banks and developers being the sole arbitrators of quality, is indeed at question.

SEPP65 showed extraordinary results are possible as a consequence of a change in regulatory frameworks that require Architects to be involved certifying designs at the front end. Architects are also experts in construction and their involvement through all aspects of development may be found to be key in resolving the present issues of quality. The regulatory framework already exists for this to occur. It was successful in the changes that brought better amenity to units in the SEPP65 regime. In the opinion of the writer this should now extend to the entire development process.

Please do not hesitate to contact the undersigned with any queries relating to the above.

Yours faithfully,  
CANDALEPAS ASSOCIATES

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