

**Supplementary
Submission
No 56a**

**INQUIRY INTO REGULATION OF BUILDING
STANDARDS, BUILDING QUALITY AND BUILDING
DISPUTES**

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Date Received: 15 October 2019

SUBMISSION TO THE
Design and Building Practitioners Bill 2019
Consultation



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October 2019

1. Introduction

This submission responds to the invitation issued by the NSW Government to provide input on the Design and Building Practitioners Bill 2019.

Section 2 provides some general observations on the process for undertaking building regulation reform and how it could be improved.

Section 3 provides comments and observations on the Design and Building Practitioners Bill 2019.

Section 4 sets out the areas of reform that are essential to have an effective building regulation system which are not yet in place in NSW and hence mean that the proposed Bill by itself, even without the identified deficiencies set out in section 3, is not sufficient to address the underlying industry problems.

2. The NSW Building Regulation Reform Process

As I observed in my earlier submission, Submission to the Building Stronger Foundations Consultation, 24 July 2019, what is notable about both the process and the actual reforms undertaken to date in NSW since both my report and the Shergold Weir report is how limited and piecemeal the “reforms” have been.

The “reforms” undertaken to date are as follows:

- Release of a Government response to my 2015 report in which about half the recommendations were not addressed
- Provided the Minister for Better Regulation with responsibility for building regulation and transferred the then Building Professionals Board to Fair Trading, within the Finance, Services and Innovation portfolio but failed to transfer the building policy function covering building standards from the Environment and Planning portfolio and failed to provide the necessary resources for the building regulation function.
- Consolidated and rewrote the building regulation parts of the Environmental Planning and Assessment Act in one part of the Act but failed to make it a standalone Act consolidating all building regulation, with this problem of legislative fragmentation being compounded by a series of additional items of legislation such as this Bill.
- Enacted a regulatory requirement for certification of fire protection system and design and annual review by competent fire protection professionals. However, the potential benefit of this was negated both by not covering installation of fire safety systems as well as design and annual review and failing to put in place an accreditation scheme for fire protection professionals, despite considerable work and input from the Fire Protection Association Australia over the last two years. In the current regulation competent fire protection professionals are those deemed to be so by building owners, which is hardly satisfactory.

- The Building and Development Certifiers Bill was written to replace the Building Professionals Act but it has yet to be enacted
- Release of the Building Stronger Foundations Discussion Paper which set out three “reforms”, three of which are covered in the draft Bill and the appointment of a Building Commissioner, but with no Building Commission in the sense of a fully resourced, empowered and experienced building regulator, regardless of its governance structure.

What is missing from the whole process is a clear vision statement by the NSW Government of how building regulation will be structured and undertake its function of ensuring the safety, integrity, functionality and regulatory compliance of buildings in NSW, and the time frame and stages within which this process will occur.

In addition, the key enabler for building regulation reform, a resourced and experienced building regulation agency, is not in place. There are still two agencies involved in building regulation: the Building Policy Unit in the Department of Planning and the Environment, which advises the Minister for Planning on the National Construction Code, and the Home Building Services part of Fair Trading. Both should be combined, fully resourced and located separate from Fair Trading, but within Finance, Services and Innovation portfolio and report to the Minister for Building Regulation. This is not meant as reflecting adversely on Fair Trading but is due to the different culture, philosophy and approach required of the Building Regulator relative to Fair Trading. An Office of Building Regulation is regulating the functioning of an industry and hence needs to be actively involved in monitoring the industry, undertaking ongoing investigations and audits, overseeing the accreditation and performance of registered building professionals, ensuring the proper performance, training and development and accountability of building certifiers as regulatory agents and public officials, as well as ensuring that proper support and assistance is provided to them in undertaking their role and advising the Minister on the performance of regulation and building policy issues.

The regulatory function is quite distinct from the consumer protection role which is the core function of Fair Trading and requires a proactive approach to identifying and correcting practices in the building industry that produce poor building outcomes which is at variance with the more reactive approach of consumer protection. While it is true that Fair Trading’s Home Building Services has operated a licensing system for various categories of building practitioners, the approach used is at variance with what is required for the registration function of building practitioners who are subject to active audit and investigation and have requirements for continuing professional development and the holding of insurance cover.

3. Design and Building Practitioners Bill 2019

The Bill seeks to address the registration of design and building practitioners, requires compliance declarations from those parties, imposes a duty of care on those engaged in construction and sets out the framework for disciplinary actions, investigations and enforcement.

The core provision in the Bill is to require the registration of what are termed building practitioners and design practitioners and to require them to declare that the work that they undertake is compliant. In the case of the designers the declaration is that the design is compliant with the building code while in the case of building practitioners the declaration is that the building work is in accord with the designs and in compliance with the building code. In addition, as noted above, the Bill imposes a duty of care on those undertaking building work and the preparation of building designs to the owner of the land on which the work is done.

While this is an improvement on the current situation there are deficiencies in the approach taken in the Bill, these being as follows:

i. The Bill only covers builders and building designers and not other relevant building practitioners

In their report to Australian Building Ministers, Building Confidence, Shergold and Weir recommended that each Australian jurisdiction require the registration of building practitioners involved in the design, construction and maintenance of buildings and listed the following categories:

- Builder
- Site or project manager
- Building inspector
- Building surveyor/certifier
- Architect
- Engineer
- Designer/draftsperson
- Plumber
- Fire safety practitioner

While building surveyors/certifiers, builders of non- commercial buildings builders and plumbers are covered by other legislation, it is not clear whether it is intended to register and regulate the full list of building practitioners as set out above. In this regard it is noted that all Australian jurisdictions have endorsed the recommendations of the Shergold and Weir report.

Also in NSW only builders who work on buildings below four storeys in height are required to be licensed. This needs to change to include all builders in the regulatory framework, but it is not clear from the draft whether this is to occur.

ii. Classes of buildings covered

The Bill refers to classes of buildings but does not make clear what classes of buildings will be covered. It is understood that in meetings with stakeholders, when this has been raised, it has been stated that the Government, intends to only cover, at least initially, class 2 buildings which under the National

Construction Code are apartment buildings. This excludes classes 3 to ten and mixed use buildings, the latter typically including underground parking, shops and offices on several floors and apartments above these. At the very minimum mixed-use buildings should be included from the outset and there should be a time-based commitment to extend coverage of buildings beyond class 2 and mixed-use buildings.

iii. Self-Certification

The Bill only allows for self- certification by building practitioners and building designers and not for any independent, third party certification. Under the current system the building certifier is required to review and certify whether the building conforms with the approved plans and the building code. Self-certification requirements for building practitioners and designers is a modest improvement on this. However, the Shergold and Weir report recommended that each jurisdiction require genuine independent third-party review for specified components of design and certain types of buildings. The requirement for independent review should be risk based and hence would, most likely, need to be mandatory for fire safety systems and other critical building elements and for higher rise buildings. Mechanisms identified by Shergold and Weir included panels of experts, approved third party reviewers with the process administered by the government or third-party reviews by other registered practitioners with independence required.

The absence of provisions for third party, independent review is a major weakness of the Bill and is in conflict with the commitment to implement the Shergold and Weir recommendations.

iv. Variations in design

The Bill recognises that designs can vary over the course of a project. Indeed, it is a feature of the design and construct model, which predominates in the building and construction sector. Generally the initial design that leads to development approval will only be a broad design outline not the final plans and that over the course of the project the design can change. What is not covered in this regard is the linkage to the role of the building certifier who is required to be provided with the designs of the building, including any variations. This illustrates a weakness in using a series of items of legislation rather than an omnibus consolidated building regulation. The provisions governing the certifier are covered in separate legislation and hence any flow through from this Bill to the requirements relating to a building certifier have to be taken up in the separate legislation.

v. Principal design practitioner

This role is created in the Bill and appears to require the party in this position to collect all design declarations from designers involved with a project. It is not clear whether this role can be undertaken by the builder or is a separate position and who appoints the person and the skills and training required for the role. In any case the building certifier is already required to obtain and hold all building designs declarations so it is not clear why the additional position is required. If it is to be established it should be more than a collector of declarations and add value. Value could be added if the person holding the position were required to assess whether the designs fit together in a coherent whole.

vi. Phoenix companies

A major gap in the current regulatory approach is the presence of phoenix companies, companies that are established to undertake the legal function of builder for a project and then get unwound at the end of the project, leaving the owners without legal recourse against the builder for defective work. This situation undermines the regulatory requirement for builders to make declarations about the building work conforming to the design and the building code and to the provision imposing duty of care on builders and designers. The Bill or ideally a comprehensive Building Act should address this issue which is in fact addressed in the Queensland building legislation.

4. Priority Building Regulation Reforms Not Yet Implemented

There are a number of building regulation reforms that, four years after my report, have yet to be addressed and which are critical to having an effective building industry regulation framework in place. These include:

- Consolidated building regulation in one piece of legislation written in plain English and principles based: in fact, the situation has regressed with each aspect of building regulation resulting in separate legislation
- A consolidated, fully resourced and empowered building regulator with broad powers to audit building work and take effective compliance and enforcement actions and which incorporates the building policy function in the Department of Planning. As noted above this body should not be in Fair Trading.
- Establish a Building Regulation Advisory Committee to advise both the Building Commissioner and the Minister on building regulation reform and practice, with membership drawn from suitable persons in key parts of the industry and relevant consumer representative organisations, each with relevant knowledge and experience and a commitment to best practice regulation and industry performance.
- Ensure that local government are committing adequate resources to the building compliance and enforcement function and if necessary, facilitate additional funding through a levy on DAs and CDCs
- Establish a requirement for councils and building certifiers to work together, including a requirement for mandatory reporting to councils by building certifiers of non-compliance and for councils to act on such notices and keep the building certifier informed of developments.
- Enhanced accountability, support and professional development of building certifiers, including:
 - Provide practice guides for building certifiers and each other class of certifier of building work, setting out their role and responsibilities to which certifiers are held to account.
 - Provide support for certifiers in the form of a help desk and a panel of experts on which they can draw for advice and a Reference Panel for mandatory reviews of select designated complex and higher risk developments

- Put in place controls to mitigate conflicts of interest and increase the independence and transparency of engagement of building certifiers and building practitioners.
- Provide building certifiers with enhanced supervisory powers and mandatory reporting obligations in respect to building non-compliance.
- Establish and maintain a program of Continuing Professional Development for all building certifiers
- Require building certifiers to be members of an approved professional association which is subject to a full professionalisation process overseen by the Professional Standards Authority
- Establish accreditation for fire safety system practitioners