Urban Taskforce
AUSTRALIA

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To whom it may concern

Building Approvals Framework

The release of the draft Building Approval Framework bills represents a significant suite of changes to building construction legislation with consequences affecting aspects of the EP&A Act, the Architects Act, the Home Building Act, the Plumbing and Drainage Act, the Design and Building Practitioners Act, the Residential Apartments Building Act, the role and practice of principal certifying authorities among others, and the industry in general.

While Urban Taskforce Australia acknowledges the extension of the original timeframe provided for the exhibition of this Draft Bill, we caution against allowing a change of this magnitude to be rushed, going forward. Prioritising broad industry engagement throughout the passage of this new building approvals framework into legislation and regulation will ensure a reduction in the number of unintended consequences arising.

Broadly, Urban Taskforce Australia supports the Government's proposition to consolidate the various Acts into one, plain-English Building Act.

Urban Taskforce appreciates that the Building Commission has now established a detailed process of industry consultation involving all the peak industry bodies, including Unions NSW.

In the context of the housing supply crisis we are in the midst of, any regulatory or legislative change brings about uncertainty and risk. That is the last thing we need so great care needs to be taken.

These reforms are significant. They require a comprehensive "tooling up" of education campaigns and systems amendments. There is very high risk associated with reliance on the e-planning portal (both from the perspective of system design, system capacity and user education/error).

The absence of insurance products and/pr their exorbitant cost is a major problem. There is no point regulating or legislating for all practitioners to hold adequate insurance if this does not exist as a product. This happened with the DBP Act and it has been a major factor in forcing many in our industry out of NSW, out of Class 2 Building, or in many cases, out of the construction sector (the great resignation was a real "thing" as building regulation just became too hard).

Great care needs to be taken to ensure the transition of licencing or qualifications recognition does not stop or prevent works on new housing from proceeding.

The proposed changes will, no doubt, require ongoing amendment and adjustment. There should be provisions to make these changes through regulation.

This will remain true even after policy is made and implemented through legislation, with ongoing feedback and corrections needed to correct many effects that will only reveal themselves over time.

Staged Approval Criteria

There are risks with the proposed reform to "Introduce clear staged approval criteria" and restrict staged approvals to completed parts of the building. The Bills propose to restrict any Occupational Certificate where key elements and essential services are incomplete. This represents a reduction in flexibility and threatens opportunities for early occupation when the building is safe and able to be occupied.

These risks may add complexity, administrative burden, delays and cost, not to mention other inefficiencies such as coordination issues with contractors.

To mitigate these potential problems, effective communication between all parties, including builders, certifiers, and regulators, is crucial. Clear timelines to understand the requirements for each stage, coupled with streamlined guidelines for the administrative processes will help reduce the risk of delays and miscommunications.

Recommendation 1: that staged approval criteria processes undergo intensive industry engagement and road testing, to ensure their implementation doesn't cause widespread delays to occupation or additional costs.

Industry Consultation

Page 25 of the Position Paper states *"Further consultation will be carried out to determine the minimum necessary information to issue a building approval."* This was the promise made when the DBP Act and RAB Acts were introduced. However, the resulting consultation was more of a presentation of what was going to happen, and the worst aspects of this Act prevail.

The industry will need time to adjust to this policy reform.

It is not enough to have peak industries analyse policy and provide recommendations. There are issues that need to be worked though with industry and tested more broadly. This should be done is the usual public exposure draft setting. Such an exposure period act as an early education tool as well as a means for flushing out detail.

There is no pressing urgency for this reform coming from the property development sector. Nonetheless, we recognise that it was an election commitment. We say, proceed, but don't rush!

In order to recover from reform fatigue and stop large and small builders from stopping operations or leaving the industry altogether, ongoing consultation should apply to every aspect of this Bill.

Some issues that should be highlighted for consultation, workshopping and testing include:

- *Chapter 6 Approvals relating to building work, Part 2, 121* that outlines Staged Building Work. The implementation of staged schedules for approval should consult construction companies and developers, regarding costs time considerations.

- *Chapter 3, Part 2, Div. 3 31* which outlines the Co-regulation model for competency assessments and allows the use of industry associations to assess certifiers through competency assessment. How will the Building Commission ensure competency assessments translate to a safe built

product while not becoming overly onerous and causing delays at a time when we can least afford it?

- *Schedule 1 Scope of work, Part 1 Licences for building work*. The Building Commission should engage stakeholders to ensure there are enough top-tier builder licenced contractors and other specialised workforces available to deliver at the magnitude required to meet the expectation placed on developers so as not to outprice construction.

- *Chapter 6 Section 114: Design compliance declarations and 115: Building work compliance declarations*. How can it be assured that compliance assessments shouldn't hold up construction work? We don't want tradies waiting for an exam result before they can get back on the tools.

Recommendation 2: that the full suite of documentation associated with the Building Approvals Framework be tabled as public exposure draft and that a broader selection of industry players, and the public, are consulted.

DBP Insurance

The Government keeps deferring the requirement for all those covered by the DBP Act to be covered by "adequate insurance". This is because the cost of this insurance is prohibitive or simply not available. This reflects a nativity among those that drafted the policy and leaves consumers exposed.

The problem for head contractor builders and the property development sector is that we end up being the under-writer for the lack of insurance cover of other building professionals.

This is an unacceptable risk for many and they are voting with their feet by leaving the sector in NSW. It has had a massive impact on costs.

The *"can has been kicked down the road"* too many times and it must be addressed, lest the current deficit in builders worsen. While other professions are given a free-pass on insurance, builders and developers are liable for the failings of this inadequately insured group of building professionals and practitioners.

Government must take responsibility for this mandated insurance by working with the insurance sector to bring an 'adequate insurance product' to market and underwriting these claims until the time that such a product can

fairly and accurately represent the division of responsibility involved in property development.

Recommendation 3: that Government underwrite DBP-related claims, until it can work with the insurance sector to bring an 'adequate insurance product' to market.

Certifier Insurance

While higher penalties for certifier-breaches of conflict of interest, the automatic suspension, where show cause has been issued, risks certifiers becoming even more cautious about signing anything off.

The strict rules under *Section 39 of the Building Bill* for license suspension or cancellation, are based on offenses or administrative errors. This could remove key players from the industry, if not applied fairly, and might disrupt ongoing projects, limit competition, and reduce the number of qualified professionals available to work on new housing developments.

While Sections 17 and 69 of the *Draft Building Insurance Bill* present the requirements and conditions of Certifier Insurance, certifiers must also have the insurance protections to make quick decisions, otherwise over-conservativism can create approval delays.

The licencing system should also be structured to allow insurance companies the confidence that the certifiers' following this code can be insured; that their risk can be quantified.

This is not provided for and as a result poses a significant risk to progressing housing supply.

Recommendation 4: The Building Approvals Framework must return the use of professional discretion for PCAs and the certification process.

Decennial Liability Insurance (DLI)

The problem with inadequate insurance is exacerbated by the lack of a DLI product, but the immediate and retrospective obligation of builders and developers to cover the full cost of serious defects as defined in the RAB Act.

While, as noted above, all the design and builder professionals have had extension of time before they are required to have adequate insurance to cover the costs of any error or omission they may make, no such luxury has been applied to developers.

Urban Taskforce is advised that there is a significant departure of class 2 contract builders who formerly provided this class of building. This has resulted in higher prices and significant delays.

One of the key reasons is, this class of builder cannot be insured in such a way that all obligations under the RAB Act are covered. Financiers are realising the risks incurred by development proponents in providing projects of this class, and are increasing premiums, often to a point where the project is no longer feasible.

While build-to-rent projects dodge this type of insurance, build-to-sell projects are becoming too expensive to meet feasibility requirements.

Despite clauses *110 to 117 of Subdivision 2 Decennial insurance*, there is still industry concerns regarding the uncertainty of DLI. This framework sets up processes that anticipate a mature market. Despite Governments ‘talks’ with insurance companies, maturity seems no closer.

Unfortunately, this uncertainty is noted by financier who see this as an uninsured risk and apply premiums to financing. These externalities of myopic and ill-prepared statutory insurance policy are costing the housing supply industry and threatening to undermine the integrity of the original act.

As it stands, successive Ministers have promised the imminent expansion in the market offerings of DLI, however, at present, insurance of this type is simply not available, and these issues will swiftly become a consumer issue.

Many of our members have advised that the one product currently available is more of a “DLI lite” or even a Latent Defect Insurance (LDI) product, rather than a genuine back-to-back DLI product.

What is needed is a back-to-back product that includes DLI paired with LDI and a clear vision of how this product will be integrated, for a market and become competitive.

One option which our members favour is for the Government to partially underwrite DLI claims against this insurance product. The percentage underwritten should reduce as new products enter the market and risk metrics are better known by insurers.

To encourage DLI usage, Government should subsidise DLI product premiums for new entrants to the market by substantially lowering them for class-2 builders.

Further to this, the briefing video provided with the Building Approvals Framework spoke to the targets that the commission had in regard to a mature DLI market.

One of the targets was that DLI premiums would remain under 2% of the of Construction Investment Value (CIV). This matches the current Strata Building Bond cost and would be a management expense to Class 2 building development. However, this is a market product and not directly within the control of the Building Commission. Because of this, there is a risk that the market will not sophisticate, per the definition given by the Building Commission.

If the market can't find a workable cost for this insurance type, further uncertainty will occur in the industry and with consumers and threaten to destroy the confidence of this building type.

There needs to be a backup provision to support this 2% of CIV cap in insurance cost.

Recommendation 5: To prevent a mass exodus from class 2 residential property construction, the Government must partially or fully underwrite DLI claims until a Mature Market exists and to subsidise DLI premiums to create initial demand for this product. Solutions should be found to maintain DLI cost to 2% CIV or below.

Right of Appeal

There is no provision in any of the exhibited draft legislation for the retention of the existing right of appeal to the Land and Environment Court for a refusal or failure of a local council to issue a construction, occupation, subdivision works certificate when an application is made to it. It is crucial that this appeal right be retained.

In the absence of this right, a development proponents will have no recourse if both certifiers and a local council lack the confidence or protections to act consequently to issue a 'building approval' or 'occupation approval' under the new building approvals framework. This is a retrograde step.

Recommendation 6: that the Building Approvals Framework include the right to appeal to the Land and Environment Court when certification bodies or approval bodies have refused or not issued a building or occupational approval.

Building Approval Requirements

Part 2 116 Building work requires building approval (1) (a) of the draft Bill, the requirements for a building approval is to be extended to include all 'building work' (subject to regulations) not just work pertaining directly to the erection of a building.

As this currently stands in the draft, it would capture demolition (when all existing structures are to be demolished to make way for a new building), vegetation clearing (which is currently 'building work', but not work that is the erection of a building), and investigatory activities (such as drilling bore holes) that are routinely carried out prior to the issue of a construction certificate.

It is highly problematic to include these peripheral works in the building approval as it would interfere with traditional construction schedules, causing significant additional cost and delays to projects, without any benefit to the building outcome quality.

Recommendation 7: that Part 2 116 Building work requires building approval (1) (a) of the Bill is amended to exclude works outside of works directly pertaining to building erection or that other regulatory exemption are put in place to exclude these peripheral works.

Balanced Certifier Powers

Chapter 6 Construction Part 3 Building Approvals (125) states that variations to building works must be approved by a certifier before works can be undertaken:

125 Variation to building approval

(1) A building approval may be varied with the approval of the approval authority appointed for the building work.

> (2) The approval authority may approve the variation if satisfied that the application for the building approval would still have been granted if the variation had been included as part of the application.

Section 75 and 93 of the Building Bill, as well as the page 46 of the Positioning Paper give a clear distinction between 'reasonable variations' and 'unauthorised and non-compliant building work'. This distinction ensures that variations within a contract must follow a formal process, and unauthorised or non-compliant work is not protected by the contract.

The Position Paper notes that:

> *"There is currently a missed opportunity to leverage the unique role of certifiers in the building approval process to overcome these challenges, by strengthening their powers and providing them with sufficient support to address unauthorised and non-compliant work. This is in tandem with the proactive powers and role of Building Commission NSW."*

There is a significant risk of over-use with regard to the increase powers given to the Building Commission NSW in addressing non-compliance across the industry. This also involves data and analytic power dynamics that can be lorded over construction companies inappropriately or with too much force, requiring further data to solve and delaying further building works.

Certifiers must have the power to stop 'unauthorised and non-compliant building work' and the power to streamline the alterations of works that are 'reasonable variations'. Efficiency in the approvals process is critical in the current context of the housing supply crisis.

Recommendation 8: that the Bill be amended to ensure the restoration of a balance of powers for certifiers for ensure removal of 'unauthorised and non-compliant building work' while streamlining the variation processes for 'reasonable variations.

Minor or Relatively Insignificant Variations

Certifier confidence to be able to issue a Building Code of Australia approval where there are minor variations which may not align to the minutia of documented drawings is critical to construction efficiency. When building certifiers lack the confidence to appropriately make decisions, Section 4.55 modifications begin to mount up, overwhelming local councils and forming yet another bottle neck in the planning process, stymying housing supply.

The nature of design co-ordination means that, often, multiple contracted designers must work in tandem to deliver final design documentation. These constructions drawings are then brought before subcontractors who must draft shop drawings to match their level of detail before construction, manufacture or installation. These drawings are often added to and altered, as design development and variations occur. While these drawings go through detailed review process, they are rarely absolutely in line with all aspects of the approved DA documentation.

Building certifiers must have the confidence and authority to decide what slight deviations to the approved DA documentation are allowable as a natural outcome of the design development and documentation processes. Policy can go further to provide additional allowance for what certifiers can do without risking building quality outcomes.

This aspect of construction needs to be acknowledged, through appropriate guidelines that allow greater flexibility for certifiers and that build their confidence and agency to make decisions. This may be achieved by explaining how determinations should be made on specific elements that exhibit slight variations to approved DA documentation. This function of Building Certifiers should be made explicit so approvals can continue without the requirement of a Section 4.55 modification.

The workability of this pivots around the clear definition of 'minor or relatively insignificant variation'.

Recommendation 9: that guidelines and supporting legislation give certifiers with the confidence and agency to approve slightly deviating design variations to the approved DA documentation or BCA standards.

Licensing and Competency Assessments

From extensive discussions with our members, Urban Taskforce is advised that the biggest problems faced by the industry are what regulation will look like and the skills shortage that is reducing the number a capacity of builders. Apprentices can't find builders to train under.

This Regulatory Framework should build confidence for builders and their contractors, that are critically needed in this moment. It is not only failing to do this, but also exacerbating the problem.

Chapter 3 of the Building Bill imposes stringent licensing and competency requirements for anyone involved in building work. While the intent is to improves quality control, there is a risk that when poorly applied, it may limit the available workforce, especially if competency assessments, under *Sections 22-31* are too rigid or administratively intensive.

With the state of the Construction Industry's labour shortage, legislation should make provision for the application to ensure that these licensing and competency restrictions do not inadvertently slow down housing supply. Lengthy and carefully crafted transition provisions will be an essential element to the success of these proposed changes.

Further to this, competency assessments managed by industry bodies (Sections 31-34) risks creating additional bottlenecks if the industry bodies lack the capacity or speed to handle applications efficiently. This could delay the entry of new skilled workers into the market, exacerbating labour shortages and thus slowing housing supply.

Recommendation 10: that the implementation phase adopt a long-lead transition period to reduce bottlenecks in the supply of contractors, sub-contractors and trades.

Architects and Designer Registration

Currently, the Architects Registration Board is a standalone statutory authority reporting directly to the Minister under the Architects Act 2003 (a version of which has existed since 1921).

If the proposed reforms succeed, the registration system for architects will be integrated into the new Building Bill, and the Architects Act will be repealed.

The Board will continue as the regulator under the new legislation.

Broadly we support that those involved in design are covered in the same provisions.

However, Urban Taskforce questions whether the removal of the *Architects Act 2003* is absolutely necessary if it places designers in an less certain context and at odds with the new framework. As long as the final outcome ensure consistency of treatment of design professionals along with other skilled professionals involved with design and construction, does the Act itself need to be abolished?

Recommendation 11: that the government reconsider the proposal to remove of the *Architects Act 2003* and examine other options for bringing architects under the same regime of regulation and obligation.

Policy Change Fatigue

Urban Taskforce supports the following statement from page 43 of the Positioning Paper:

> *"the legislative framework reflects the fluidity of the sector. There is a need for flexibility across the construction of the development, without undermining the approval process and compliance requirements."*

While legislative reform across the building regulatory framework was overdue, this reform brings with it the issues associated with legislation fatigue.

Especially in the construction industry, which is of the most regulated sectors, frequent legislative changes lead to confusion, inefficiency, increased risk and costs, and a drop in morale or compliance diligence. This is what NSW is seeing and anything that exacerbates this is not welcome.

The planning space is during wide-ranging policy and regulatory changes in an effort to boost housing supply. There is much more to be done on this front alone.

Reforms or change will increase regulatory anxiety for a period before it gets better.

Even common terms that form the public and government narratives on discussion have been altered. For instance, Urban Taskforce questions the benefit of the nomenclature shifts of:

Certifier/Principal Certifier	>	Approval Authority
Construction Certificate	>	Building Approval
Occupation Certificate	>	Occupation Approval

There has been a gargantuan effort expended to bring government departments, politicians, the media, other industry stakeholders, and the public on board on the journey for this new legislation and regulatory framework.

The Building Commission should now focus on creating confidence in the industry through leveraging current and future industry consultation programs

to make clearer and more concise regulations with effective communication, guidance and educational resources.

The rollout of this consolidated framework should be staggered with transitional periods and regular consultation sessions and feedback mechanisms with Industry. The transition should have a risk-based approach, should be flexible and involve tailored support until the regulatory landscape in know and sophisticated.

Recommendation 12: that in the implementation of this regulatory framework, the Building Commission focus on reducing regulatory fatigue through affective communication and guidance.

Planning Portal Upgrades

Page 26 of the Positioning Paper notes that building approval applications will continue to be submitted on the NSW Planning Portal by the owner of the relevant land (contractors or those carrying out the works are not the applicant).

While there is already a need to fix the planning portal if successful legislative change is to occur, an update to it is required to streamline approvals.

This will further remove the need for paper-based signoff for the purpose of certification to the planning portal and promote electronic registration of registered drawings, relevant practitioner sign-off and building certification.

There is enormous risk that a digital building approval portal will inhibit the housing supply pipeline. Even for the tech-optimistic among us, assuming that this implementation will be conducted without issues is a leap of faith.

Any changes to the planning portal must involve a carefully planned and resources system that ensures benefits are realised and protects against inefficiencies and an unintended collapse of the planning portal.

Recommendation 13: that adequate Government resources accompany all updates of the planning portal to allow the time and investment to introduce a workable tool that benefits the housing supply pipeline.

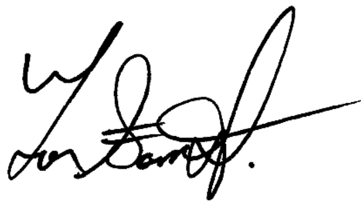
Conclusion

As with any regulatory reform, there are unintended consequences to the industry that avoid prediction and arise only after integrating. What can be predicted should be given significant focus in order to reduce the chance of negative impact on housing supply. The engagement of other stakeholders through feedback processes should be adopted in order to pick up the unpredicted issues and nullify them before they impact the industry.

Urban Taskforce looks forward to ongoing engagement with diverse and relevant stakeholder throughout the making, passing, integration and refining of this legislative framework.

Should you wish to discuss this submission further, please call either myself, or our Policy, Planning and Research Analyst, Benjamin Gellie on 0461-566-807 or via email benjamin@urbantaskforce.com.au

Yours sincerely



Tom Forrest
Chief Executive Officer

Urban Taskforce Recommendations – Building Approvals Framework

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