

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

Organisation: Property Council of Australia

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Australia's property industry

Creating for Generations

Mr David Shoebridge MLC
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Dear Mr Shoebridge,

Inquiry into the regulation of building standards, building quality and building disputes.

The Property Council welcomes the opportunity to make a submission to the inquiry into the regulation of building standards, building quality and building disputes. Consumers, building owners, building practitioners and insurers need certainty and confidence in building regulation which will ensure the community has confidence in the development of our State and the quality of the homes they buy or rent.

This is the Property Council's second submission to the Inquiry and its focus is the exposure draft of the *Design and Building Practitioners Bill 2019* (the Exposure Draft). The *Design and Building Practitioners Bill 2019* (the Bill) is currently before the Legislative Assembly and this submission contains some notes on relevant changes that have been made to current Bill before Parliament considering the submissions made on the Exposure Draft.

The Property Council of Australia

Property is the nation's biggest industry – representing one-ninth of Australia's GDP and employing more than 1.4 million Australians. The largest employer in Australia.

In NSW, the industry creates more than \$81.4 billion in flow on activity, generates around 387,000 jobs and provides around \$61.7 billion in wages and salaries to workers and their families.

Our members are the nation's major investors, owners, managers, and developers of properties of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play.

The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive and sustainable places.

PROSPERITY | JOBS | STRONG COMMUNITIES

A pillar of NSW

The property and construction industry underpins the health and prosperity of the NSW economy. The industry:

- generates over 390,000 jobs – 12 per cent of the workforce.
- provides \$25.4 billion in wages and salaries to workers and their families.
- pays \$20.9 billion in state taxes, Local Government rates, fees, and charges - the state's single largest tax payer, accounting for 54.1% of Taxes.
- contributes \$63.4 billion directly to Gross State Product – 12.7 per cent of total GSP.

The Design and Building Practitioners Bill 2019

The Property Council welcomes reforms that will increase confidence and accountability in the building industry and strengthen confidence.

There are industry concerns about the practical implementation of the proposals as much of the policy detail is yet to be made available as it is not contained in the draft legislation and will be instead finalised in the regulations.

This is worsened due to the tight timeframes and the seemingly arbitrary deadline for introduction of the Bill. Having said that, we note that some changes have been made to the Bill since the Exposure Draft was first circulated presumably in response to the submissions received. For this reason, the comments below seek to relate to the Bill as introduced.

The Property Council acknowledges and welcomes the Department of Customer Service's ongoing consultation on this issue. We consequently look forward to more considered consultation on the Bill's accompanying regulations.

Duty of Care

The Property Council has raised concerns that the scope of liability in the drafting of the duty of care provisions in the Exposure Draft extended beyond that currently set out in the Home Building Act 1989 (HBA) and also at common law. In addition, we fear the section as drafted is ambiguous and will lead to uncertainty and will only promote litigation with all the accompanying costs and time delays.

As the Exposure Draft was drafted, the proposed duty of care could have had the following impacts:

- There is a risk that builders will stop building those types of buildings covered by the duty.
- A rational response to the measure would be for builders to add contingency to the contract price to protect against their liability being expanded. Our advice is that most builders contractually limit their liability and usually exclude liability for defined types of consequential loss, subject to the application of item 4 of Schedule 2 to the Home Building Act);
- The flow on impacts of the above such as a rise in building costs (due to the above), resulting in worsened housing affordability; and

- Increased pressure on the insurance market, at this stage it is unclear whether the insurance market will be willing to insure at a reasonable price this potential increase in risk.

The Property Council recommended that section 27(1) be amended as outlined below:

'A person who carries out construction work for a building has a duty to exercise reasonable care to avoid economic loss caused by Major Defects in that construction work.'

The proposed amendment intended to provide that:

(i) the duty attaches to defects *in the work done*. On the current drafting, the duty attaches to

(A) defects in a building for which the work is done; and

(B) defects related to a building for which the work is done,

which could arguably capture defects in the building for which the relevant person has no connection.

Our proposed amendment would also ensure the types of defects covered by the duty of care are major defects only (as defined in s18E of the Home Building Act, or a similar definition).

Since the exposure draft of the Bill, section 30(1) has been amended.

Section 30(1) now provides that:

A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects:

*(a) in or related to a building for which the work is done, **and***

(b) arising from the construction work.

(emphasis added)

In respect of section 30(1), the Minister made the following remarks in his Second Reading Speech:

- '... a duty is owed to the end user and in respect to liability for defective building work.'*
- '...any person who carries out construction work will...have an automatic duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the construction work is done **or** arising out of that work.'* (emphasis added)
- '...owners of property will be receiving protections that are owed to them against any kind of defect **that arises from construction work**...' (emphasis added)*

The Property Council is concerned that section 30(1) could be the subject of dispute as to its interpretation, and the remarks in the Second Reading Speech do not resolve this concern.

A broad interpretation of section 30(1) is that the duty is to:

- avoid economic loss caused by defects that are in or related to a building for which the relevant construction work is done; and
- avoid economic loss caused by defects that arise from the relevant construction work.

In other words, limbs (a) and (b) stand alone, and the duty is to avoid both separate limbs.

A narrow interpretation of section 30(1) is that the duty is to avoid economic loss caused by defects that satisfy both of the following criteria:

- a) the defect is in or related to a building for which the relevant construction work is done; and
- b) the defect arises from the relevant construction work.

In other words, limbs (a) and (b) are read together, the duty is to avoid a defect that satisfies both limbs.

The remark in the Second Reading Speech at item 3(b) above seems to support the broad interpretation, but the remarks at items 3(a) and 3(c) above seem to support the narrow interpretation.

It would be helpful for the Department to clarify what is the intended interpretation, so as to minimise future disputes.

It is also noted that the type of building in relation to which a duty of care will be owed will be outlined in regulations. The Property Council recommends that it should be limited to residential classes of buildings only. The definition of 'owner' in both the Exposure Draft and Bill before Parliament includes only individuals and owners corporations (and not corporations), which is consistent with the duty of care only applying to residential building work. The definition of owner should also ensure that it does not include tenants.

It should be considered if the definition of 'building' extends to civil works that service residential buildings, such as guttering and stormwater facilities (especially where these civil works are undertaken prior to the residential buildings, and usually by a different contractor, as is the case in large estates). The position in the *Home Building Act* is unclear, and an opportunity to clarify this would be appreciated.

In section 27 (2) of the Exposure Draft, we considered there is a risk that the words '*in relation to which*' could mean that neighbouring landowners are owed the duty. The Property Council recommends this section is amended to make it clear that neighbouring landowners are not owed the duty.

In the relevant Section 30 (2) of the Bill before Parliament, there has been no change made;

The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.

Section 30 of the exposure draft stated that there can be no contracting out of the duty, that is, a construction contract cannot be used to limit liability under this Part, therefore there will be unlimited liability for designers and practitioners that undertake construction work.

This will have consequences in the property industry as outlined previously, in relation to the type of construction work undertaken, type and cost of insurance that is able to be obtained and the impact on housing affordability.

Schedule 1 of the Exposure Draft defined 'Existing arrangement' as *a contract or other arrangement for the preparation of regulated designs or the carrying out of building work entered into before the commencement of section 9.*

We recommend that 'existing arrangement' be defined as:

(a) a contract or other arrangement for the preparation of regulated designs or the carrying out of building work entered into before the commencement of section 9; and

(b) a contract or other arrangement for the performance of construction work entered into before the commencement of this Act in accordance with section 2.

In the relevant schedule (Schedule 1) of the Bill before Parliament, there has been no change made

Definition In this Part— existing arrangement means a contract or other arrangement for the preparation of regulated designs or the carrying out of building work entered into before the commencement of section 9

Insurance

The definition of adequate insurance as defined in the Bill should be changed. The Bill outlines the design practitioner is "indemnified by insurance". However, industry advises that indemnity is only resolved after a claim is made. It would be difficult for a design practitioner to make a claim that they are "indemnified by insurance". This definition of adequate insurance should be changed to reflect this.

In the relevant Section 11 (2) of the bill before parliament, there has been no change made.

For the purposes of this section, a registered design practitioner is adequately insured with respect to a declaration and work if the practitioner—

(a) is indemnified by insurance that complies with the regulations against any liability to which the practitioner may become subject as a result of providing the declaration or doing the work, or

(b) is part of some other arrangement approved by the regulations that provides indemnity against the liability.

Varied Designs:

The Property Council acknowledges that a lot of the detail of the policy will be expanded upon in the Regulations. Thus, proper consultation should be undertaken on what variations of the design will be captured. Submitting all variations would be onerous and resource intensive for both industry and the Government, therefore further discussion needs to occur on what variations would be deemed material.

Penalties

The Property Council queried the proposed penalty regime outlined in the exposure draft, as the penalties appeared to be lower for non-registered practitioners.

For example, as outlined under Division 2 section 12 and 13, a registered principal designer practitioner attracts a penalty of 1000 penalty units, but in section 13 an unregistered person declaration only attracts a 500-unit penalty. The Property Council queries the rationale as to why the unregistered person attracts a lower penalty.

It appears that the current Bill before Parliament aligns penalties for registered and non-registered practitioners.

Powers that may be exercised on premises

The Property Council is concerned at the broad powers that this section invests in an authorised officer.

For example, in section 73 (2) (k) of the Exposure Draft the authorised officer is able to “open up, cut open or demolish building work if the authorised officer has reasonable grounds for believing that it is necessary to do so because it is connected with an offence against this Act or the regulations.”

Also, the Exposure Draft stated in section 73 (3) “The power to examine and inspect a thing includes a power to use reasonable force to break open or otherwise access a thing, including a floor or wall containing the thing.”

Clarity should be provided as to what would be deemed to be reasonable grounds. It is feasible that either of these actions would result in costly reparations to be met by the building practitioner, and therefore we recommend an amendment that allows this clause to be appealed and/or if the authorised officer was found not to have “reasonable grounds” then the potential for compensation.

Consideration should also be given to a higher threshold than “reasonable grounds” for the authorised officer to take this action

In relation to Clause 73(2) of the Exposure Draft, an authorised officer should be limited to exercising these powers to only after notice has been provided to any person affected in order to allow such persons an opportunity to observe and make a recording of any exercise of such powers.

In the relevant section 76 2 (K); 76 (3) of the Bill before Parliament, there has been no change made.

(K) Open up, cut open or demolish building work, if the authorised officer has reasonable grounds for believing that it is necessary to do so because it is connected with an offence against this Act or the regulations,

(3) The power to examine and inspect a thing includes a power to use reasonable force to break open or otherwise access a thing, including a floor or wall containing the thing.

Stop Work Orders

Section 78 of the Exposure Draft proposed to allow the Secretary of the Department to issue a stop work order if the Secretary considers that:

- building work is, or is likely to be, carried out in contravention of the new law; and
- the contravention could result in significant harm or loss to the public or occupiers or potential occupiers of the building to which the work relates or significant damage to property.

A stop work order could have immediate effect. There would be no requirement for advance consultation as to whether a stop work order should be issued.

There would be an appeal right against the issue of a stop work order but the appeal would not be to the Land and Environment Court but to the NSW Civil and Administrative Tribunal.

This approach exposes a problem of having the same matter of substance simultaneously being handled in two different forums — the Land and Environment Court and the NSW Civil and Administrative Tribunal

The Property Council strongly recommends that the government invest the Land and Environment Court with the jurisdiction to deal with appeals from stop work orders of this kind.

In the relevant Section 82 (1) (2) of the Bill before Parliament, a change has been made to reflect the above submission.

(1) A person given a stop work order may appeal against the order to the Land and Environment Court within 30 days of the service of the notice of the order.

(2) The lodging of an appeal does not, except to the extent that the Land and Environment Court otherwise directs in relation to the appeal, operate to stay action on the order appealed against.

Thank you again for the opportunity to make a submission to the inquiry. Please do not hesitate to contact me on _____ or _____ if you would like to discuss any aspect of this letter further.

Kindest Regards,

William Power

Deputy Executive Director NSW