

30 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 Mr Tansey,

Planning Institute of Australia (NSW) Submission to Building Stronger Foundations

Thank you for the opportunity to provide feedback on the *Building Stronger Foundation Discussion Paper*. The Planning Institute of Australia (PIA) welcomes reform that further supports implementation of the recommendations of the Shergold Weir *Building Confidence* report.

Our submission is based on the following desired goals:

- To better balance accountabilities and liabilities across the industry;
- To improve trust in building certification processes;
- To increase capability and competence across the building industry;
- To establish a regulatory reform pathway to deliver the Shergold Weir recommendations;
- To establish a capable and resourced regulatory authority responsible for reform oversight and ongoing operation; and
- To limit the unnecessary and costly growth in detail and delay in preparing development applications.

In summary, PIA believes the key to achieving these goals is: shared responsibility and liability; enhanced training and competence; enhanced culture of transparency; and resourcing of new bodies to effectively monitor and regulate the building industry.

GOOD PLANNING IS AFFECTED BY REDUCED TRUST IN BUILDING QUALITY

The growth of a high-quality high-rise residential building sector is vital to achieving the directions of Sydney's district plans. High rise towers are a critical part of the housing mix needed to increase resident's access to jobs and amenities, enhancing liveability and

productivity. The strengthening of residential densities in accessible strategic centres is essential to achieving a 'thirty-minute city' and to offsetting the impacts of sprawl.

At an individual building scale, planners also rely on the effective delivery of a range of design and construction features to improve carbon performance, conserve water, manage heat, maintain local amenity and ensure safety of residents. It is difficult to implement the quality design intent of the NSW Apartment Design Guide when fundamental concerns arise on building safety and integrity.

There is the potential for a negative feedback loop - with less community trust in the delivery of sound buildings the community will be less willing to engage in future planning processes. The outcome would be less community support for the development needed to shape our cities consistent with adopted strategic plans.

Planners are not responsible for building construction. Notwithstanding they have a stake in the building industry delivering a quality product to enable a more diverse, sustainable and resilient city.

PIA members are also concerned at the potential for higher business costs that may arise from any reappraisal of professional indemnity insurance risks should the separation between planning and building roles not be clearly distinguished.

BETTER BALANCE OF LIABILITY, ACCOUNTABILITY AND RESPONSIBILITY

As a general principle, PIA supports the professional that is best equipped to manage construction risk being accountable and liable in relation to that work (a notion adopted in the Campbell Inquiry, NSW Parliament 2002).

PIA acknowledges that currently certifiers (generally private) carry a disproportionate liability in the issuing of construction and occupation certificates for buildings. As certifiers cannot be aware or responsible for every construction detail, PIA supports a broader spread of accountability across the key professions (ie fire safety, water proofing, structural engineering). This will more fairly distribute legal burden and allow greater certainty for pricing professional indemnity insurance for these trades and professions.

To this end, PIA supports calls for key trades and professions to provide compliance certification declaring that their contribution has been undertaken in accordance with approved plans and the Building Code of Australia (BCA). Such a scheme could include the following components:

- Building Commissioner nominates which trades and professions should provide such certification and when it should be issued.
- Compliance certificates should only be issued by practitioners with acknowledged competency recognised by professional registration and licencing.
- All certificates should be considered by the overall certifying authority at relevant stages of construction.

- Where variations to plans are sought, these should be noted and compliance with the approved plan, conditions and the BCA should be certified.

Additionally, consideration should also be given to whether large scale builders (constructing residential flat buildings over three storeys) should also be required to offer Home Owners Warranty insurance in a comparable way to other builders. This differing standard could be seen to undermine consumer confidence in high rise construction. Any consideration should take in to account all warranties and bonds that apply for rectifying defects.

CULTURE OF TRANSPARENCY, COMPETENCE AND TRAINING

PIA supports more rigorous and frequent building inspections, training to increase professional competencies and further resourcing of the Building Professionals Board / Building Commissioner to undertake audits to maintain certifier standards and ensure competent third party certification.

CONSTRUCTION INSPECTIONS

PIA is concerned that, depending on the complexity of a project, too few pre and post construction certification inspections occur.

Inspections need to be scheduled to coincide with each critical stage of site preparation and construction to ensure that the benchmarks of the approved project and the BCA are met throughout. It is noted that regulations have been recently changed to increase inspections for residential buildings in relation to bounding construction and fire sealing of penetrations. However, overall too few inspections reduce the opportunity for progress in meeting the expectations of all parties and this places pressure on certifiers.

PIA recommends the Building Commissioner mandate the points at which inspections occur across different types of projects and consider an optimum inspection regime that increases the frequency and better targets inspections at critical stages. It should also take account of which type of expert should contribute at each inspection. Each inspection should result in a transparent electronic trail of documentation that is accessible to the Building Commissioner, Building Professional Board – and ultimately the interested public.

The regulations should acknowledge that the purpose of the construction stage inspection regulations is to sample a building during construction. The inspection regime should be sufficiently sophisticated and documented to facilitate risk analysis and enable better oversight of any areas found to be problematic during inspections.

TRAINING AND COMPETENCY

High training and competency standards must be maintained for certifiers and all accountable design and building professionals. This standard should be acknowledged through industry 'registration' and the accompanying competency, continuing professional development and code of conduct requirements.

All building professionals need to be informed of regulatory changes and changes in industry expectations (eg introduction of Competent Fire Safety Practitioners).

As public officials, certifiers should remain up to date with their statutory obligations and duty of care. Maintaining high industry competency as well as ethical standards is essential and requires initial training and ongoing professional development for certifiers to develop skills in certain development types and disciplines. The Building Professionals Board / Building Commissioner is encouraged to consider the suitability of certifiers competencies to work across the wide range of certification tasks across diverse projects and all project stages. There are already 24 categories of certifier skills and competencies. The inclusion of specialised certifiers from other occupational licencing frameworks (eg fire safety) for specific functions is welcomed in this regard.

Building and construction standards would benefit from setting higher training and competence standards generally across the building profession. PIA encourages the NSW Government to consider the adequacy of current Technical and University training offerings, identify the necessary competencies and reform the curricula and trade certification / registration requirements accordingly.

AUDITING

A rigorous and frequent independent audit regime is important to maintain industry standards and community trust in the performance of certification. The Building Commissioner is urged to consider options to further resource the audit regime of the Building Professionals Board and to act rapidly on issues identified.

THE FUTURE OF PRIVATE CERTIFICATION

PIA notes although private certification carries an inherent potential for a conflict of interest, it is unlikely to be abandoned given the capabilities gap that would emerge in the public sector unless a very long transition time was adopted.

PIA supports a range of measures to improve the performance of and trust in private certification processes, including:

- Authorisation of a wider range of practitioners to issue statutory compliance certificates relevant to critical construction activities (eg fire safety, waterproofing).
- Increased frequency and clarification of the critical stages at which inspections are required.
- Transparent electronic document trail to track key stages in building design, construction and certification.
- More frequent and rigorous audits of certifiers as PCA's as well as those more specialised practitioners issuing trade specific compliance certificates.
- Revised training and CPD expectations across the profession.
- Adequate resourcing of the Building Professionals Board / Building Commissioner to undertake audits of certifier performance, accredit professionals and set industry performance and ethics expectations.

PIA notes that the future role of the Building Commissioner may include the implementation of these measures. PIA has previously provided a submission to the NSW Government on options to improve the independence of certifiers that highlighted the above measures ([linked here](#)),

PROCUREMENT PROCESSES REQUIRE EXAMINATION

The expansion of Design and Construct (D&C) contracting to over 70% of major construction projects means that some of the traditional supervisory role of the architect is not present to the same degree. Building Contractors proceed through a series of 'value engineering' processes to both reduce costs and modify the development in ways that generate advantages for construction. There is a high risk of product substitutions or design modifications (eg. cladding, windows) that reduce costs and improve constructability, but which may depart from the approval or design intent.

The ultimate implication of more prevalent D&C contracting is a shift in the power relationships in favour of the builder and developer – with residual responsibility to ensure adequacy of construction and conformance with approval falling to the certifier.

The prevalence of Special Purpose Vehicles (SPVs) established as shelf companies to fund and manage D&C contracts creates further concerns where these entities are wound up and liability for ongoing rectification works is difficult to trace.

PIA urges the NSW Government to consider restoring the checks and balances necessary to maintain quality and community trust in development proceeding as approved in a procurement environment dominated by D&C contracts.

Additionally, the availability of finance for apartment development has had an influence through increasing reliance on pre-sales. As noted by Professor Randolph (SMH 24/7/19), the lack of reliably detailed information on the nature of an apartment being purchased off the plan puts the unit buyer at a disadvantage - should their quality expectations not be met. A lack of information available to the consumer can affect the operation of the market in setting a clear price for this risk - and by creating an incentive to reduce the standard of construction.

PIA expects the reforms being tackled will not be able to address the full range of underlying factors that create an incentive for cost cutting and deviations from development as approved. However, PIA urges the NSW Government to consider restoring the checks and balances necessary to maintain quality and community trust in development proceeding that is consistent with that which was approved.

BUILDING COMMISSIONER TO IMPLEMENT REGULATORY REFORM

PIA supports the appointment of a Building Commissioner with a clearly defined two-phase role. Firstly, the Commissioner should lead development of a new regulatory regime nominating

those roles the Commission would oversee, secondly, the Commissioner should establish, resource and maintain any oversight bodies and the records they keep.

PIA understands the scope of the Building Commissioner's work and resourcing arrangements have not yet been determined and urges the Government to consider the opportunity for the Commissioner to:

- Champion the development of effective regulation, including legislative reform in consultation with industry and community stakeholders;
- Nominate those trades/professions which will need to issue compliance certificates for specific elements of building work;
- Maintain a digital public register of approved plans, relevant variations, inspection results, certification of trades and professions;
- Audit certification documentation and certifiers and individual practitioners; and
- Monitor, investigate and enforce relevant regulation and standards.

This role should make it clear to industry that there is one regulator overseeing the sector and provide confidence in the community that there is sufficient construction oversight. The Commissioner would need to resolve the role of the Building Professionals Board in the emerging regulatory landscape.

IMPLICATIONS FOR PLANNING PRACTICE

The planning profession is not directly involved in the building and construction certification process. However, the implication of current practice is a gradual undermining of trust in both the planning and building process. The community is rightly concerned when the development approved at DA stage, particularly has shown in photomontages, differs so significantly from what is built – notably in relation to materials and finishes.

The impact of a low trust environment in the certification space has had significant impacts on the development application (DA) process. 'Front loading' of construction detail in the DA has emerged as a common practice to limit certifier flexibility to accept significantly modified designs (see *Burwood Council v Ralan Burwood Pty Ltd and Ors* [2014] NSWCA 404 noting broad discretion of certifiers). Although regulations have since tightened certifier discretion, the outcome appears at odds with *Environmental Planning and Assessment Regulation 2000* cl 54(4), which stipulates that DA officers not request detail which would form part of the detail required at construction certificate phase.

PIA urges the Building Commissioner to consider regulatory reform that reduces certifier flexibility to accept design and construction modifications that are at odds with the outcome of the public approval process.

A gradual increasing climate of trust in the certification process should allow less construction detail at DA stage and allow assessment officers to focus on the intent of development assessment regarding compliance with relevant policy and law, site suitability, public interest and environmental, social and economic impacts.

CONCLUSION

PIA supports the urgent implementation of the Shergold Weir Report nationally. PIA is available to provide more specific advice to the NSW Government about the details of the proposed reform package. PIA maintains that key to these reforms must be themes of shared responsibility and liability, enhanced training and competence, culture of transparency and resourcing of new bodies, including the Building Commissioner, to effectively monitor and regulate the industry.

PIA NSW looks forward to future opportunities to engage on this issue.

Yours sincerely

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Planning Institute of Australia