

Submission to the NSW Department of Finance, Services and Innovation

BUILDING STRONGER FOUNDATIONS CONSULTATION

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2.0 Introduction

The Building Products Industry Council (BPIC) has been invited by the NSW Department of Finance, Services and Innovation to comment on its *Building Stronger Foundations* discussion paper (the Discussion Paper). The discussion paper outlines proposed approaches regarding improving the certification industry in New South Wales.

BPIC agrees with the need to make the building certification process more robust and deserving of public confidence. The measures outlined in the Discussion Paper go a long way towards achieving those outcomes, yet BPIC has concerns about some aspects of the consultation, including:

- **Lack of national consistency**

The Discussion Paper talks about the NSW commitment to the Shergold and Weir report recommendations. One of the primary findings of that report was the degree to which inconsistent legislation and regulation amongst jurisdictions has contributed to the current building compliance crisis, specifically:

“A common theme in our consultations was the call for greater harmonisation in compliance and enforcement systems. This issue has been raised time and time again……. The recommendations [of the Shergold and Weir Report], if adopted by all jurisdictions, will lead to a degree of harmonisation which does not presently exist. Further, because many of the recommendations call for a national approach, the implementation process will continue to strengthen the relationships between jurisdictions and their appreciation for each other’s systems.”

While page 8 of the Discussion Paper talks about the NSW Government responding to the Shergold and Weir report through the BMF, there is little substance to the commitments made by the NSW Government in the discussion paper to “harmonise the national response.”

- **Restrictive reference to the BCA**

Throughout the Discussion Paper reference is made to the Building Code of Australia (BCA) and embedding the term BCA into possible future legislation and regulation. However the BCA is only one component of a series of codes and guidance material that make up the National Construction Code (NCC). It seems inconsistent for the NSW Government to want designers, specifiers and

certifiers to follow only the requirements of the BCA and not the other parts of the NCC that incorporate the Plumbing Code of Australia (PCA), future codes such as the Electrical and Gas Code and the extensive library of NCC handbooks and tutorials.

There are numerous additional legislative requirements that also form part of the regulatory responsibilities which vary widely from one jurisdiction to the next including: various state building regulations, local bylaws, NEPP requirements and specific development consent (DC) conditions.

Declarations made by building designers and practitioners need to include statements that are inclusive of these additional requirements. It would be helpful if all specific reference was made in any declaration as to the particular pieces of legislation, regulation or standards that are applicable, as well as any local bylaws or DA specific consent conditions that may be relevant.

- **Lack of focus on Class 1 buildings**

The Discussion Paper appears to focus exclusively on building Classes 2-9. However similar building regulatory problems are evident in Class 1 residential buildings and any outcomes from this consultation should cover all building classes so as not to create a two speed regulatory system that applies different stringencies to practitioners depending on the class of building they are involved with.

Despite these concerns, BPIC believes that the intention of the NSW government to increase building certification stringency requirements is to be applauded, and provides the following responses to questions posed in the Discussion Paper.

BPIC Responses

Declaring that plans comply with the BCA and other relevant requirements

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

BPIC Response:

- 1.1 Final construction plans, engineering drawings and all documentation submitted to a building certifier for or at the time of CC or CDC.
- 1.2 Ensure that building designers', declaring that the building plans specify a building which will comply with building regulations including the NCC requirements, is inserted into the NSW model building contract and all other model building contracts (HIA, MBA, AIA, etc).
- 1.3 Site engineering studies such as windload assessments, Bushfire Attack Levels, Acoustic requirements/reports, etc and that these attributes or variables are consistent with the relevant Standards under which they are developed. For example, it should not be enough for a building designer to simply state that a building design complies with AS/NZS 1170.2. The declaration must state the specific design attributes (e.g. Serviceability and Ultimate wind pressures) as calculated for that specific project.
- 1.4 Specific materials, systems or forms of construction detailed in the plans that are *subject to variation or substitution* such as is often seen in building plans and specifications as "XYZ or similar"

2. Could plans be statutorily declared at the CC/CDC stages?

BPIC Response:

- 2.1 *Yes, this is the perfect time in the approval process for statutory declarations of conformity to be made.*

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

BPIC Response:

- 3.1 Create a "Works as Executed" or "As Built" requirement including a required information (NCC and referenced standards compliance) template and this would be submitted to the regulator. Further, there should be compliance controls on product substitution (using building products other than those specified) such that practitioners must declare that any substituted product is fit for the original purpose and still meets NCC performance requirements. There is also scope to articulate a requirement for approved building plan/working documents to show all substituted products as edited mark-ups against original specified/design products so these notes and substitutions are more readily visible for certifiers and clients to question.

The QBCC Form 15 and 16 would be a suitable starting point for these templates.

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

BPIC Response:

- 4.1 Since the practitioner is deeming all their work/design/specification to be code compliant for regulatory and insurance purposes, then a statutory declaration should cover all variations as even seemingly minor changes to the design/specification can have profound effects on building performance - e.g. downgrading 12mm Dynabolts to 8mm Dynabolts without increasing the number of fixings, or an extruded brick to a dry-pressed brick in a load bearing wall to achieve cost savings. However, being too stringent on this point will become a burden. Not being stringent enough will negate the whole purpose. There needs to be a balance and focus on clear definitions that describe what variations are reportable and those that are within the authority of the specific practitioner to make.

5. Are there any obstacles that would prevent a person from submitting a statutory declaration for variations?

BPIC Response:

- 5.1 Obtaining easy and timely access to a JP or other notary authorised to witness statutory declarations.

- 5.2 A clear understanding of the “approval process” for variations is needed. If the building designer certifies the plans are compliant, do all changes (for example a variant in glass type for windows) need to be signed off by the designer, or is the builder/supplier able to justify equivalency and self-certify?
- 5.3 It is likely, that in some circumstances, these declarations may be quite complex, requiring a significant dedication of time, effort and money to generate. In many instances, this is likely to impose a burdensome obligation of the building practitioner to execute what may otherwise be a relatively simple change.

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

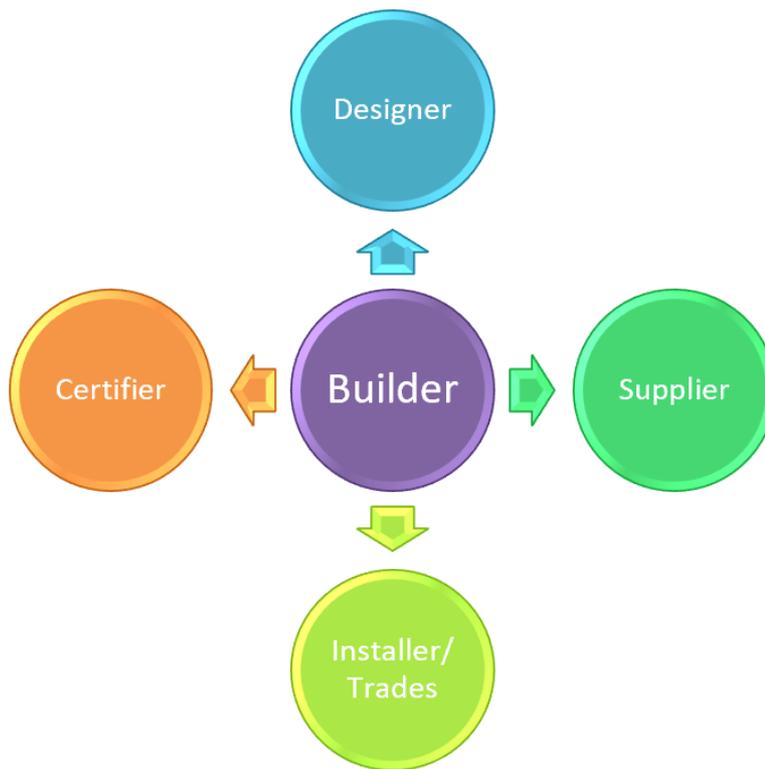
BPIC Response:

- 6.1 If we consider the designer at one end of the process and the certifier at the other, the principle authority engaged end-to-end is the builder. All other trades are (in most cases) sub-contract to the builder. It therefore seems logical that it is the builder’s role to assume responsibility (and accountability) for variations, including those proposed/required by any trade. Any variation to the design must be signed off by the builder and in some cases, where necessary, by the building designer as well. It will be important that variations to design are well documented and have the necessary sign-off/approval.

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

BPIC Response:

- 7.1 Making the builder responsible for oversight of all sub-contractors and ultimately responsible for the final product provides a single point of contact and control.



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

BPIC Response:

- 8.1 Create an electronic building passport for all buildings or a centralised data collection of builder, certifier and building designer data under the control of the Building Commissioner with penalties for practitioners who supply inadequate or incomplete information about projects.

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

BPIC Response:

- 9.1 The same as are required for building certification. Furthermore design practitioners should not only need to demonstrate how performance solutions would satisfy the requirements of the NCC but provide evidence of practical buildability. It is easy to come up with theoretical performance solutions but often these are simply not buildable, are unnecessarily expensive or fail to meet NCC Deemed to Satisfy performance equivalence.

Explaining through documentation how any performance solutions used in the design and construction of the building comply with the BCA

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

BPIC Response:

- 10.1 When the solution is based on theoretical modelling where there has not been a statistically significant data set to arrive at desired confidence levels, e.g. sensor data on heating and cooling of 2 houses in one climate zone used as the basis for all houses in a climate zone.
- 10.2 Performance is determined as an extrapolation of an existing tested system, e.g. wind load tests done on cladding show performance at 1kPa wind pressure and mathematical extrapolation instead of more testing done to determine performance at 2kPa pressure.
- 10.3 Requirements of various standards relating to the solution are vague or contradictory.
- 10.4 Performance of individual components or materials of a solution cannot be determined when they are used as a system.

11. Would a performance solution report be valuable as part of this process?

BPIC Response:

- 11.1 Yes, the ABCB has produced guidance about what information a solution should contain and the process undertaken. This should be expanded to a nationally consistent performance solution report or template that all practitioners must use and that can be captured in a database.

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

BPIC Response:

- 12.1 The ABCB has produced guidance about what information a solution should contain and the process undertaken. This should be expanded to a nationally consistent template that all practitioners must use and that can be captured in a database.

Declaring that buildings are constructed according to building plans

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

BPIC Response:

- 13.1 Create a Works as Executed requirement including a required information template and this would be submitted to the regulator.

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

BPIC Response:

- 14.1 Since builders are the suppliers of the "goods" in the building, they should warrant that their work is code, standards and regulatory compliant. This creates a chain of responsibility for compliance throughout the building process.

BPIC is aware of the practice where the builder requests/demands inferior, non-conforming product from suppliers, and at the same time exerts significant financial pressure on suppliers to then certify work as compliant. Whilst we acknowledge that this behaviour is covered under the Competition and Consumer Act 2010 as unconscionable conduct, we feel there is opportunity to call out this type of behaviour in the proposed legislation as a means to directly prevent this behaviour in the construction industry.

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

BPIC Response:

- 15.1 All contractors who are paid to perform work on a building regardless of the scope should warrant that their work is code, standards and regulatory compliant. This creates a chain of responsibility for compliance throughout the building process.

16. Are there any circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans?

BPIC Response:

- 16.1 Where owners or developers have overridden the builder's decisions. The regulations needs to provide specific authority (and responsibilities) for builders to avoid such situations. It should not be a reasonable outcome of the construction process that a building is non-conforming because the owners or developers wanted it that way. Builders must be responsible for their work and should not be over-ruled contractually by unqualified stakeholders.

Registration of 'building designers'

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

BPIC Response:

- 17.1 No. It is possible for poorly or marginally competent practitioners to gain professional membership of representative bodies and by default, a licence. Equally it is possible for practitioners to immediately or progressively lower their standards after gaining registration/licence. Over the last 9 years the NatHERS scheme has demonstrated that CPD is largely ineffective at raising performance or changing practitioner behaviour. Therefore registration should create an onus on professional bodies and individual practitioners to submit to random audits. At the same time the agency undertaking the audits needs to maintain third-party accreditation (such as NATA, JAS-ANZ or similar) and undertakes a robust, structured audit/remediation scheme. Strict protocols need to be developed such that accrediting bodies are themselves subject to scrutiny of their systems (including remediation practices and CPD).

The registration scheme

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

BPIC Response:

18.1 Land surveyors; engineers; architects; building designers; building surveyors; suppliers or fabricators of building subsystems (as opposed to individual building products) that are independently designed/engineered for projects, commissioning and tuning practitioners, professional builders, developers and owner builders. Manufacturers should be subject to specific regulatory obligations under the scheme, but should not be required to be registered in the same way as a builder or building practitioner.

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

BPIC Response:

19.1 The registration scheme in NSW should be nationally standardised with all other jurisdictions and also include QA audits of licencees along with associated remedial and punitive processes in place for those found to be sub-standard professionally. These processes need to accommodate the fact that it is very difficult to hold tradespeople accountable because a number of simple tactics can be used to frustrate any punitive or remedial measures. These range from claiming ignorance of the full legal implications of their role, to lodging counterclaims against auditing bodies for lost business revenue while proceedings are underway, to dragging out the appeal process, to producing biased witnesses on their behalf and so forth. There is also the difficulty of obtaining unambiguous, objective evidence of wrong-doing especially in any scheme where 'professional judgement' is exercised (what one tradesperson thinks is a substandard work, might be perfectly fine to another tradesperson). The registration scheme should require at least evidence of statutory PI and liability insurance (similar to home warranty insurance) to protect consumers and to not unduly burden practitioners, these checks could be applied only to businesses trading above a certain threshold.

20. What form of insurance should be mandatory for ‘building designers’?

BPIC Response:

20.1 Professional Indemnity

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

BPIC Response:

21.1 That the building documentation produced by the insured complies with all building regulations including NCC and Australian Standards requirements.

22. What skills should be mandatory for ‘building designers’?

BPIC Response:

22.1 Working knowledge of the NCC and referenced standards. Expert in digital drafting and BIM. Basic knowledge of surveying, QS, structural engineering, practical building/construction techniques, material science and production.

23. Should specific qualification(s) be required?

BPIC Response:

23.1 Yes.

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

BPIC Response:

24.1 Statutory declaration commitment to a Code of Conduct for their profession including agreement to be deregistered if found guilty of poor performance, wrong-doing, etc.

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

BPIC Response:

25.1 Statutory declaration commitment by practitioners to a Code of Conduct for their profession and be resourced to enforce disciplinary and remedial processes including deregistration if found guilty of poor performance, wrong-doing, etc.

25.2 Institute practical ways within the regulatory system to prevent the scourge of 'phoenixing' in the industry so that 'builders' (other than owner builders) are not able to set up convenience companies for single projects. They must have an ongoing business that has appropriate liability cover over an extended period to allow future building owners to claim in cases of defects and non-compliance. This would:

- a) Take pressure off the NSW Home Warranty Scheme as reports indicate that the majority of claims are currently accounted for by business insolvency.
- b) Protect good operators and tradespeople who are doing the right thing.

BPIC would like to see stronger punitive mechanisms that tie responsibilities to directors even after a company becomes insolvent and/or individual directors become bankrupt.

25.3 Introduce mandatory inspections for installation quality and compliance to code requirements and Australian Standards. 'Installation' certificates need to be issued only by persons qualified to do so.

25.4 Create proper supply chain of responsibility legislation under the control of the Building Commissioner

Establishing a duty of care

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

BPIC Response:

26.1 All building practitioners as part of a supply chain of responsibility regime.

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?

BPIC Response:

27.1 A supply chain of responsibility regime should apply to all parties involved in constructing a building so that each owes a duty of care to each party further down the supply chain and to the end consumer.

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

BPIC Response:

- 28.1** Expertise and learnings from the QBCC should be used to determine practical and cost effective ways that this can be done.

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

BPIC Response:

- 29.1** The building owner, all subsequent building owners and all occupants.

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

BPIC Response:

- 30.1** Purchase, rental, leasing of a property and all other forms of occupation/habitation of a property (e.g. hotel accommodation, office worker, etc).

3.0 The Role of BPIC

The Building Products Industry Council (BPIC) is a national peak body representing Australia’s leading building products industries and related services (listed in the footer of this document) in:

Steel	Gypsum Board	Concrete	
Insulation	Timber Products	Roof Tiles	Glass
Windows	Clay Bricks	Concrete Masonry	
Cement	Tiles	Insulated Sandwich Panels	

BPIC’s members and associated companies directly employ over 200,000 Australians with more than 470,000 employed indirectly. Their collective industries are worth over \$54B in annual production to the Australian economy. BPIC is a not for profit organisation governed by a Board of Directors comprised of representatives from its member organisations.

BPIC’s primary objective is to provide coordinated representation of the building products industry to interested parties including Government, the construction industry, and the general public to help improve building and construction standards. We also provide a forum for discussion, information sharing and policy formulation among major product categories in the building industry. BPIC’s mission is to:

- Promote regulatory reform to ensure that products meet minimum standards, code compliance, and are used in the manner for which they are intended.
- Promote public and regulatory confidence, growth and innovation in the building product sector.
- Promote and support improved, robust and nationally consistent building and construction product legislation, regulation, codes and standards.

BPIC works to fulfill these aims by gathering and supplying practical and current industry information on behalf of BPIC member organisations and other organisations and companies that are not members but follow BPIC through various means. This industry-wide approach to responding to regulatory issues, helps to ensure that Governments are informed of possible problems in the building industry and are provided with appropriate industry-considered responses. BPIC also encourages investment in skills formation, product development and industry research by helping to identify and remove regulatory impediments to innovation.