

Mr Marcus Ray  
Executive Director  
Planning Reform & General Counsel  
NSW Planning and Infrastructure  
23-33 Bridge Street  
SYDNEY NSW 2000

18 March 2014

  
Dear Mr Ray,

**Building upgrade reporting – Clause 132A, EP&A Regulation 2000**

Thank you for providing the Property Council of Australia with the opportunity to comment on the amendments as set out in the *Environmental Planning and Assessment Amendment (Complying Development and Fire Safety) Regulation 2013* under the EP&A Act 1979.

The property industry supports the introduction of the streamlined and expanded implementation of exempt and complying development assessment. We were pleased to see the inclusion of many of the changes that came into force on 22 February 2014, such as:

- The development of new industrial buildings up to 20,000 square metres on land zoned for industrial development.
- Additions of up to 2,500 square metres for offices.
- Allowing building to boundary on lots between 10 metres and 12.5 metres wide.
- Temporary extension of operating hours for retail premises prior to Christmas.
- Allowing development in heritage buildings or allotments where there is no change to the heritage component.

However, we recommend the removal of *Clause 132A*, the new requirement for a Building Upgrade Report, and a return to the previous arrangements, particularly in relation to fire safety.

While the policy goal of speeding the upgrade of buildings and streamlining development is laudable, the new requirements have undermined this by sowing confusion and creating excessively burdensome requirements for building owners, tenants, certifiers and local government.

A series of unintended consequences has been created, the most notable being that onerous Development Applications (DAs) are now being considered by industry as preferable to the use of Complying Development Certificates (CDCs).

The most significant element of the new reporting requirements concerns upgrade work for fire protection: a Building Upgrade Report. Where required, the Building Upgrade Report will need to be prepared and submitted with every complying development application, and the council must acknowledge receipt of the Report before an Occupation Certificate (OC) can be issued. The Property Council believes that the system as it stood before 22 February 2014 was not allowing an undue level of risk in regard to fire safety.

### **The previous system was working**

Current building maintenance and certification processes require building owners to maintain and annually certify a building's fire safety system. Every year an Annual Fire Safety Statement is submitted to council certifying that each of the measures listed in the most recent Fire Safety Schedule are installed in the building, and that they remain capable of operating to the Standard listed in the Schedule.

Under existing planning legislation, council can ensure that an acceptable level of fire safety is provided for older buildings during the approval of building works, a change of building use or when a complaint is received. Indeed, *Clause 94 of the EP&A Regulation 2000* requires a building upgrade if a high rate of alteration has occurred.

This framework already captures and enforces the upgrade of fire safety measures for older buildings through the adequate implementation of current requirements of the Building Code of Australia (BCA), during a building's refurbishment phase or change of use. This is sensible as the work can be planned to be undertaken when funds are available, whilst causing minimal disruption to sitting tenants.

### **The new regime**

As of 22 February 2014, CDC proposals for a change of use, addition or alteration to an existing building approved prior to 1 January 1993, and involving an area greater than 500 square metres now require a Building Upgrade Report from an independent A1 Accredited Certifier (AC) prior to the issue of a CDC. This cannot be the same certifier that is assessing the CDC application.

The new regulations stipulate that the Report must provide an assessment of matters relating to the compliance with the deemed-to-satisfy provisions of Sections C, D and E of the BCA. The Report will need to separate the recommendations into what needs to be completed as part of the CDC scope, and what needs to be completed as part of an ongoing upgrade strategy.

A copy of the Report must be lodged with council, and acknowledgement from council must be received before an OC can be issued.

### **Building regulations should not be retrospective**

The new regime mandates that the independent AC must make recommendations as to whether it would be appropriate to bring the building to total or partial conformity with the BCA.

This is problematic as the BCA is updated in May each year, which will in turn require an ongoing review of Building Upgrade Reports to take into account any relevant changes and updates to the BCA. Additionally, the Building Upgrade Report needs to be revised and reissued for every CDC.

The BCA is not retrospective, because many existing buildings are not able to comply with current and future changes. For example, it would be near impossible for an existing building to install a new fire stairwell or for the independent AC to inspect all structural elements of a building.

### **Real risk of non-compliance by default**

Building Upgrade Reports are required to list compliance/non-compliance clause by clause of Sections C, D and E of the BCA. The amendment's wording removes flexibility where compliance cannot be assessed by the independent AC as the amendment calls for every part of Section C, D and E to be assessed.

As noted above, many buildings erected prior to 1 January 1993 will not meet the current BCA requirements. As a result, unless sub-consultants are engaged at significant cost, the independent AC cannot guarantee a satisfactory assessment of compliance or non-compliance, resulting in non-compliance by default.

In the instances of non-compliance, of which there will be many, the independent AC must make a recommendation as to whether it would be appropriate to upgrade to comply. Many of the services would need input from additional experts, such as fire and structural engineers. This could see the cost of the reports increase from the range of \$5,000 - \$20,000 to upwards of \$50,000, whilst also impacting the timeframes in which a report can be prepared, adding further delays to the CDC process.

This will lead to increased uncertainty and instability in the certification system. This creates significant recurring costs and delays for building owners that will soon filter through to tenants taking occupation of existing buildings, as well as local government.

### **Anti-competitive certifying environment**

Under the new arrangements, CDC approvals will require a Building Upgrade Report from an A1 Accredited Certifier, of which there are only around 60 in NSW.

This cannot be the same certifier that is assessing the CDC application. They must be 'independent', that is, individuals from separate companies. This has resulted in many A1 certifiers refusing to undertake Building Upgrade Reports at the expense of their ongoing CDC work.

The requirement for a Building Upgrade Report will result in the simultaneous production of multiple reports by different certifiers for the same building. These will result in wide and varying upgrade requirements due to a lack of knowledge or reference to each other.

### **The Building Upgrade Reports undermine the policy goal of streamlined development**

The Property Council is sympathetic to the Government's policy imperative to speed the upgrade of buildings and streamline development. However, the newly implemented requirements for Building Upgrade Reports are not the way to do so; they have created widespread confusion, and will see stakeholders burdened with significant delays, cost pressures and layers of red tape.

For building owners, these Reports have incentivised a reversion to a costly Development Approval. This onerous time and cost burden will flow-on to local government, with many councils not even aware of the changes, and lacking the framework, allocated resources or processes for the implementation and management of these Reports.

### **Uncertainty over the administration of these new requirements**

Councils have indicated that they will likely respond to the ambiguity of the new regime by resorting to issuing a Fire Safety Notice – again, an onerous process that could take anywhere from 6 months to 2 years to complete.

Councils have not been able to say for certain how they will administer the acknowledgement of the Building Upgrade Reports, or how long that processing will take. The Property Council believes that the requirement for acknowledgement of receipt by council and the rising level of local government involvement undermines the fundamental rationale of private certification.

For the Building Professionals Board (BPB), there is a lack of clarity in their role in relation to Building Upgrade Reports, namely in the determination of rules and oversight.

## Recommendations:

- The Property Council recommends the removal from the *Regulation of Clause 132A* – the new requirement for Building Upgrade Reports.
- The mechanisms for building upgrades under *Clause 94* of the *EP&A Regulation 2000* are understood, more practicable and much more affordable for all stakeholders – be they building owners, certifiers, councils, tenants or fire safety engineers and other professionals. A fire safety upgrade should not have to impact the entire building. Base building specifications should comply with building codes that were originally applied, with appropriate upgrades required based on risk and return and practical timing, such as during a major refurbishment.
- Over the longer term, the Property Council recommends that a review of the fire safety accreditation system be undertaken in close consultation with all stakeholders.
- There are issues to be resolved, but the best approach is to gradually improve and tighten up the previous system in lieu of the new regulation that has sown confusion and created burdensome requirements for building owners, tenants, certifiers and local government.
- The Property Council supports the BPB's recommendation to further professionalise certification through accreditation. This would create a cascade of improvements without the enormous cost of the measures that came into force 22 February 2014. This could be provided by the BPB on a gradual basis.
- The Property Council supports the long term goal of accreditation being expanded beyond certifiers to all those who provide certificates in relation to BCA. One avenue that could be explored is to provide an accreditation system for fire safety personnel to certify building fire safety.
- The Property Council recommends that the management of documentation, starting from approval work, should be streamlined and centralised. Online processing and accessibility is preferable, so that all stakeholders can have some clarity and not work at cross purposes. This fits with building regulation and certification objectives laid out in Chapter 8 of the Government's *White Paper – A new planning system for NSW*.
- At the broader level, the Property Council recommends that a Regulatory Impact Statement be written and circulated whenever a suite of changes to building regulation are canvassed by the Department of Planning and Infrastructure.

The Property Council appreciates the Government's efforts to streamline building regulation and certification. We would greatly appreciate an opportunity to meet with you and discuss this further. I can be contacted directly on (02) 9033 1906 or [gbyres@propertyoz.com.au](mailto:gbyres@propertyoz.com.au). Alternatively, please feel free to contact NSW Policy Advisor Henry Lawton, who can be contacted directly on (02) 9033 1909 or [hlawton@propertyoz.com.au](mailto:hlawton@propertyoz.com.au).

Yours sincerely,



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