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Australia's property industry

Creating for Generations

31 August 2021

The Hon Kevin Anderson MP
Minister for Better Regulation and Innovation
GPO Box 5341
SYDNEY NSW 2001
Via email: office@anderson.minister.nsw.gov.au

Dear Minister Anderson,

PRACTICAL APPLICATION OF THE BUILDING CODE OF AUSTRALIA (BCA) DURING STAGED APPROVALS

The Property Council of Australia welcomes the opportunity to provide a submission to the Minister for Innovation and Better Regulation regarding the recently published guidance material from the Department of Customer Service on the issue of which version of the Building Code of Australia (BCA) applies during staged approvals.

The Property Council has been heavily engaged in the building reform work happening across NSW and commends the work of the NSW Government and the Building Commissioner in their achievements to date in ensuring the integrity and quality of built form in Class 2 buildings.

As Australia's peak representative of the property and construction industry, the Property Council's members include investors, owners, managers and developers across all property assets.

Property is the nation's biggest industry, representing one-ninth of Australia's GDP and employing more than 1.4 million Australians, as well as being the largest employer in Australia. In NSW, the industry creates more than \$581.4 billion in flow on activity, generates around 387,000 jobs and provides around \$61.7 billion in wages and salaries to workers and their families.

Our members are the nation's major investors, owners, managers, and developers of properties of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play. The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive and sustainable places.

We are pleased to provide the attached comments for the Committees consideration.

Interpretation of regulations

Guidance Material released by the Department of Customer Service on the issue of which version of the Building Code of Australia (BCA) applies to either:

- a. Staged CCs - Proposal to require BCA in force at each CC stage to apply; and
- b. Modified CCs - Proposal to require the BCA in force at the time of the s4.55 to apply,

has highlighted the urgent need for reforms to the *Environment Planning and Assessment Regulation 2000* (the Regulation). The interpretation included in the Guidance Material will impact homeowners, the public, the construction industry, as well as the broader New South Wales economy. The interpretation of the regulation also contradicts long-standing and best practice common law principles and approaches to managing policy changes throughout the life of a construction project, namely avoiding retrospectivity, and inconsistent applications across staged projects.

The Property Council disputes the interpretation included in the Guidance Material. We propose that the best way forward is a policy change to be made at a ministerial level to the existing Regulation in order clarify best practice approaches to Building Code compliance and applications for staged approvals. A policy and regulatory change from a ministerial level would restore certainty and confidence to the New South Wales construction industry as well as homeowners, and occupiers alike.

The practical and sensible approach adopted by the NSW Construction Industry to date has kept development moving in NSW during the Covid-19 pandemic. The industry has always conducted itself in a manner which maintains compliance with the BCA in force at the time of the application for first CC under a development consent. Staged approvals under a single development consent cannot be practically handled under different versions of the BCA. This is explicitly recognised in other jurisdictions around Australia where the legislation allows staged approvals to comply with the BCA in force, as at the application date for approval or at commencement of work for a staged development.

The consensus industry position, which aligns with common-law principles avoiding retrospectivity, is that the version of the BCA in force at the receipt of the first CC Application Form determines the relevant BCA for the entire development. In effect, for the purpose of determining the applicable version of the BCA any subsequent staged CCs are treated as a continuation of the original CC and modified CCs are treated as an Amendment to the original CC. The result of this is that both Staged CCs and Modified CCs are subject to the BCA in force at the time of application for the original CC. This currently is the only workable interpretation to what is an unreasonable clause in the EP&A Regulation (145(1)(b)). We note that the view put forward in the Guidance Material would appear to violate Section 30(1)(b) of the Interpretation Act 1987 which relevantly provides that the:

“Amendment of an Act or statutory rule does not affect the previous operation of the Act and statutory rule, or anything duly commenced under the Act or statutory rule.”

Further, with respect to Modified Construction Certificates, as noted in the Practice Note titled “Construction certificates for building work” issued by the Department of Urban Affairs and Planning, dated September 1999 the modification of a Construction Certificate is “*assessed in the same way as the original application*”. That is, a proposal by the applicant to modify the Construction Certificate is to be assessed under the same BCA that was in force for the original application.

This previous advice reflects the current legislative requirements under Section 148 of the EP&A Act 1979, whilst Fair Trading’s current advice does not appear to align with current legislation, nor previous advice from Government. While some Department officials have put the case that performance solutions are the remedy to the issues created by the above clause, obtaining a performance solution for constructed elements is not possible under NSW law, as approving completed works via a Construction Certificate is not allowed once it is constructed. A retrospective performance solution is viewed as not legal. Additionally, obtaining a performance solution is not always possible, as performance clauses can often change in different versions of the BCA.

Building Codes and Construction Certificates

The Property Council appreciates the purpose of the current *Building Code of Australia* requirements, compliance with which is further enhanced through declarations required under the *Design and Building Practitioners Act 2020 (the DBP Act)* and the DBP Regulations in New South Wales. However, the stringent and ever-changing requirements under the code are posing significant and costly impacts on the development and housing industry, particularly between marketing representations relating to the pre-sale of units and retail premises. The unpredictable variations that have stemmed from the building codes’ changes over the life cycle of a staged development can cause significant cost implications for approved projects, which have already secured prior approval and certifications under existing specifications and regulations.

Impacts from changes to the Building Code surrounding approved projects are being felt across the integrated design and building life cycle, from design and architecture through to building fit out and occupancy. Furthermore, impacts being experienced by developers, owners and builders alike are now spreading to the structural requirements surrounding concrete codes, architectural and service requirements as well as design and administrative obligations. Structural increases in code requirements trigger greater cost but also increase sizing which triggers a loss in lettable floor area and height from slab to slab, or alternatively triggers an increase to overall building plans to maintain the same amount of floors approved in existing development applications and construction certificates.

The design and construction industry has highlighted practical programming issues which need to be addressed regarding the Building Code. It is unachievable to construct a building utilizing one version of the Code and then switching to another version. For example, if footings have

been constructed to serve the overall structural building design and then the code changes to increase the requirements for structural columns and slabs, then the footings that are built under an early construction certificate may now not be suitable to carry the load of the main works construction certificate structure, even though this would be compliant under the DBP Act.

Recommendation

The Property Council urges that new Building Codes on approved developments are not applied where at least one construction certificate has been issued and construction work has commenced. If this were not to occur, there will be significant time delays, cost increases and potentially abortive works on projects which will ultimately result in adverse impacts to housing supply and affordability.

Retrospective and inconsistent application of policy changes

It is a long-established principle that construction projects which begin before policy changes take effect are not impacted by that change and therefore avoiding retrospectivity. This is usually achieved by including transitional arrangements, as was the case with the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* as well as other legislative changes.

This retrospectivity principle ensures consistency in projects and allows industry to smoothly transition to new policy arrangements. The alternative approach would mean policy changes are being applied to projects that have already commenced creating a range of practical difficulties for all stakeholders, which are set out below. Avoiding retrospectivity is a well-known and accepted approach, not just in the construction industry but all regulated sectors, and indeed, in everyday life. It is a matter of procedural fairness and a significant efficiency consideration.

As has been observed by industry stakeholders, retrospective laws can cause several practical difficulties for business, and the wider economy, including actual and reputational damage to the market, disruption to business planning processes resulting in high compliance costs and unintended consequences from increased regulatory complexity. Unfortunately, by disregarding this principle, this is exactly what the Guidance Material would seek to do through its interpretation of how different versions of the BCA be applied to staged construction and modified Construction Certificates.

The Guidance Material also exposes an inconsistency in the treatment of which version of the BCA is applied to Crown work versus non-Crown work. As per section 6.28(2) of the *Environmental Planning and Assessment Act* (the **EP&A Act**), the BCA that is applicable to a Crown project is the one in force at the time of the date of invitation to tender. This then locks that version of the BCA in for the entirety of the project. This is a common-sense interpretation, which the NSW Government considers appropriate for Crown work, yet private building work is subject to what is effectively an impractical provision.

Recommendation

The Property Council urges the New South Wales Government to apply the same principles relating to BCA applications to staged approvals across all non-Crown works, as they currently apply to all Crown works. This provision would enable consistency and certainty across the building and design industry.

Unintended and practical consequences of the BCA Regulation

The Property Council has identified several practical implementation issues relating the Guidance Materials. The interpretation in the Guidance Material provides for several unworkable tenants which, when applied on a staged development would cause significant issue for developers and constructors.

Importantly, relatively minor design changes made well into a project will also trigger a new version of the BCA being applied, if they occur after a new version of the BCA is released, potentially rendering some or all previous work conducted on the project non-compliant. Given that construction certificates cannot be issued for work already carried out, the regulatory challenge created is an unintended consequence of the Governments desire to have all changes adopted on all projects immediately.

With around 30,000 new multi-unit dwelling completions in 2019 alone, the unintended consequences of the Guidance Material would mean there are thousands of multi-unit dwellings that could now be deemed technically non-compliant across the state, when they in fact are compliant with the BCA in force at the time of the application for first construction certificate. There will be significant cost increases and delays for homeowners if construction projects which have already progressed significantly have to be retrospectively changed to comply with a new version of the BCA. This would lead to significant costs passed onto consumers in the form of rectification works, or the inability to exchange on newly acquired dwellings. The flow on from this is rendering persons in some cases even homeless.

Designers and certifiers should be focusing on compliance with one set of BCA provisions and singular version of an Australian Standard, rather than assessing the differences between versions and considering performance solutions to address differences where applicable to a single project. The uncertainty created at all levels and continued for the life of a building (typically 20 to 40 years), reduced quality of outcomes, expense (particularly at a time where Covid related debt is impacting the construction industry and consumers alike) is considered both unnecessary and unreasonable.

Recommendation

The Property Council strongly urges the NSW Government to consider amending the EP&A Regulation by inserting “first” into clause 145 (1)(b) of the EP&A Regulation, which will then read:

“The proposed building (not being a temporary building) will comply with the relevant requirements of the Building Code of Australia (as in force at the time the first application for the construction certificate was made).”

Building reform work across New South Wales continues to improve the confidence of consumers, owners, and occupiers. The Property Council remains committed to working with the New South Wales Government to ensure the integrity and quality of apartments and buildings remain at a high standard. Our concerns and recommendations in this submission addresses the implementation issues, inconsistency, and retrospectivity as well as practical design and construction implementation concerns surrounding the BCA and applicability across developments.

Should you have any questions regarding the content of this submission, please contact Charles Kekovich, NSW Senior Policy Adviser on ckekovich@propertycouncil.com.au or 0409 776 588.

Yours sincerely,



Luke Achterstraat
NSW Executive Director
Property Council of Australia