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Executive Director, Policy & Strategy
Better Regulation Division
Department of Customer Service

Feedback on regulations accompanying the Design and Building Practitioners Act 2020

The Property Council welcomes the opportunity to provide feedback on the draft regulations attaching to the Design and Buildings Practitioners (D&BP) Act 2020.

Improving building standards and guaranteeing build quality is of critical importance to the property industry. Without a robust, clear, consistent response to issues identified in the '*Building Confidence Report*' (Shergold Weir, 2018)¹ there will be no improvement in consumer confidence. Without confidence our industry will be greatly challenged, particularly given the current economic conditions we are now operating in as a result of the COVID-19 pandemic.

The Property Council roundly supports the recommendations contained in the '*Building Confidence Report*', and the NSW Government's response to that report namely the '*Design and Building Practitioners Act 2020*' and the '*Residential Apartment Buildings (Compliance and Enforcement) Act 2020*'.

Key points of previous submission relating to the regulations accompanying the Design and Building Practitioners Act 2020

1. A '**developer**' should not be considered a **Building Practitioner** simply because it has entered into a **Building Contract with a Builder**. The roles and responsibilities of a developer differ significantly to that of a building practitioner.
2. **Points of lodgement –**
 - a. **1st Point of Lodgement** – this should occur at the time of lodgement and receipt of the applicable stage of the relevant building or building element Construction Certificate. We propose a maximum period of 2 days: and
 - b. **2nd Point of Lodgement** – the requirement for documentation to be provided to the Secretary within 1 days of the variation to building work to which the documents relate is unworkable. A more pragmatic approach that provides

https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf

certainty for all stakeholders would be for documentation to be provided at the achievement of specific milestones on a project such as:

- i. Completion of bulk excavation works and prior to the first concrete slab (on ground) pour.
 - ii. Topping out of the structure.
 - iii. Completion of the façade enclosure.
 - iv. 3 days prior to request for the first Occupation Certificate; and
 - v. 3 days prior to request for any subsequent Occupation Certificate.
3. Reference to **recent reforms in Queensland** to be considered – we believe it would be useful if there is reference to the Queensland Building and Construction Commission Act 1991 amendments which provide a good benchmark and ensure cross jurisdictional consistency – a key issue identified in the Shergold Weir report.
 4. Industry values certainty and clarity, and accordingly would appreciate **greater precision and specification on what constitutes a ‘variation.’** For instance, is there an acceptable deviation from a declared regulated design or, is there a level where a deviation from a declared design is material and therefore considered a ‘variation?’²
 5. **Waterproofing for landscaped areas above habitable spaces e.g., roof terraces with planter boxes** should be captured by these regulations. We note that the evidence and research would suggest that a very significant percentage of defects are related to water ingress.

Further clarification requiring implementation.

We wish to thank the Building Confidence Response team for the ongoing engagement throughout this process. Many of the questions we have raised since the publication of the draft regulation related to the implementation of the regulation on 1 July 2021. We have asked questions relating the declaration requirements for waterproofing, as well as the transitional arrangements for implementation.

Consequently, we now understand that a stage of Construction Certificate (CC) issued before 1 July is only considered relative to the Act and not the regulations, and post 1 July on the new regs however it is still unclear relative to subsequent staging which we would encourage should not be subject to the new regulations. We further welcome your commitment to not...

“...unnecessarily disrupt pre-arranged design and building work. The transitional arrangements attempt to pave a seamless transition for work already underway.”

There are still minor clarifications that we would like to work constructively with you on over the coming weeks around for example where a party chooses to submit multiple CCs. **We look forward to further detailed, constructive engagement.**

Submission of documents

Design Declaration – it would greatly assist industry if the regulations were to refer to building work **or relevant building element** of building work³ rather than just building work. This minor change to the drafting would enable the associated staging of works. Staging is a critical element of the design and the designer has considered the impact of relevant further works (pages 43 and 45 of Guidance).

For example, piling work is an element of the building work for which it is typical to have its own stage of construction certificate and permits construction to commence. In designing the piling work, the designers will have considered the overall built form and building dynamics

² We now understand that any deviation from a declared design is deemed material and therefore a variation. Documents relating to this variation must be submitted to the Secretary no later than 1 day after the variation work, i.e., the construction work, has commenced.

³ Refer specifically to the *Design and Building Practitioners Act 2020* (NSW), section 16(2).

and co-ordinated these with the foundation design. However, all prescribed design aspects for subsequent design elements such as waterproofing, fire systems, etc may not have reached a “for construction status”, and or the designer and or design and construct designer may not have been appointed to undertake the detailed design at that time.

Adopting this approach permits the flexibility in staging and the associated packaging of the declared designs. It is important that prescribed designs have regard to the context of the overall building work, and we are supportive of that objective as outlined in the Q and A response. Staging is fundamentally important for the continuity of construction timeframes.

Submission of documents relating to a variation.

The Regulation requires lodgement no later than 1 day after the variation work, i.e., the construction work, has commenced. The Property Council believes that this should be 5 days from the completion of the design of the variation instead of 1 day from the approval of the variation. This is based on feedback from industry and supports workability and practicality noting that the current wording is ambiguous as it could be from when the variation (direction) is provided to the designer / builder as opposed to when the design is completed.

Consistency

It appears clear in cl 16(2) of the draft Regulation and s 19 of the Act that documents that are required to be submitted by a building practitioner before commencing building work relate only to the building work to which those documents relate. However, the Regulatory Impact Statement (**RIS**) proposes a different approach, saying that “... designs for *all* the building work that require a regulated design must be lodged prior to *any* building work commencing”.

The position expressed in the RIS appears unworkable. It will significantly delay commencement of projects and cause additional costs to be incurred (which will be passed on to consumers). Design might be prepared prematurely, and then extensive variations will be required during the design development process. Projects may no longer be feasible.

For example, applying the process identified in the RIS would mean that regulated design of a façade, along with a design compliance declaration, would need to be completed prior to civil/structural works commencing. On larger projects, the façade design development to the point of being AFC, generally does not occur until many months after civil/structural works are commenced. To accelerate the design of the façade would mean a poorer design outcome at the outset, that would require significant variation as design develops. Alternatively, the commencement of works will be halted, and the project delayed by months.

Industry believes the position that is contained in the draft Regulations and the Act will achieve the goal of improving building standards, and that this position should be applied – it will mean regulated design that is required for building work is complete before *that* building work can commence. The position contained in the RIS will not appreciably improve quality of building works (when compared to how the process will work if the Act and the draft Regulation are complied with), however will create significant headwinds for development and construction.

Affordability and delays

The property industry is very supportive of this draft Design and Building Practitioners Act Regulation. We are fully committed to restoring confidence in the industry particularly when it comes to build quality.

However, it must also be said that the additional regulatory requirements contained in the Design and Building Practitioners Act and this regulation, with respect to a regulated design,

will result in longer build times and increasing cost if adequate resources are not in place to process each declaration in an expeditious manner.

The concern is that any time delays will increase cost to developers and this in turn will be passed on to the customer. In turn, this may lead to increasing prices for apartments around the State. Affordability is a key issue for the property industry. It is important that this issue be given due consideration.

Further clarification and proportionality of penalties

As outlined above one of the most important components of the reform process is certainty. This requires clarity and consistency. The property industry supports the direction and intent of the Building Reform agenda, but as can be seen from above there are a small number of areas in the draft regulation that are not entirely clear (specifically around post 1 July 2021 implementation) and do not provide for certainty.

With respect to the penalties cited in the regulation, we raise the issue of penalties particularly for those who purport to be engineers and do not hold insurance. These should be increased significantly as these are the individuals we want out of the industry. Other penalties should be reduced, noting a minor time infringement has a penalty that is the same or greater than those who incorrectly purport to be registered and competent (on smaller projects a minor time infringement has a penalty in excess of the consultant's fees for the project.)

We would like a strong focus on proportionately and on an application of sound community risk principles. We also recommend that discussion with other States regarding the experience of actually putting dollar amounts into the regulations rather than just the penalty units occur – as to vary the amount would then require a regulatory amendment process.

Code of Conduct and 'Good Faith'

On the issue of the 'Code of Conduct' and the inclusion of 'good faith' in the draft regulation. While we may agree with the intent of the words, without greater clarity or specification it may prove problematic.

We have further seen evidence of just how highly problematic the term 'good faith' can be when considering the implementation of the Mandatory Code of Conduct for Commercial Leases.

Where there is opportunity for subjectivity and opinion, delay, cost, and dispute can occur.

Regarding the 'Code of Conduct', again while supporting the intent, we acknowledge the difficulty of a Code that will properly cover an architect as well as an engineer.

We look forward to working with you on further developing and clarifying the above through examples, and definitions. Well-functioning mature Codes have detailed input from many affected stakeholders.

Fines for Directors

The Act provides for direct penalties for directors of a registered body corporate. These relate directly to the provision of compliance declarations (s.28), notifying the Secretary of certain events (s.60) and directors reporting conduct that would be grounds for disciplinary action (s. 67).

Further, section 95 of the Act requires that if a body corporate contravenes, whether by act or omission, a provision of this Act or the regulations, each person who is a director of the body corporate or who is concerned in the management of the body corporate is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention. This gives much needed clarity, and we support this clarity.

Review of the operation of the regulations

It is important the current regulation with respect to Class 2 buildings is implemented and critically evaluated before consideration is given to expanding into other building classes. It is

critical that appropriate guidance around expectations on what is required to be submitted is provided to avoid unnecessary penalties being issued.