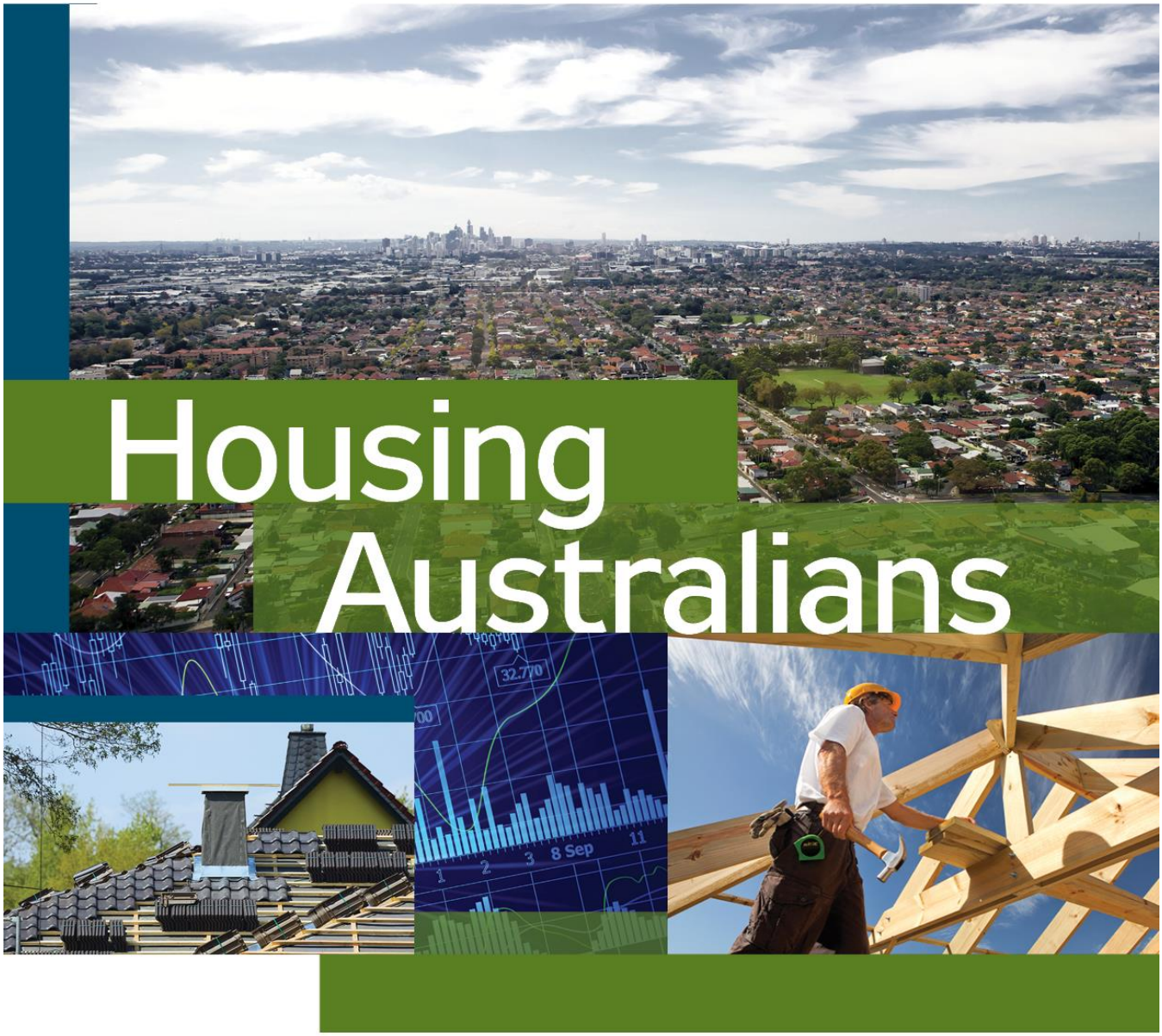
HOUSING INDUSTRY ASSOCIATION



Submission to the
New South Wales Government

Design and Building Practitioners Bill 2019

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HOUSING INDUSTRY ASSOCIATION

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 60,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationery, industry awards for excellence, and member only discounts on goods and services.

1. EXECUTIVE SUMMARY

On 2 October 2019 the Department of Customer Service released the public consultation draft of the *Design and Building Practitioners Bill 2019* (the Bill).

The Bill's purpose is to implement the reforms proposed in the Building Stronger Foundations Discussion Paper (the Discussion Paper) for which HIA provided a submission.

As outlined in HIA's submission to the Paper, HIA is supportive of the intent of the measures proposed by the Bill including ensuring that relevant building and design practitioners are required to bear an obligation for their work in relation to it meeting relevant regulatory requirements, such as complying with the Building Code of Australia (BCA) and that they are responsible for the role they play in delivering a building.

HIA is concerned with the way the Bill is attempting to achieve the above intent by creating new roles and functions in a standalone Act. This is not the preferred approach for industry and the community, and it will potentially prove to be ineffective if not correctly incorporated into the existing arrangements for building certification under the *Environmental Planning and Assessment Act 1979* (EP&A Act).

For example, all of the practitioner functions and registration requirements could be incorporated into the *Building and Development Certifiers Act 2018* (BDC Act). Equally, the obligations within the Bill that certain declarations be made at Construction Certificate (CC), Complying Development Certificate (CDC) or Occupancy Certificate (OC) stages would be more effective if they were directly associated with the requirements for issuance of these certificates under the EP&A Act.

The duplication proposed by this standalone Act means that in NSW there will now be another definition for 'building work' on top of the six existing different definitions already used in various building laws, adding complexity and confusion to NSW building regulation at a time when the primary intent of any reforms should be to improve clarity and understanding of the system.

There also appears to be conflicting information between the stated intent of the Bill and the legislative drafting. HIA was assured that builders who currently offer design services would be able to continue to do so without undergoing significant change or restructure to their businesses. Under NSW home building law residential builders are already responsible for the entirety of the services they provide. The Bill in its current form would require most residential builders who provide design services to hold multiple registrations, insurances and appoint new or additional directors who hold relevant licenses. This is not considered an appropriate outcome of the reforms.

HIA continues to oppose the introduction of a legislated Duty of Care. The way in which the Bill has been drafted makes it impossible to determine who in the building industry will be affected by the duty of care provisions and how long those obligations would remain on foot.

It is also unclear which classes of buildings the Bill is intended to apply. This is obviously deliberate, but it does not detract from the fact that provisions of such substance should be debated and scrutinised by Parliament with the knowledge of the actual implications they would have on the building industry and the building certification process.

The executive is provided, through Schedule 1 of the Bill, with the flexible means to make regulations containing such other provisions of a savings or transitional nature as it considers appropriate. Whilst recognising that Parliament does maintain some oversight and that legislation may be subject to judicial review, HIA opposes the introduction of legislation in this manner. Matters of such substance should not be left to be dealt with by regulation.

Also lacking is an assessment of the cost to industry that the introduction of this legislation will undoubtedly cause, and also the taxpayer through the cost to Government of implementing an expanded registration scheme.

The following submission elaborates on HIA's concerns with the Bill.

2. CONCERNS WITH THE BILL

2.1 A STANDALONE ACT

NSW building laws are already some of the most complex in the nation. Those in the residential building industry must manage a complex web of national, state and local laws, regulations and codes. These range from planning, design, environment, health and safety, to building certification and inspection requirements, and a multitude of building, electrical, mechanical and plumbing processes.

They must also comply with a legislative framework that spans licensing, ATO obligations, dispute resolution processes, builders warranty obligations and contractual requirements.

The proposal to create a new standalone Act with yet another definition for 'building work' represents an extraordinary lack of efficiency, unnecessary duplication and would add confusion to a system that should be seeking to be more transparent and certain for both industry and the community.

Each of the Bill's proposed new roles, functions, registrations and penalties could all have been placed into existing legislation. For example the Bill makes it an offence to make application for an OC before certain *design compliance declarations* have been made. It will be difficult to regulate who is responsible for making sure what declaration is made at which point in time, especially when it comes to staged CC's. It would be much simpler and more effective to make the required declarations a mandatory condition for release of a CC under the EP&A Act. To do this, the Parts 2 of the Bill should be incorporated into the EP&A Act. As the declarations are eventually to be on an online portal it would not be a difficult task for a certifier to ensure that the required declarations have been made before issuing CC, and the certifier should be able to rely on those declarations made in good faith by *registered practitioners*. It is not considered appropriate that the relationship between the requirements of this Bill and the certification provisions in the EP&A Act be placed in a future Regulation associated with this Act. They must be incorporated into one uniform piece of legislation.

Another example of inefficiency with the Bill is evidenced by Parts 4 through to 8 being virtually identical to provisions of the BDC Act. There is no reason why the functions and obligations to register additional types of practitioners cannot be inserted into BDC Act, particularly given this function is now within the remit of the Department of Customer Service. Placing all of these practitioners including certifiers into a single Act will assist with ensuring that all *practitioners* are clear in relation to their roles and responsibilities. The proposed approach will add complexity and confusion and it is unclear whether a new regulator will be established to manage this new set of practitioners or if the functions will be undertaken by one of the two existing regulators that manage licensing and accreditation.

2.2 MANUFACTURERS AND SUPPLIERS

HIA has raised in previous submissions to building regulators that a key component of lifting compliance with the BCA is to ensure adequate and compliant plans and specifications are provided to the builder and building certifier before construction commences. HIA supports the intention of the Bill to introduce provisions which set out which building elements must be detailed prior to construction commencing and which may be deferred to later stages in the building process. However, thought must be given to how these requirements will impact manufacturers and suppliers, as the draft Bill appears to imply that the product specifications produced to accompany the use of their products would be captured as part of the regulated design clauses. If this is the intention of the Bill manufacturers and suppliers would need to produce these details using a regulated design practitioner. It is not clear if the Bill intended to capture manufacturers and suppliers or not under this clause.

Manufacturers and suppliers play a crucial role in both the design and at times the construction of a building. For many building elements, such as fire rated walls, roofing systems, cladding systems, windows and doors, the exact details and specifications are not redrawn into project documentation, instead the detailed installation guides provided by the manufacturers are relied upon as the detail for those elements. These product specifications are generally developed as a generic design specification that can utilised and adapted for different building types rather than being developed for individual specific buildings.

These product specifications details provided by reputable manufacturers are often the result of significant resource expenditure, research, testing and development to ensure compliance with National Construction Code (NCC) *evidence of suitability* requirements and form part of the compliance documentation as part of building approvals.

It makes sense that a manufacturer who is supplying detailed installation guides for critical building elements should ensure that these details are 'signed-off' by appropriately qualified and registered practitioners. HIA has previously advocated and continues to advocate for improvements to the building product compliance system nationally.

However, HIA has concerns with the application of the Bill as drafted and whether it is the most effective means of achieving the stated intent in relation to building products. It appears there is potential overlap and duplication of other processes such as declarations of compliance under the NCC evidence of suitability requirements and there would be merit in considering these provisions further to ensure a practical and effective outcome is achieved.

If the Bill does proceed in its current form in relation to this matter and it is intended to apply to manufacturers and suppliers, the form that a design compliance declaration takes for a building product will need to be different to that supplied by an engineer or building designers for the whole building.

Consideration must also be given to how specifications provided by manufacturers of individual products, such as liquid waterproofing membranes, rather than complex building systems should be treated under the Bill. Manufacturers and suppliers of these products generally do not have teams of engineers and building materials scientists writing the specifications for use of the product, rather, they more typically rely on test certificates from NATA accredited laboratories which is an acceptable form of evidence of suitability under the NCC.

HIA would be willing to participate in further discussions with the Department to work through practical solutions for how manufactures and suppliers should be regulated under the Bill and would be happy to facilitate a meeting with a number HIA's major manufacturing members to discuss potential options and to provide further insight into the design and approval of these products and the interaction with the building design process.

2.3 Residential Builders Offering Design Services

Under the Bill, building businesses currently operating with a NSW builder's licence will be required to have at least one of its directors to be registered as a *building practitioner* or more likely appoint someone who is currently an employee and a nominated supervisor as a director of the company.

In addition, building businesses who have design staff will have to appoint one of these employees as a director of the company so that the person can qualify to be a *registered design practitioner*.

It is unlikely that employees fulfilling either function would be willing to sign *design compliance declarations* and other proposed declarations as an individual and consequently be personally liable for that work when they are an employee of the company.

These issues appear to be a result of a misunderstanding regarding the operation of a significant proportion of building business in NSW. The Bill places the same obligations on building businesses as those placed on certification businesses. The Bill would require the significant restructure of most residential building businesses despite the fact that these businesses are already liable under existing home building laws for all of the work they undertake including the design and oversight functions.

Building businesses in NSW should not have to appoint new or additional directors to achieve compliance with these provisions. Further, employees of these businesses should be permitted to sign the necessary compliance declarations on behalf of the building business with liability for those declarations remaining with the business.

HIA would be keen to meet with the Department to discuss this issue in further detail to ensure a practical and appropriate outcome is achieved.

2.4 Duty of Care

Present duty of care and its extension

Part 3 of the Bill contains the provisions relating to duty of care. The Bill, proposes to impose on a "person who carries out construction work" an obligation or duty not to act negligently (perform defective work) so as to cause economic loss to an owner of land.

This legislation will in essence extend a statutory duty of care to categories of persons to which the courts have consistently declined to extend such a duty. The courts have refused to extend that duty for very sound reasons.

Central to the cases in deciding whether a duty was owed were the salient features of the relationship and whether one of the parties was vulnerable in the sense of not being able to protect themselves from the consequences of the other parties actions.

The notion of the 'sophistication' of the parties and whether there were statutory protections, such as implied warranties and warranty insurance, in place have commonly been considered by the courts in determining whether a duty arose. Such considerations will be jettisoned by this legislation, which will heavily favour the owner and subsequent owners of land. And, as the legislation makes clear, not deprive them of any other remedy they may have under the common law or any other statute. This will have consequences on the bargaining power of the contracting parties thereby upsetting long held understandings in the industry.

Application of the duty of care

Clause 26—*Definitions* contains yet another definition of *construction work* to the plethora already in existence in New South Wales. This definition encompasses "regulated designs and other designs." Yet despite being a "definition" it will extend the concept of duty of care to as yet unknown classes of buildings and undefined persons carrying out construction work. No-one will be certain until the Regulations are enacted.

This is unacceptable. Matters of such substance should be contained in the principal Act and should be before Parliament so that they can be properly scrutinised and debated.

During the consultation process, a number of other assertions were made such as applying the concept of the duty of care to persons performing works of a low monetary threshold value. HIA observes this may be the intent of clause 26(4), which allows the regulations to "prescribe additional work" for the purpose of attracting the duty of care protections and obligations. Again, it is difficult to discern the intent.

The following subclause, 26(5) provides that the "Regulations may exclude persons from being owners for the purposes of this Part." The Part in question, which deals with the duty of care provisions. (While it is noted that cl 26(1)(c) does the opposite; it can prescribe other persons as being owners.)

HIA submits that the Regulations should also permit the explicit exclusion of certain persons from being construction workers for the purposes of Part 3, rather than just relying on an exclusion relating to certain work as currently drafted.

The effect of such an exclusion would mean that it could apply to certain types of business structures, or trades, rather than be reliant on the type of work that may be performed, which may be performed by very small businesses and large contractors alike, which may otherwise be the target group intended to be captured by the legislation.

The existence of statutory warranties and statutory insurance

HIA contends that it is necessary and appropriate to consider the proposition that the provisions in the Bill relating to the duty of care should not apply in instances in which statutory warranties are implied into contracts for residential building work and the benefit of owners and their successors in title for those dwellings and also for which the statutory insurance home building compensation (HBC) also applies for the benefit of owners and their successors in title.

It has been observed in a number of cases, including *Brookfield*[1] that statutory forms of protection have overtaken the decision in *Bryan v Maloney*[2] for owners who buy dwelling houses which turn out to be defective, and that owners and subsequent owners need not rely on the duty of care for a remedy. The Court in that case specifically noted the reference the Court of Appeal made in respect of NSW legislation concerning warranties and insurance.

HIA submits the introduction of a statutory duty of care for owners and subsequent owners may well be warranted where other forms of statutory protection do not exist. For example it may be now thought appropriate to provide the statutory duty of care remedy for the benefit of those owners and subsequent owners of those types of strata accommodation which are not subject to statutory home building compensation.

[1] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36
[2] (1995) 182 CLR 609

It should be noted that if, as HIA proposes, those dwellings for which HBC applied were to be excluded from the proposed statutory duty of care provisions, the common law duty of care would not be ousted and it would still be available in appropriate circumstances as a remedy.

If the statutory duty of care provisions are introduced HIA is concerned that it will adversely and disproportionately impact small business, add complexity, complicate and add uncertainty to the existing legal and regulatory consumer protection framework, add cost and red tape, skew the allocation of risk in construction contracts and provide no additional guarantees to homeowners of compensation than currently exists.

It remains HIA's primary contention that extending the duty in the ways that are seemingly being proposed will not do anything to further the aim of improving the quality of building design and construction. A claim in negligence for breach of a duty of care is a legal remedy necessarily only available after damage has already been suffered.

2.5 MISCELLANEOUS ISSUES

Timing and responsibility for the occupation certificate

Clause 15 places an obligation on the *building practitioner* to ensure that their declaration has been made before an application is made for an OC and a significant penalty is associated with this requirement. This fails to recognise that under the EPA Act and the BDC Act the 'relationship' is not between the builder and the certifier. The builder has no powers to prevent an owner or client from making an application for an OC. It is not unusual for an owner or client to make an application for an OC without the builder's knowledge or even before the builder has completed their scope of works. Similarly, the EP&A Act recognises that the occupation of a building by an owner or any other party, prior to the granting of an OC is an offence.

As mentioned above in section 2.1 it would be more effective to make the required declarations as mandatory conditions for the issue of an OC under the EP&A Act. The EP&A Act could be amended to allow for declarations to be made for a part of a building which is suitable for occupation where application is being made for OC for part of a building. Then the remaining declarations should to be made before making subsequent applications for OC of the remainder of the building. This is not dissimilar to the approach taken in Western Australia and Tasmania currently.

Objects

The Bill lacks both a preamble and objects. This is unfortunate as the courts look to the objects of an Act as an aid to resolving any uncertainty and ambiguity that may arise.

One of the basic rules in interpreting legislation is that an Act needs to be interpreted so as to give effect to its purpose or object. And as s 33 of the *Interpretation Act 1987* further provides, "a construction that would promote the purpose or object underlying the Act … [irrespective of] whether or not that purpose or object is expressly stated … shall be preferred to a construction that would not promote that purpose or object."

Another effect of the Bill not having objects is that it presents difficulties when determining whether any proposed amendments are relevant or not. Ordinarily an amendment to a bill may not be moved it is not relevant to the objects of the bill.

Penalties

The Bill is replete with provisions for which penalties apply. The maximum penalty that can be issued is 3,000 penalty units in the case of a body corporate. In the provisions where this occurs, the maximum that may be awarded against an entity which is not a body corporate is 1,000 penalty units. See for example clauses 16, 17 and 18.

In terms of providing for imprisonment, the Bill contains provisions allowing for up to two years imprisonment. See for example clauses 15 and 24, which both allow for a maximum penalty of 2,000 penalty units or imprisonment for 2 years, or both.

This penalty provisions appear disproportionately harsh when compared to other legislation regulating the building industry. Under the *Home Building Act 1989* (HB Act) and the *Fair Trading Act 1987* (FT Act) for instance the maximum financial penalty is 1,000 penalty units.

In respect of imprisonment under the HB Act the maximum term does not exceed 12 months, and that is only imposed for a subsequent offence for an individual who is convicted of breaching s 92, which requires insurance for people doing residential building work under a contract.

HIA notes that cl 55(1)(c) which deals with the imposition of penalties as part of the disciplinary action that the Secretary may take prescribes a dollar amount rather than being expressed as penalty units, which are used throughout the rest of the document. For consistency in drafting, HIA submits this should be amended to prescribe the maximum penalties as 2,000 penalty units and 1,000, rather than being expressed as "an amount not exceeding $220,000 … or $110, 000" respectively as currently drafted.

Professional indemnity insurance

Clause 20 makes provisions for *building practitioners* to be adequately insured. While the Bill does not set out what insurance product this must be it should be noted that currently there is no professional indemnity product accessible to builders as they insurance industry does not accept they operate a professionals for the purposes of this type of insurance. This is distinct from the treatment of building certifiers, architects and engineers and other professions. HIA would appreciate the opportunity to work with the Government on what insurance requirements may be applied to a building company to facilitate the proposed registration framework.

If this type of insurance is to be required, it may be appropriate, for similar reasons given above in 2.4 with respect to duty of care and home building compensation insurance, only for those building practitioners whose work is not covered by home building compensation insurance.

3. CONCLUSION

HIA is supportive of the intent of the measures proposed by the Bill including ensuring that each building and design practitioner is required to ensure that their work complies with the Building Code of Australia (BCA) and that they are responsible for the role that they play in delivering a building. However HIA is concerned that the proposed Bill may not achieve these goals in its current form and will potentially add unnecessary complexity to NSW building laws, rather than create greater certainty for practitioners and the community.

HIA would welcome the opportunity to work with Government to ensure that proposed reforms are effective, efficient and help to restore confidence in the residential building industry.