



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: Building Stronger Foundations submission

Thank you for the opportunity to comment on the recently released Discussion Paper: *Building Stronger Foundations*. Council supports the NSW Government's agenda to improve building regulation and the safety of buildings through effective regulation, certification and enforcement.

Given the short time frame for submissions, this is a preliminary submission yet to be endorsed by Council. Following Council's meeting in September, an endorsed submission will be forwarded for your consideration.

Council supports the new registration scheme for 'building designers'. The proposal to require categories of building practitioners who are registered as 'building designers' to declare plans and performance solutions are compliant with the Building Code of Australia, is supported. All persons who have a role in drafting plans/designs should be accountable and this documentation submitted at Constriction Certificate (CC) stage.

However it is recognised that alternative solutions during construction inevitably result in changed plans. A declaration that the documentation is compliant with the BCA is not enough to ensure that such has been built. For example, whilst Council requires development applications to be accompanied by a BCA compliance reports (for applications greater than single dwellings/multi dwelling development), these reports are not accurate, as many times significant changes are often required at CC stage. Variations to approved development application plans are subject to a S4.55 (old S.96) application to Council. The building must be substantially the same or a new development application is required. However it is apparent that Certifiers are not lodging the required S.4.55 applications (following the existing required process). The proposed reforms do not address how changes to ensure BCA compliance during the construction process will be managed.

To ensure quality construction the proposed reforms shift some of the accountability to the designers. What form of insurance will 'building designers' have? Difficulties with building insurance are likely to be replicated by building designers (see comments below). However, design is not usually the main cause of building defects; poor quality construction is.

Requiring builders to declare that the designs are built according to these declared plans will go part way to ensuring building regulators are more accountable for construction standards. However it is difficult to see that taking on this responsibility and potential 'liability' will be acceptable to the wider building industry. A builder is not always on site and work is

undertaken by various contractors, often sight unseen. How could builders be sure work was undertaken as required? Who will insure them? Requiring a builder to declare that buildings are constructed in accordance with building plans may have the same lack of success as private certification in terms of recourse and insurance. It appears that the building industry in New Zealand has largely turned back to Council Certification given the lack of insurance options for Certifiers.

The Building Professionals Board (BPB) was established to oversee building and subdivision certification, which in turn oversees the construction industry. It is noted that the BPB is not publishing a record of any independent audits of Certifiers. Are these audits being regularly undertaken? Or is the BPB only investigating in response to complaints? If so, the regulator is highly reliant on the public to notify the BPB of building irregularities, and sadly, the public has few resources/qualifications to identify if there has been a breach of DA/CC/CDC consent or the BCA. A builder is unlikely to report any breaches and it is no longer Council's role to be the construction watchdog, nor does Council have the resources to do so. The BPB also appear to be an unsuccessful watchdog.

Regulation is highly reliant on the BPB, but there has been little action from the regulator. Only 19 decisions were handed down by the BPB in 2018, and the highest fine was \$50,000. In 2019, there has been 21 decisions to date, with the highest fine being \$30,000. In 17 years, of the 467 BPB decisions available on their website, less than half of BPB decisions involved a fine. Whilst fines imposed by Building Professional Board BPB may be up to \$110,000, the greatest fine issued by the BPB was \$50,000 (that project had a 2012 value of over \$17 million). A suburban residential flat building has a value over \$34million and yet corresponding fines by the BPB have been negligible. Approximately 6 Certifiers have lost their accreditation for a period of time – across all of Sydney. Some Certifiers have repeat offences and yet retain their accreditation. It appears that these fines and actions are hardly an effective deterrent for breaches of certification duties. Furthermore a true account of construction compliance will never be evident unless the BPB (or independent auditor) audits a representative sample of construction projects.

A number of Certifiers have been reprimanded for certifying buildings that were not built in accordance with the approved plans (BPB actions). How indicative is this of the industry as a whole? How many more construction projects are not in accordance with the approved plans? Given the limited performance of the BPB in regulating Certifiers, how will appointing a Building Commissioner to act as the consolidated regulator for building in NSW improve built outcomes?

Requiring a builder to declare that a structure is built according to these declared plans is of no use when the builder no longer exists. Sadly, the proposed reforms do not adequately address the widespread practice among builders and developers of limiting their exposure to liabilities through \$2 companies. These companies are made defunct at the end of the building process and owners are left with little recourse. The seven-year statutory warranty for all defects has been reduced to a six-year warranty for "major" defects and a two-year warranty for others – this is a difficult distinction for a new resident to draw – how can a home owner easily establish that a problem is 'major' defect, or a minor defect in a 2 year period?

For higher rise buildings (four storeys +), no home warranty insurance applies, developers are instead are required to lodge a building bond (2% of the contract price) with NSW Fair Trading. The bond is held only for 2 years post completion of building work. Is this sufficient time to identify defects? – in the case of the Mascot Tower, it was not. Such development must rely on insurance taken out by the owners' corporation – and typically this excludes loss or damage from defective workmanship or design. The proposed requirement to ensure building practitioners owe a common law duty of care to owners' corporations is supported but difficult to see how this will provide recourse for affected parties in practice.

Private Certification has increased opportunities for conflicts of interest. It is highly likely that in many instances certification is not occurring independent of the builder, as the builder directly 'pays' the Certifier. It is noted that Council's 'in-house' Certifiers are rarely contracted to certify larger developments – why? What BPB action been taken against Council Certifiers? Does this reflect the rigour applied by Council Certifiers and their integrity? To give greater transparency and avoid conflicts of interest, consideration should be given to a process that requires Certifiers to be paid independently. This may make it more difficult to also achieve market competition but is appropriate to maintain the integrity of certification. Perhaps the same transparency should apply to building 'designers'.

Amending the legislation to clarify duties owed by various practitioners will be beneficial to the building industry. However it is the ability for the wronged party to take recourse, and the penalties for poor construction/regulation, that will define its effectiveness.

It appears that Private Certifiers and the building industry currently have a *laisse faire* attitude. Substantial legislative and cultural change is required to ensure building compliance again achieves the high standards produced by a government regulated process.

Yours sincerely,

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