



Master Builders Association of New South Wales

Response to the NSW Government's *Building Stronger Foundations* Discussion Paper

July 2019



**Master
Builders
Association**
New South Wales

EXECUTIVE SUMMARY

The operating environment of the building and construction industry presents arguably one of the highest risk profiles of any industry in Australia. Those who have been in the industry for several decades will appreciate that risk has been effectively shifted to those who have the least ability to manage it.

Up until the late 1980's, builders built predominately low-rise, less-complex, single dwellings, to prescriptive building codes and standards utilising trade contractors who had come through robust apprenticeship and vocational training processes, and utilised standardised building methods and products.

Many projects were overseen by independent (Clerk of Works) council building inspectors in addition to inspections from quantity surveyors, from banks and financial institutions, which provided a quality assurance mechanism ensuring building outcomes where defects were identified early and remedied prior to completion.

There was also a strong, effective and independent regulator focused on ensuring industry compliance with licensing, contracting and statutory warranty requirements in addition to administering the then home warranty insurance scheme.

Within this risk setting, building defects and disputation appears to have resolved quicker and consumer protection included the provision of home warranty insurance for all residential building work, including high-rise projects. Professional indemnity insurance was also readily available to those who required it.

In more recent times, builders construct significantly more complex, medium density and high-rise projects, to performance-based alternative solutions, utilising trade contractors who, due to skill shortages, rely heavily upon employees or subcontractors who have not come through vocational training system. Furthermore, many trade contractors are not aware of the various codes and applicable standards, and are using increasingly changing and innovative building methods and products.

Insurance underwriters have withdrawn from providing adequate and affordable professional indemnity insurance for those practitioners who require it, and a lack of willingness of underwriters to return to the home building compensation market, provide ample evidence of the industry's changing risk profile.

The presence of a highly visible and credible regulator is critical to providing incentives to building practitioners to comply with building standards and deliver high-quality building outcomes to consumers.

While the reforms within the ***Building Strong Foundations*** discussion paper are welcome, they should be viewed as the first tranche in a series of reforms required to reduce risk, enhance consumer protection and deliver better building outcomes. The implementation of these reforms in addition to those outlined within the ***Building Confidence*** Report (BC Report) of themselves are, we respectfully submit, are part of what is needed to address the high-risk environment of building and construction industry today and into the future.

Reform of the industry also requires a focus on the quality of trade contractors, the supply of quality products, increased and appropriate waterproofing standards, reforming the home building compensation scheme and the accountability of all stakeholders in the in the building project chain, including those who supply not only products to the industry, but those involved in the developer sector.

Master Builders strongly believes that the creation of an Independent Building Commission (IBC) is the core piece of infrastructure that will bring equitable and long-lasting benefits for all industry stakeholders.

The IBC must hold the regulatory levers, be the single go to point for consumers and builders and negotiate with other instrumentalities for ongoing reform.

We are firmly of the view that regulatory framework, systems and processes should be designed to proactively support the industry to deliver quality building outcomes in the first instance, rather than having a focus on picking up the pieces after things have gone wrong.

The Master Builders is not critical of the move to private certification or introduction of alternate solutions. In fact, we support the creation of a market for certification services and for innovation in building to occur and flourish via alternate solutions. However, these policy changes require a robust regulatory framework supporting them.

Given the high-risk environment of the industry today it is not surprising that some industry stakeholders are increasingly seeking to mitigate the risks they face via the use 'special purpose vehicles' to deliver building projects. These risk mitigation strategies have had perverse implications for consumer protection as evidenced by recent events.

This situation has also left government and taxpayers seriously exposed to requests for rescue packages from owners' corporations.

The key elements of an effective, efficient and low risk building and construction industry include:

- Well trained, skilled and experienced builders;
- Well trained, skilled and experienced trade contractors;
- A robust quality assurance process involving knowledgeable and skilled certifiers;
- A highly visible and credible industry regulator;
- Full engagement of all parties in the building project chain from suppliers, developers, designers to builders and trade contractors; and
- A robust registration / licencing regime for all involved in the building chain.

Better building outcomes for consumers and the industry as a whole, will be achieved by ensuring these key elements are present.

The delivery of quality building outcomes and lower risk can only be achieved within a framework where all industry participants and regulators have strong interrelationships.

Within this interdependent framework:

- All building practitioners are accountable for the decisions they make within the value chain;
- They are supported by the external compliance and quality assurance functions of principle certifying authorities; and
- An informed and focused regulator supports all facets of the industry via the use of feedback, compliance and enforcement of standards of behaviour

Master Builders fully supports the introduction of registration for all building practitioners involved in the building, construction and supply chain, including the design sector and engineers. We are of the view that the registration of all building practitioners will increase the accountability of all who play a critical role in the building design and construction process.

The proposed requirement that designers, architects and engineers make declarations regarding the compliance of building plans to the NCC and Australian Standards is welcomed. At a time when alternate solutions are becoming increasingly common, builders need to be able to rely on the veracity of the plans that they are being asked to build to.

Master Builders advocates for the move to implement the following additional reforms, some which align with those contained within the BC Report:

- Establishment of an independent building commission;
- Implementation of a central data repository and reporting platform ('Building Approval Management' system) for tracking and recording all building projects completed in NSW;
- Implementation of a PCA allocation regime in relation to all developer building projects;
- Implementation of a compliance reporting platform and support service supporting PCA's connecting them directly with regulators.

Master Builders has previously provided the NSW Government with its "Building Better" blueprint supporting the implementation of an independent building commission and other reforms. We provide this submission for information purposes. (**See attachment "Builder Better" submission**)

Master Builders agrees with the sentiment of the BC report that transparency will drive the right behaviours of building practitioners. Accordingly, in keeping with recommendation 12 of the BC Report, Master Builders advocates that the NSW Government develop a central repository for all plans, reports and declarations set out within recommendation 1 of the Discussion Paper.

The development of a platform providing all building practitioners with online access to complete their reporting and declaration obligations would reduce regulatory and administrative burden. Data insights from this platform could be utilised to inform the industry in relation to areas of high defects so that meaningful and targeted training and professional development programs can be delivered.

Developing and maintaining a central repository for all building approvals, design and construction declarations will improve consumer protection. Recent defective building work cases have demonstrated the difficulty inspectors, owners' corporations and regulatory investigators have in locating and accessing building documentation. A central repository will overcome this significant problem. The platform could also be made accessible to the purchasers of properties and their conveyancers thereby enhancing consumer protection.

In implementing a centralised repository, the NSW Government would also be able to leverage its existing investment in developing its ePlaning platform and CertAbility capability.

Master Builders is of the view that 'duty of care' is a complex matter which depends upon the particular circumstances in each case. The scope of the "duty of care" by building practitioners is able to be determined by Tribunals and Courts based upon the particular set of circumstances surrounding the alleged breach of duty of care.

The establishment of a regulatory framework, registration regime inclusive of licence scopes and accountabilities as proposed by the Discussion Paper will greatly assist the tribunals and court systems to determine these matters.

Master Builders supports the appointment of a Building Commissioner, however we respectfully submit that, the establishment of a properly resourced, highly visible and credible Independent Building Commission (IBC) should be viewed as being the cornerstone of the Government's reform plans for the industry.

While there has been massive changes in the industry over the past 30 years, the scope and qualifications for builder licences has remained unchanged. The obtaining of Certificate IV in Building and Construction and two years practical experience may not adequately prepare a builder to undertake medium density and high-rise construction projects. In this area Master Builders believes that builder licencing regime should be examined and reviewed to include the changing complexity of the building processes.

Master Builders' looks forward to working with the NSW Government to produce better building outcomes for all that utilise this most important sector of the economy.



Brian Seidler AM

EXECUTIVE DIRECTOR

RESPONSE TO DISCUSSION PAPER QUESTIONS

1. 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?*

As builders carry the burden of statutory warranties it is critical that they be able to rely on the veracity of all building plans and their compliance with the National Construction Code (NCC).

Accordingly, Master Builders is of the view that all plans provided for a builder be declared as compliant with all aspects of the NCC by the building designer, architect, engineer or other building practitioner(s) involved in the development of those plans.

We note however, situations may arise where declarations are made that plans and documentation provided are compliant, but may indeed “not” be compliant, by the declarant relying on incorrect information provided by others.

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

Yes. Building plans and any declarations made by those involved in the development of (or amendment to) those plans should be recorded within a central repository.

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

Master Builders is supportive of a framework whereby plans and changes to those plans are lodged with a central repository. The extent to which changes are required to be lodged and who is responsible for lodgement needs further exploration. What would the Building Commissioner do with the plans? Would he/she be responsible for reviewing and assessing every plan lodged in NSW? This would be an insurmountable and costly exercise and could lead to extensive delays in the approval process.

The value the Building Confidence Report alludes to is the creation of transparency of decisions made by all practitioners involved in the building value chain, thereby incentivising those practitioners to exercise all due diligence.

The key to improving building outcomes in this regard is creating a platform for building practitioners to easily upload approved plans, make declarations and changes along the way if required.

The regulator will obtain value from having access to all of this information in terms of:

- guiding effective compliance and audit programs;
- assist with early identification of:
 - non-conforming building products;
 - causation of repeated building defects; and
 - weakness in regulatory processes
- assist in identifying meaningful continual professional development topics that address defect causation or poor process issues; and
- feedback critical data insights and information to industry stakeholders and participants.

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

Our view is that a **declaration** should accompany only major variations to plans as these relate to structural elements of construction. In order to reduce red tape and paperwork, the NSW Government should develop an online capability that will allow building practitioners to easily make these declarations. Paper-based **declarations** would seem to be unnecessary and an additional administrative burden. The key is the recording of who the accountable decision maker is combined with their declaration as a registered practitioner that the plans comply with the BCA.

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

Master Builders is of the view that the submission of 'statutory declarations' represents an unnecessary administrative burden.

The development of an online platform for the lodging of plans and the making of **declarations** will remove administrative obstacles for building practitioners who would be required submit declarations. Our view is that making the declarations and decisions of the building practitioner publicly available via a building approval management system would drive the right behaviours without the need for producing legal documentation.

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

As outlined in the Shergold Weir report, transparency is key to ensuring accountability and better building outcomes. Accordingly, all declarations and documentation relating to the design and construction process should be uploaded to a publicly accessible building information management system for future reference. The issue of ownership and protection of the intellectual property rights of plans would need investigation.

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

As outlined above an online, centralised system for recording and tracking the building process is key to ensuring these important processes are simple and easy for building practitioners.

The online system would also make it simpler and easier for the certifier and other building practitioners to record and track changes in design through the building processes. A centralised system operated and monitored by the Building Commissioner would ensure that record keeping in relation to building and construction process in NSW is robust.

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

An online centralised system for recording and tracking the building process, lodging of plans and declarations is key to ensuring these important processes are simple and easy for building practitioners.

The Building Commissioner's role would include monitoring the provision of the plans and declarations by building practitioners and make inquiries in circumstances where these elements are absent or delayed.

The Building Commissioner will be able to utilise the information provided as part of these new processes in terms of:

- guiding effective targeted compliance and audit programs;
- assist with early identification of:
 - non-conforming building products;
 - causation of repeated building defects; and
 - weakness in regulatory processes

- assist in identifying meaningful continual professional development topics that address defect causation or poor process issues; and
- feedback critical data insights and information to industry stakeholders and participants.

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

'Building designers' would be required to lodge all plans together with any certificates of compliance from other building professional (e.g. engineer, fire protection systems engineers or specialists) and other material relied upon to inform their decision regarding compliance of the plans with the BCA.

2. 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?*

We are not aware of any difficulties. It would be expected that a building designer or architect would be able to provide certification from a building professional which contains evidence of testing or calculations relied upon to demonstrate the solution within the design meets the NCC performance requirements.

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

Yes. This is part of the problem alluded to by Shergold and Weir.

A performance solution report(s) is critical to providing reassurance that the building design will deliver the performance outcomes sought by the NCC. The recording of the effectiveness of a performance solution provides assurance and protection to the builder that doesn't currently exist.

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

We appreciate that architect, building design and certification associations will be able to provide guidance in relation to this issue.

3. 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?*

We would expect that there would be two declarations at this stage of the process, one from the PCA and one from the builder.

From a PCA perspective we expect that it would not be too different from the nature of the information required at OC stage as part of the Building Professional Board's certification data reporting process introduced in 2018. The PCA would be able to provide (and upload) all certification received from other building practitioners (e.g. fire protection systems) at this time.

The declaration from the builder may align with their statutory obligations contained within the Home Building Act 1989, or which are currently used in other jurisdictions. The development of a national approach should also be considered.

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

Builders should only be required to declare in relation to the works constructed by that builder.

The collection of declarations of compliance from 'building designers' and other specialist consultants would be part of the certifier's role.

It should be noted that other jurisdictions have established procedures for building declarations.

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

The builder contracted by the homeowner or developer. However, it should be noted that all building practitioners in the supply chain should be responsible for their work.

16. 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?

There should be provision for builders to declare what parts of the building can be declared and others that are not, and the reason why. For those other parts, there should be an obligation on the party responsible for that work to separately make a declaration.

4.1 Overview of registration

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

For the sake of consistency (and keeping with recommendation 2 of the BC report), Master Builders recommends that NSW investigate the qualification requirements and licensing scopes for engineers and building designers currently in place in other jurisdictions in Australia.

The use of professional bodies to assist with the accreditation requisite to the registration of these building practitioners as in other jurisdictions could be adopted in NSW. Further, a robust Continuing Professional Development regime should be applied.

Master Builders holds the view that all building practitioners should sit with the same regulatory, compliance and enforcement framework so that a consistent regulatory approach is applied. Accordingly, any proposed licensing regimes could be incorporated into the existing framework set out within the Home Building Act 1989. Proceeding in this way will also reduce duplication of existing regulatory processes.

Any new licencing regime should give consideration to the application and interaction with the Home Building Compensation Fund and a builder's ability to secure this type of product.

4.2 The registration scheme

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

Architects, Building designers (drafts person) - development of building plans and certification and evidence supporting use of alternate solutions);

Engineers - involvement in the development of building plans; involvement in the support or approval of alternate solutions, the provision of professional advice, calculations, testing and issuing of certificates of compliance.

Fire System Engineers - involvement in the development of building plans; involvement in the support or approval of alternate solutions, the provision of professional advice, calculations, testing and issuing of certificates of compliance.

It should be noted however, there are many building practitioners who supply design albeit not mentioned above. Master Builders believes they should all be captured by a registration scheme.

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

Master Builders recommends that any registration scheme for building designers be aligned with the requirements set out in other jurisdictions.

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

Building design practitioners should be required to obtain and hold a level of Professional Indemnity insurance deemed appropriate for the work that they intend to undertake.

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

The level of PI cover should reflect the risk associated with the construction design task.

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

Master Builders recommends the adoption of the requirements utilised by the regulators in other jurisdictions where the registration of building designers has been in place for several years.

23. Should specific qualification(s) be required?

Yes, see above. It should be noted however, that a national approach to design qualifications would be desirable.

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

As above.

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

As outlined earlier, building designers and other building practitioners to be registered as part of these reforms should sit within the framework of the existing Home Building Act 1989. In doing so, the Building Commissioner will be able to utilise the existing suite of powers available under that Act for ensuring compliance by building designers and other building practitioners.

The Master Builders does not support the establishment of registration, compliance and enforcement frameworks for new 'building practitioners' that is separate to those that existing for builders and building contractors.

The existing powers the regulator has should be sufficient. The development of separate legislative frameworks may simply result in duplicative processes leading to confusion and inequity within the industry.

5 Duty of care of building practitioners

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

All building practitioners involved in the design, construction, building and certification chain.

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?*

This is a complex matter and depends upon the particular circumstances in each case. The scope of the duty of care by building practitioners will be determined by the Tribunal / Court based upon the particular set of circumstances surrounding any alleged breach of duty of care.

The establishing a regulatory framework, registration regime inclusive of licence scopes and accountabilities for those building practitioners outlined in the discussion paper will greatly assist the tribunals and court system determine these matters.

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

Master Builders submits that there is no need to extend the duty of care in relation to builders as owners are adequately protected by stricter and wider statutory warranties.

However, the duty of care should be extended to the parties in the chain or responsibility, such as building designers and engineers.

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

Any initial, or subsequent owner, but a specified end date from the completion of the project needs to be identified.

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

In the instance where there is defective work (non-compliance with the BCA), or design.

We look forward to working with the NSW Government to implement the reforms necessary to create better building outcomes for all stakeholders.