16 October 2019

Design and Building Practitioners Bill 2019 Consultation
Better Regulation Division, Regulatory Policy
McKell Building
2-24 Rawson Place
SYDNEY NSW 2001

Dear Commissioner,

PIA SUBMISSION ON DRAFT DESIGN AND BUILDING PRACTITIONERS BILL 2019

Thank you for the opportunity to provide feedback on the Design and Building Practitioners Bill. The Planning Institute of Australia (PIA) welcomes reform to implement the recommendations of the Shergold Weir Building Confidence report.

PIA Reform goals

PIA’s submission to the NSW Government Building Stronger Foundations Discussion Paper set out the following goals to guide the Government’s response:

• 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.

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.

PIA supports the twin thrusts of the Draft Bill:

• Regulation of designs and design practitioners
• Clarification of common law duty of care for construction work
However, PIA is looking for further reform to more comprehensively address PIA’s goals. PIA notes the recent publication by the NSW Productivity Commission stresses the links between improving productivity and maintaining trust in the quality and performance of our planning system and the buildings approved under it.

Ultimately, a lack of confidence in the construction standards of buildings (over three storeys) undermines the ability of planning professionals to accommodate the expected growth of our urban centres.

**Regulation of ‘designs’ and ‘design practitioners’**

PIA supports stronger accountability for ensuring buildings are designed and built according to the Building Code of Australia. Stronger regulation of the design process as proposed in the bill is supported – but it is only one element of allocating accountability to those responsible for the performance and safety of buildings as constructed.

PIA specifically does not see a role for a class of planners being recognised as ‘design practitioners’ to certify design compliance with the BCA. Planners do not prepare design detail and would not prepare ‘regulated designs’.

As a general principle, PIA supports the professional that is best equipped to manage design and construction risk, being accountable and liable in relation to that work. PIA acknowledges that currently certifiers carry a disproportionate liability in the issuing of construction and occupation certificates. 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 licensing.
- 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.

PIA understands that the proposed regulation of the certifying role of the ‘design practitioner’ should improve the ability of the designer to ensure that the BCA continues to be achieved as designs are further developed or modified for construction advantages. However, the proposed regulation would not re-establish the traditional oversight role of the architect and may not reduce the risk of product substitutions or design modifications (eg. cladding, windows) that reduce costs and improve constructability and may depart from the approval or design intent.

**Duty of care for construction work**
PIA supports the clarification in the draft bill to ensure that a duty of care is owed for construction work to certain categories of ‘owner’. The constructor has a duty to exercise reasonable care to avoid economic loss caused by defects. PIA understands the bill clarifies that an affected person (or owners corporation) may be entitled to damages (as if under common law) if economic loss is caused by defects by the constructor notwithstanding the nature of construction contractual arrangements with the owner or previous owner(s).

PIA regards this clarification as consistent with our goal of better balancing accountabilities and liabilities across the industry. However, PIA continues to urge consideration 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 (refer submission). Continuing to have a 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.

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

Stop Work Orders – identify most appropriate Tribunal

PIA suggests that the Government further consider options (s78) and justify why the NSW Civil and Administrative Tribunal is more appropriate to determine applications to lift stop work orders than the Land and Environment Court. The fundamental concern is that the court/tribunal be capable of making rapid and appropriate decisions.

Conclusion

PIA supports the intentions of the Bill and is available to provide advice on implementation as the process evolves. For further detail, please do not hesitate to contact john.brockhoff@planning.org.au or by phone on 0400 953 025.

Yours sincerely

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