



File no: 16-204-1

24 July 2019

The Secretary
NSW Department of Finance, Services and Innovation
BCR@finance.nsw.gov.au

Dear Sir/Madam,

Building Stronger Foundations Discussion Paper

Thank you for the opportunity to comment on the subject Paper.

The matters discussed in the Paper are considered to be crucial to the approval, construction and certification of our State's building stock, particularly multi-storey residential buildings.

We look forward to a future opportunity to comment on any relevant draft legislation that may give effect to the Paper outcomes.

We wish to offer comments on the following issues raised in the Paper and our specific responses to the "Questions for feedback" are attached at Annexure "A".

Introduction

The 1998 reforms to the *Environmental Planning and Assessment Act 1979*, described by the Government of the day as providing for the faster approval and construction of a more economic building stock in NSW, are considered to have contributed significantly to the building development environment addressed by the Paper. It is our view that the community's perception of these previous reforms is that they appear to increase the focus on the interests of the developer while, at the same time, reducing the focus on the interests of the development consumer.

The number and proportion of multi-storey residential buildings in the NSW building stock has resulted in an increasing number of dwelling owners not being protected by home owners' warranty insurance. The owners of these buildings, where they exceed 3 storeys in height, are not protected by the provisions of the *Home Building Act 1989*.

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Further, the building inspection requirements of the *Environmental Planning and Assessment Regulation 2000* do not require accredited certifiers, or anyone, to inspect any of the structural elements of any commercial or industrial building, including multi-storey residential buildings.

The lack of progress inspections of any building project is considered to be a significant contributor to the present lack of public confidence in the integrity of our building stock.

The Government's "four-point plan to improve the certification industry" seems to focus on building development processes, rather than the structural adequacy, safety, health, amenity and sustainability of building projects.

The proposals appear to focus heavily on expanding the existing regime of certifiers collecting certificates, declarations and statements from others, without having to personally inspect, assess and verify the adequacy of building designs, construction, elements or systems. Whilst these proposals are considered to have relative merit on their own, we are of the view that they need to be complemented by other measures that promote the core issues of the safety, adequacy and longevity of our building stock, and not give the appearance of acting merely provide more layers of certificates, declarations and statements to assist in apportioning liability.

Part 1 – Outcomes of the Review

The diminished public confidence in the building and construction industry does require genuine and meaningful reform to ensure the safety (including fire safety), health and longevity of our building stock, as well as compliance with the development standards of applicable planning instruments.

The current legislation requires building certifiers to attest to the proposed building development's compliance with any applicable State planning instrument, Development Consent and National Construction Code and the associated Building Code of Australia (BCA). Any proposal to have an accredited designer verify that a building design complies with the BCA and the builder to declare that a construction is in accordance with the approved plans may also invite a new provision that requires an accredited planning certifier to attest to a proposal's compliance with a planning instrument or Development Consent. Such a dilution of the present building certifiers' role in the building development industry raises questions as to what the desired role will be for building certifiers in the future.

Part 2 – Responding to the Building Confidence Report

The Government's proposed approach to achieve its objectives involves four key reforms, namely:

- A. Declarations from the building designer (that plans comply with the BCA) and the builder (that building construction complies with the approved plans)
- B. Registration of building designers and commercial builders
- C. Establish common law where building practitioners owe a duty of care to building owners, including owners' corporations
- D. Appointing a Building Commissioner.

The Construction Certificates (CC), Complying Development Certificates (CDC) and Occupation Certificates (OC) issued under the existing legislation are designed to satisfy Reform A. It has been this Council's experience, however, that where certifiers accredited by the Building Professionals Board (BPB) issue these certificates, there is no assurance that the completed certified building complies with the BCA or the relevant Development Consent or planning instrument. Further, it is considered the BPB has been ineffectual in its oversight of the various building practitioners and will generally only take meaningful action after numerous complaints have been lodged against an accredited certifier. This process offers little or no compensation for affected building owners.

The declarations and registration of building designers and commercial builders (by the BPB or its successor) (Reforms A and B) are generally considered desirable, as they add a layer of rigour and accountability to the process. The declarations should not however obviate the need for review and certification by the principal/accredited certifier to provide an additional level of robustness and clarity to the certification process. Further, this documentation would bolster the effectiveness of the current owner's manual provisions of the *Environmental Planning and Assessment Regulation 2000*.

The establishment of duty of care at common law (Reform C) would be desirable, but difficult to regulate, particularly when the various corporate practitioners may be transitory entities. Such legislation should establish realistic proportional liability provisions that include a likely scenario where the practitioner has left the industry or the entity is dissolved. The litigious "last man standing" syndrome should not unfairly implicate perpetual entities, such as councils.

The appointment of a Building Commissioner (Reform D) (understood to replace the functions of the BPB and Office of Fair Trading) is supported to oversee the necessary changes to the building development certification regime. This role should be strongly recognised by legislation to ensure ongoing funding commitments in support of improving development outcomes and building standards in NSW.

The complementary reforms to the building and construction sector are generally supported. Broadening the range of penalties to enhance the accountability of certifiers, however, is not considered the sole measure that is necessary to protect the interests of consumers, particularly residential apartment owners. The historical disciplinary measures of the BPB have undoubtedly played a part in producing buildings of questionable structural integrity, fire safety or quality.

The development and implementation of reforms should consider some historical aspects of the construction industry, such as the objectives and outcomes of the NSW Building Services Corporation and Builders Licensing Board.

Part 3 – Introducing “building designers” into NSW legislation

The current provision which requires an accredited certifier to verify that a building design (including the architectural plans and building specifications) complies with the BCA, also requires this certifier to verify BCA alternative performance solutions, compliance with non-BCA conditions of any Development Consent and non-BCA development standards of any relevant planning instrument. Were the proposed “building designer” not to verify the various aspect of a building design before the issue of any CC or CDC, these verification roles may need to be undertaken by a number of “ancillary certifiers”. This would increase the complexity of any building approval process and further dilute the level of accountability at this pre-construction stage of development.

The proposal for a builder to declare that a completed building has been constructed in accordance with the “building designers” plans (the builder’s declaration) provides an opportunity to verify all aspects of building development, including its structural adequacy, functionality of its passive and active fire safety elements and systems, amenity and planning approval requirements are compliant. The builder’s declaration would assist the principal certifier to assess the completed project and add substance to any required owner’s manual.

Were the existing “one stop shop” CC or CDC and OC building approval concepts to be replaced by a multi-faceted approval concept, clear boundaries of responsibility, discipline and accountability would need to be established and enforced. The current BPB practitioner accreditation scheme is considered to have limited ability to achieve this.

The proposals’ various certificates, declarations and statements appear to negate the current role of certifiers, leading again to the need to clearly and definitively describe the roles, responsibilities and authority of the certifier in the approval and construction processes.

Part 4 – Registration of “building designers”

The proposal to accredit or register “building designers” has merit.

Where these “ancillary certifiers” are to be accredited by a scheme similar to the existing scheme under the *Building Professionals Act 2005*, more stringent training standards, experience requirements and disciplinary processes need to be implemented.

People with no formal training can acquire a CAD and prepare architectural plans for BCA Class 1a and 10 buildings that meet the prescriptive requirements of Schedule 1 of the *Environmental Planning and Assessment Regulation 2000*, without any real knowledge or understanding of the BCA or fire engineering guidelines. These draftspersons should only be accredited or registered to prepare plans for Class 1 and 10 buildings where they have successfully completed BCA and stormwater drainage courses and hold appropriate professional indemnity insurance.

Further, any regulation of the “building designer” practitioners should include a provision of compensation for the builder and owner where a defective or non-compliant declaration is issued.

Any “building designer” (who could be a builder) and builder’s declarations should not be issued by the same person or entity for the same project, to mitigate any conflict of interest.

Where the powers and roles of a Building Commissioner reflect those of the BPB, it is considered there will be no significant change to the building development certification environment, to the consumers’ disadvantage.

Part 5 – Duty of care of building practitioners

The proposal to provide that a building practitioner’s duty of care extends to subsequent title holders has merit.

The current provisions of the *Home Building Act 1989* provide only limited protection to the owners of low-rise residential buildings. The owners of industrial and commercial (including multi-storey residential apartments) buildings are afforded no regulated protections against BCA non-compliant or failing constructions, and must resort to common or contractual law proceedings for any compensation or restitution. These owners usually have limited capacity to litigate for any building practitioner shortcoming.

Previous NSW Government agencies, such as the Building Services Corporation and Builders Licensing Board, licensed and disciplined builders, as well as collecting a development levy to meet the cost of residential building remediation work. A new

licensing regime, somewhat similar to the NSW drivers licence points system, could be an effective means by which builders and other accredited building practitioners would better value their livelihood and work practices.

I trust this submission will contribute to your consideration of proposed reforms to the legislative framework of the building construction certification regime in NSW. We would be happy to contribute to any further opportunities to assist in this process.

Yours faithfully,

Trevor Taylor
Manager Development Policy and Regulation



Building Stronger Foundations Discussion Paper Response to Questions

The Discussion Paper invites responses to specific questions.

It is this Council's officers' opinion that many of the questions are too general or rudimentary in nature, do not properly interrogate the "real life" circumstances of the building development certification industry, do not differentiate between comparatively small domestic buildings and complex residential/commercial/industrial buildings or otherwise appear not to advance the achievement of the Paper's four-point plan to improve the industry.

For example, the Part 3.2 questions variously refer to plans being "changed", "varied" or "modified", when each of these subjective expressions may mean something quite different to the array of accredited or registered professionals mentioned in the Paper.

Also, repeated references to "the builder" do not identify if this entity is a real person or corporate entity.

The submission of comprehensive and practical responses to all the questions is generally not considered achievable based on the somewhat limited information contained in the document.

Accordingly, where we believe insufficient detail has been provided to allow an informed response by us, or it is outside our expertise, this is annotated by "**No response**".

Question	Issue	Response/Comment
1	Nature of declared plans	<p>A categorised “building designer’s” declaration should have prescribed content and relate to all architectural plans for all Classes of building.</p> <p>Where separate declarations are to be required for other elements of the construction, including structural, electrical, hydraulic and mechanical services engineering details, these may not be available at CC/CDC stage.</p> <p>Were all “building designer’s” declarations and declared plans to be lodged with the Building Commission, this would require significant reference, access and storage facilities demands.</p> <p>Council’s should be the repository for all relevant documentation, including the owner’s manual.</p>
2	Plans declared at CC/CDC	<p>The “building designer’s” declaration could be made at CC/CDC stage, with any progressive changes/variations/modifications being similarly declared and lodged.</p> <p>This further documentation would also need to be lodged with the Building Commissioner.</p>
3	Changed plans to regulator (Building Commissioner)	<p>Council’s should be the repository of public record for all relevant documentation, including the owner’s manual.</p> <p>All declared changed (minor and major) plans should be lodged with the Building Commissioner.</p>
4	Declaration accompanying all variations	<p>The declaration should apply to all changed (minor and major) plans.</p>
5	Obstacles to varied plan declaration	<p>No response.</p>
6	Options for plan variations	<p>No response.</p>

Question	Issue	Response/Comment
7	Simpler and robust modifications	No response.
8	Building Commissioner plan access	It is presumed the proposal is that the Building Commissioner (not councils or any other authority) would be the custodian of the documentation mentioned in the previous questions. The documentation could be hard or soft copy.
9	Documents provided to the Building Commissioner	All that documentation indicated in the Responses to Questions 1-4, above.
10	BCA performance solution documentation	This documentation is rarely lodged with Council, and what is lodged is generally neither definitive or comprehensive. The documentation should include all those aspects of the BCA provisions that justify the performance solution (particularly fire safety measures) that may not otherwise be accessible to anyone but the accredited certifier. This justification documentation should be included in the owner's manual for the benefit of future owners and regulatory authorities.
11	Value of performance solution report	There is currently no provision relating to who should prepare the report and determine its content.
12	Other methods of documenting BCA performance solutions	Documentation needs to be consistent, definitive and precise. It needs to be able to be readily understood by building owners and relied upon for technicians and others engaged in annual certification of fire safety measures over the life of the building.
13	Building compliance declaration	Such a declaration could not reasonably apply to every component, element and aspect of even the most basic and unsophisticated project. It is probable that the builder, in every instance, will make such a declaration, in order to obtain

Question	Issue	Response/Comment
		<p>the Occupation Certificate, obtain payment for the construction work and move onto the next project (perhaps as a different entity).</p> <p>The builder may take the risk that the declaration may not be challenged in the near future and, if challenged, likely to involve complex and protracted litigation that may not necessarily produce any benefit or compensation to the building consumer.</p>
14	Builders role in building compliance	No response.
15	Which builders should declare building compliance	In principle, a higher level of accountability is supported.
16	Difficulties to builders' declaration	Refer 13, above
17	Existing licensing regimes for certifiers	No response.
18	"Building designers" registration	<p>Registered architects, with relevant experience.</p> <p>Council often receives neat or aesthetically pleasing architectural plans prepared by someone who uses a CAD computer program.</p> <p>These plans may comply with the prescriptive provisions of Schedule 1 of the <i>Environmental Planning and Assessment Regulation 2000</i>, but often demonstrate that the designer has limited knowledge or understanding of the Building Code of Australia provisions.</p>
19	Requirements for registration scheme	The registration scheme is supported in principle. There needs to be a clear understanding of the ongoing administrative burden that this scheme would entail, and a commitment to sustaining and funding the process in the long term.
20	"Building designers" insurance	No response.

Question	Issue	Response/Comment
21	“Building designers” insurance policy requirements	No response.
22	“Building designers” skills	Refer 18, above.
23	“Building designers” qualifications	No response.
24	“Building designers” registration pre-requisites	No response.
25	Compliance powers for “building certifiers”	Powers superior to those of the Building Professionals Board.
26	Duty of care for building practitioner categories	All categories.
27	Duty of care scope	All building construction work.
28	Duty of care effect on contract chain	No response.
29	Duty of care owed to consumers	Initial and subsequent owners/consumers, within the legislated statute of limitation.
30	Basis of consumer protection	Owner of the building or strata title, within the legislated statute of limitation.