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Building Stronger Foundations Discussion Paper
Regulatory Policy, Better Regulation Division
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City of Sydney submission for the Building Stronger Foundation Discussion Paper

The City of Sydney (the City) supports the proposed reforms outlined in the discussion paper however further and better targeted reforms are needed to rebuild confidence in the building and construction industry, in particular for multi-unit residential developments.

The lack of progress of implementing recommendations of the “Building Confidence” report (Shergold & Weir, February 2018) has not met community and industry expectations. The NSW Premier, Gladys Berejiklian, MP, has stated “we know there’s a problem, we know there’s a gap in legislation, we allowed the building industry to self-regulate and it hasn’t worked”.

The ongoing combustible cladding issue together with Sydney’s Opal Tower, Zetland Apartments and the more recent Sugarcube and Honeycomb development in Erskineville bring into sharp relief the issue of inadequate on-site quality control and the performance of certifiers during the construction process.

There is increasing evidence suggesting that the increased potential for building failure is due to cost-cutting and substandard onsite building practices, lack of experienced and independent oversight, insufficiently detailed plans that do not adequately direct on-site subcontractors and ready departures, including substitutions, from the approved design and plans.

The reforms must consider a requirement for project ‘building designers’ (meaning both engineers and architects) to be responsible for the detailed designs needed to guide construction and installation and a role to oversee the construction and installation of their designs by retaining their services during construction. It is strongly suggested that additional reforms are needed to better prevent building failures as well as the need via an audit trail in order to hold failures to account after the event.

To restore confidence in this important sector of the NSW economy the government should progress reforms that address increased on-site supervision, defect detection responding to improved regulatory required oversight by independent professionals (not working for the contractor undertaking the work). This should include more action to address the inherent conflict of interest of the current arrangements where development/contractors directly pay for regulating their construction activities and form business relationships with private certifiers. These arrangements are a significant

city of villages

element of the self-regulation the Premier states “hasn’t worked”. More effort is required to embed quality in all aspects of the construction process, particularly in the case of multi-unit residential building where there is an extreme imbalance of knowledge and experience between the purchaser and the developer.

Cost-cutting and risk management strategies by developers and contractors lead to the widely used “design and construct” contracts that put the builder in charge of most contract elements and the client or developer responsibility is reduced to paying the bill and accepting the outcome. Substitution with inferior products from those specified is rife, and adherence to Australian Standards by cheap substitutions is questionable and virtually unverifiable.

Substituted goods and services, without adequate supervision during construction, can lead to defective workmanship which is transferred to the purchasers who also have to accept, often unknowingly, the outcome. Almost all multi-unit residential developments are permitted to be built this way, and the risk is, and the recent evidence shows, that a number are. The role of the client’s site inspector (usually Clerk of Works or construction architect) has all but disappeared in Australia allowing this issue to spread.

The paper addresses a narrow set of issues, mainly regarding certifiers. The City’s response to the discussion Paper’s questions are attached which include a number of considerations for government when developing the proposed regulatory framework. In addition the following recommendations are made:

1. Resolve and publish a NSW Government implementation plan for accelerating an approach that goes beyond the recommendations of the Building Confidence Report.
2. Introduce accountability at all levels of the certification process through an immediate overhaul of the procurement of private certification practices including consideration of fee reforms, independent peer review of alternative solutions, increased onsite and desktop auditing of private certifiers, as well as clear enforcement pathways and reporting obligations.
3. Mandate the role of expert works inspectors who are independent of the builder (on-site Clerk of Works, construction architect and or suitably qualified and registered industry practitioner, and structural engineer) to rigorously check for building defects as they occur, before they are built-in and ensure appropriate construction quality, free of latent defects.

Yours sincerely

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Director
City Planning | Development | Transport

Attachment A: Response to Summary of Questions for Comment

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

There is concern that plans being relied upon at the construction certificate stage do not contain sufficient detail and specifications to adequately direct on-site construction practices and subcontractors. It is suggested that a schedule of plans be developed in consultation with industry and experienced and academic stakeholders. The kinds of plans should include those that are key to the buildings ongoing performance and should be informed by evidence and research of common faults as well as providing sufficient detail guide in site building practices and sub-contractors.

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

It is unclear why they would not be declared at these stages – these are the key stages at which declaration should be done. Also on any occasion prior to work being done where the work is proposed to be not in accordance with the plans or specifications – this could act as a check to ensure any new work being carried out is NCC or BCA compliant. Although this could present some administrative challenges where there are lots of small changes and perhaps this could be dealt with on a cumulative basis. Further information is suggested regarding the guidance material for Certifiers to ensure clarity on when plans can be statutorily declared.

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

Further clarity is required as to what is meant by “the regulator”, that is, is it intended to mean council and/or the Commissioner or certifier. Declared plans should be submitted to the appropriate regulator prior to work being undertaken. All current plans should be submitted to the regulator for the purposes of carrying out checks relating to compliance with approvals. Any reforms should take this into consideration to ensure the regulator can properly carry out its monitoring and enforcement functions in relation to developments underway. This may require some approval or checking process by the regulator.

All design and as-built plans need to be submitted with specifications of any proprietary system with documentation of the approval (testing and certification) mechanism with sign-off that the use of the system is suitable. This sign off could be provided by the independent inspector or where appropriate the manufacturer or product supplier. The certification authority would need to ensure that the plans are complete, and that all systems and products used are as detailed in the approval and no substandard substitution or unapproved alteration has occurred. This would typically require significantly greater inspection regime to ensure that the paper collection is an accurate record.

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

It is suggested that guidance material is needed to clarify the type and extent of the variation to the plans that would require a formal statutory declaration. A centralised authority, such as the proposed Commissioner should provide this guidance material on how a statutory declaration system would work between the building designer, supplier

and certifiers so that a statutory declaration does not conflict with approved plans or current approvals.

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

Potentially yes as this would be subject to the extent of the variation and the quality of the detail provided as to the variation. As suggested above in the response to Question 4, guidance material is recommended to provide more certainty.

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

An alternative could be to introduce a mandatory peer review by appropriately qualified professionals.

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

Assuming that the process referred to is the successive and iterative changes made to the building during the course of construction compared to the original approval, the process could be made more robust by ensuring the documentation provided to and held by the regulator/councils consistently reflects the total sum of modifications, so that the documents show what has been constructed at completion. These comments do not relate to the modifications to which s4.55 the EP&A Act apply.

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

Issues relating to development approval compliance should be enforced by local government, however, issues relating to quality of building design (whether it meets good practice, the BCA, NCC or Australian standards) should be investigated and enforced by the Building Commissioner.

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

'Building designers' (architects and engineers and other specialists) should be registered individuals who are held accountable to an enforceable code of conduct that protects the public interest. As mentioned above, the types of documents that should be provided are appropriate arrangement drawings, details and specifications to adequately direct on-site construction practices and subcontractors, such as:

- complete set of architectural plans.
- detailed engineering plans.
- product certification.
- compliance certification services.

This would require statements from all related registered 'building designers' that the incorporated goods and services used at the relevant stages are consistent with their documentation and calculations and that any particular performance solution is compliant with all other aspects of the approval and design. If the registered 'building designers' of a particular project are employed by the contractor or builder whose work is being assessed, there must in addition, be a registered independent inspector to undertake periodic inspections to detect defects during construction phase.

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

Many of the accepted “performance solutions” suggested by third party proprietary products are not supported by accessible performance solution briefs, testing and evidence of compliance from independent bodies. Many have unverifiable claims of meeting Australian standards (such as external cladding).

There may also be issues with certification and test methods that are to international standards that may not specifically meet the requirement of the Australian testing requirements or present slight differences in testing methodology or equipment used.

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

A performance solution would be appropriate, but may need further documentation to support the building being fit for purpose, particularly if the product is not compatible with another aspect of the design which relies on the performance solution. For example, further support could be through a process that provides a more holistic approach which includes the individual designer/supplier considering their product in conjunction with the overall design.

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

The documentation should be included in the construction certificate and occupational certificate, satisfying all requirements of Part A of the National Construction Code. In particular, the testing regime, assessment methodology and reason as to why it is fit for purpose.

Further discussion is required to determine the regulatory responsibility to check for the suitability of the system. If the suitability of the performance solution is to be tested it should be via the Building Commissioner and any enforcement undertaken by the Building Commissioner.

Any outcome resulting in a change to the occupation certificate documentation is preferred to be forwarded to the local councils for recordkeeping purposes only.

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

Although a trade may endeavour to comply with the performance solution, there is a possibility that further unrelated works to an area will compromise their work.

The private certifying authority can attend a site at irregular intervals only and could be responsible for key inspections and be responsible for the collection and collation of certificates. It is difficult to see how an authority could be in a position to confirm if all designs are implemented to their intent and therefore be held responsible for quality issues or failure for a particular trade or contractor. Often on construction sites there are many issues that may result in damage or altering of a contractors work without their knowledge, such as waterproofing membranes being compromised by following trades and fire separating panels being compromised by the chasing of services.

It is suggested that registered ‘building designers’ are required to undertake defects inspections during construction process. However, if they are employed by the builder whose work is being reported on (typically through novation), a registered and suitably

qualified independent inspector must review and approve that the building works have been undertaken in accordance with the 'design' plans and specifications.

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

Builders should be required to declare that they have constructed the building in accordance with plans that have also been signed off by registered 'building designers' and if not independent of the contractor, by a registered independent inspector. This duty should extend to key subcontractors or a builders who in turn should declare that they take responsibility for the work of subcontractors being consistent with the compliant plans.

Although the builder is in a better position than the private certifying authority to declare final building work, the builder should have mandated appropriate skills and training and is therefore competent in undertaking building works. A 'Principle Builder' or 'Head Contractor' should be considered to play a role in declaring final building works so an appropriate level of skill and experience is part of the onsite construction.

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

Builders and subcontractors still need to continue to take responsibility for their work. All trades, contractors and subcontractors should provide certification for their work, with the principal builder or head contractor making an assessment and certification that their observations concur with that of subcontractors. In addition, the work needs to be inspected at defined stages by an independent inspector or 'building designer' (in the case that they are not employed by the builder) or failing that, a separate independent inspector. This does alter the requirement under SEPP65 in NSW for design architects, regardless of their employ, to sign off design integrity.

15. 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?

In the case of larger developments where multiple construction contractors are engaged, it is unclear whether one or all of the contractors will be required to make the declaration of compliance with the plans. The scope of this requirement and the chain of responsibility will need to be clear.

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

Appropriate licensing or registration regimes such as the NSW Architects Register overseen by the NSW Architects Registration Board under the NSW Architects Act is considered appropriate.

Engineers and other specialists seeking to inspect buildings and sign certificates need to be registered under similar arrangements to architects.

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

The following occupations should be considered for licensing or registration (excluding current licensing):

- Engineering (Structural, Civil, Electrical, Fire, Acoustic, etc.) for design and certification processes
- Other building designers: various categories

Architects in NSW already have a scheme.

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

Those registered should be required to prove their qualifications and experience, have a minimum set level/amount of ongoing annual training to ensure they remain up to date with regulatory changes and standards, and should be required to hold a minimum prescribed monetary amount of professional indemnity insurance. This is currently the case for architects in NSW and most other states.

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

Professional Indemnity Insurance to protect consumers and the public from professional negligence.

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

Varies and depends on cover being offered by insurance underwriters.

21. What skills should be mandatory for 'building designers'?

The designer of buildings should have skills equivalent to an 'architect' as required for registration under the NSW Architects Act. Engineers of various classes should meet an equivalent standard.

All independent construction inspectors should have mandatory minimum qualifications in the BCA/NCC and an ongoing obligation to remain aware of amendments by providing evidence of professional development and training.

22. Should specific qualification(s) be required?

Should be determined by the registration or licencing authority.

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

Suitable qualifications, a written test and assessment of skills and knowledge and demonstrated experience in the industry is recommended. Additional on the job assessment should also compliment these pre-requisites.

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

Powers to suspend practice, de-register and issue fines for cases of professional negligence. Consideration should also be given to desk top and onsite audits of continuous professional development as is the case for architects in NSW.

The same powers that are exercised by the NSW Board of Architects. However, the problems in recently reported buildings have occurred during the construction stage and not by building designers.

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

By way of example the following practitioners should have a duty of care:-

- Architects
- (Construction) Inspectors
- Engineers
- Builders (including main contractors)
- Certifiers and Private Certifying Authorities

Critically, the reforms need to account for companies that might be 'phoenixed' to avoid liability.

26. What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?

Affixing a minimum dollar value before a duty of care is owed is likely to be prejudicial to those lower income earners and small businesses who may be unable to afford repairs. Also, it is unclear whether the dollar value of work that will attract such a duty of care is to be assessed on the cost for repairs to an individual issue or for the cost of repairs to cumulative issues.

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

All parties should be liable for their work, while independent inspectors and certifiers should be liable for any fit out or overall design in relation to the requirements of the Building Code of Australia, and applicable Australian Standards.

The private certifying authority should not be liable for any breach of product selection or product installation unless directly related to a mandatory inspection or requirement of the National Construction Code.

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

The following consumers should be owed a duty of care:

- Purchasers (including subsequent purchasers) of buildings, dwellings, units and owner's corporations should be owed a duty of care.
- Potentially also to include lessees of those premises.
- Both individuals and businesses.

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

There should be protection to all consumers so that there is no risk of breaking the chain of responsibility and obligation.