

Submission on the Proposed Changes to the Environmental Planning and Assessment Regulation 2000: Fire Safety and Building Certification

Introduction

I congratulate the NSW Government on providing the opportunity for public input to the reform of building regulation and certification, an important issue that impacts on all citizens at some point in time.

I was the author of the Independent Review of the Building Professionals Act 2005 and, with that background, interest and knowledge of the area, I thought it may be helpful to provide my input on the draft proposals on fire safety and building certification as contained in the public consultation draft of the Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017.

The Need for and Approach to Reform of Fire Safety and Building Certification

Before providing comments and suggestions on the draft reforms, I felt it useful to summarise what were my findings regarding the current approach to fire safety and what was needed to address identified deficiencies.

Fire safety, in common with other key building elements and systems, is not adequately addressed under the current regulatory approach. The key deficiencies are as follows:

- Lack of an accreditation system for persons designing, installing, commissioning, modifying and maintaining fire safety systems and hence accountability, by default, rests on the building certifier who should not require and is unlikely to have the necessary specialist expertise and experience
- Inadequate documentation of installed fire safety systems
- Inappropriate role for FRNSW which requires FRNSW to prepare fire safety reports within a defined period for certain classes of alternative fire safety solutions. FRNSW does not have the resourcing to undertake such a role and in reality has not prepared fire safety reports for some years. Hence after 23 days from notification to the FRNSW to prepare a fire safety report, the development has proceeded without an independent review of the alternative solution
- No targeted, risk based independent reviews of installed fire safety systems
- Lack of clarity regarding the standards for passive fire protection work and inadequate review of such work as part of the mandatory inspection requirements

Evidence provided by the industry indicated that there were a substantial number of inadequately designed, installed and maintained fire safety systems which was tragically confirmed in the case of the Bankstown apartment block fire.

The key reforms proposed in my report to address these deficiencies were as follows:

1. Redesign of the fire safety schedule and associated requirements with the schedule created at the time of the issue of the construction certificate of complying development certificate and updated throughout the project such that at the end of the project there is a fully documented fire safety system.
2. accreditation of parties undertaking the design, installing, commissioning and maintaining of fire safety systems who in turn are fully accountable for their work and hence the certification of their work can be relied on by the building certifier
3. Redesign of the role of FRNSW to one of selective audit of higher risk alternative solutions
4. Creation of an independent, selective, risk based audit of installed fire safety systems using a combination of independent, accredited fire safety engineers, a Peer Review Panel and the FRNSW.
5. Providing greater clarity regarding the standards for passive fire protection work, with enhanced review by building certifiers of passive fire protection work and suitably training and licensing of the work associated with installing passive fire protection.

Comments on the Draft Proposals

I have divided my comments into three categories: comments about the proposals contained in the public consultation draft; comments on what was not included in the draft but which, I believe, should be considered for inclusion; and a general comment on what I consider to be the appropriate form of communicating regulatory requirements to the industry.

A. Comments on matters contained in the draft proposals

Set out below are my comments on the draft proposals contained within the public consultation draft. The numbering used relates to the numbering in schedule 1 of the public consultation draft.

2. Clause 130, procedure for determining application for complying development certificate and notification requirements and 6. Clause 144A, alternative solution report required for certain fire safety aspects of building work

These two clauses address requirements regarding building work that involves an alternative solution for a fire safety system for class 1b to 9 buildings in respect to complying development certificates (clause 130) and construction certificates (clause 144A), respectively. Codifications of requirements that must be met before the issue of a CDC or CC are fully supported. However, there is a fundamental issue which is not addressed in respect to this provision and to the proposed reforms in general and that is the issue of the accountability of the “competent fire safety practitioner” for both any work that is undertaken and for certification provided on fire protection systems and what is the respective accountability of the certifying authority. The wording of the proposals appears to state that the certifying authority is solely accountable for the certification of the alternative solution fire safety system and indeed for the certification of fire safety systems in general.

The design of complying alternative solution fire safety systems is a technical area which requires specialist expertise and experience. This is recognized in the draft regulation by the requirement for the alternative solution report to be prepared by a “competent fire safety practitioner” (CFSP) and the foreshadowing in the discussion paper that the Government intends to develop a co-regulatory accreditation framework for this position. It would appear to be inherently contradictory to designate and accredit CFSPs if they are not held fully to account for their work and that the certifying authority is not able to rely on their reports.

I accept that the certifying authority has a role to play given the expertise in regarding to the Building Code of Australia and overall oversight of the building project but that expertise cannot be presumed with respect to fire protection systems to equate to the same level of expertise and experience as an accredited fire safety engineer. Furthermore, unless the CFSP is accountable for the report and any work undertaken, there is a lack of an appropriate incentive structure to ensure high quality work. The general principle should be that the certifying authority should be able to rely on certification provided by accredited specialists with regard to key building elements and systems, including fire safety systems.

A minor comment and suggestion in regarding to the wording of the clause 130 heading is that it should refer to alternative solution report in the same way that clause 144A does. The general heading implies that it is a more general requirement than it actually is.

11. 152A Reports of FRNSW for class 2 or 3 buildings containing certain fire safety systems: section 109H and its relation to clauses 144 and 152

Clause 152A is in accord with the recommendations in my report to redefine the role of FRNSW from reviewing and preparing a fire safety report for all developments meeting certain requirements (as set out in section 144(1)) to a more selective independent audit role which is undertaken at the discretion of the FRNSW.

I have two comments.

First, sub clause 152A (6) (a) appears to limit the purview of FRNSW to only developments where existing systems are being modified, given the reference to the “current fire safety schedule for the building”. It is not apparent why the scope of the review of FRNSW should be so limited.

Second, there appears to be no reason to retain the requirements contained in clauses 144 and 152 of the existing regulation. FRNSW does not have the resources to undertake this work and such reports have not been produced for a number of years. Hence the provisions serve no purpose and should be deleted.

16. 164B certain building work on fire safety systems may be exempt from compliance with the BCA standards

The way this clause is drafted provides a very open ended route for achieving exemption from the BCA standards. The only requirement is for an interested party to take the position that compliance with specified provision(s) of the BCA is “unreasonable or unnecessary in the particular circumstances of the case”. However, the discussion paper that was released with the draft regulation states that the provision will provide some flexibility for “certain minor” relevant fire

safety system work. There is nothing in the draft clause which restricts its application to “minor” matters and hence it is potentially a quite open ended exemption.

17. 167A competent fire safety practitioners

This clause provides the legal basis for establishing an accreditation scheme for CFSPs. This is an important step in the reform of the practice of fire safety work and certification. However, in sub clause (1) it is stated that the Secretary (of the Department of Planning and the Environment) has the responsibility for recognizing persons as CFSP. This approach appears to be inconsistent with the philosophy and practice of using the Building Professionals Board or its successor organisation as the entity responsible for overseeing accreditation of certifiers in the building industry and runs the risk of inconsistent approaches being applied to different classes of certifiers. It is strongly suggested that all accreditation for the building industry be overseen by one agency.

B. Comments on relevant matters not contained within the draft proposals

There are four matters contained in my report which have not been addressed in the draft regulation, which I believe are worthy of further consideration.

First, while the proposals do incorporate a limited audit function by FRNSW, this was only one aspect of the independent audits recommended in my report in regard to the design, installation, commissioning and maintenance of fire safety systems. The other two mechanisms for undertaking selective audits were as follows:

- Selective auditing by independent fire safety specialists appointed by the regulator
- Undertaking of selective reviews, principally of complex systems, by a Peer Review Panel

These two mechanisms would be overseen and coordinated by the building regulator who would also need to put in place arrangements to avoid overlap with the audits undertaken by FRNSW.

The reality is that FRNSW is not resourced to undertake a full audit function and more particularly it will inevitably focus on matters of direct relevance to its fire-fighting capability such as access to water supply points. Further, there needs to be a feedback mechanism from the audit to the building regulator and hence to the relevant professionals. For these reasons, the limited audit function of the FRNSW needs to be augmented by the above two approaches.

Second, my report did identify that there was a lack of clarity with respect to the passive fire protection standards and that these need to be addressed. I note the proposals in respect to inspection of fire separation but offer no comment as this requires technical expertise which I do not possess. I only note that I have received negative assessments from some fire protection engineers about the effectiveness of these measures.

Third, there is a lack of information about the extent of non-compliance of existing fire protection systems and in my report I suggested that it would be useful to have FRNSW undertake a stratified sample of existing buildings of different classes and sizes to obtain a better idea of the extent of the problem. This could then form the information basis for addressing this problem, possibly by giving building owners a defined period within which to address any issues of non-conformity with requirements after which heavy penalties would apply.

Finally, my report did propose giving FRNSW the power to issue penalty infringement notices for non-compliant fire safety systems. I would add to that recommendation that the penalties be cumulative, increasing after a defined period allowed for rectification for each day the non-compliance continues. One only has to look at the history of unsuccessful attempts by both the local council and FRNSW to achieve compliance at the Bankstown apartment block to see the need for effective sanctions in this area.

C. Comments on the form of communication on regulatory requirements with industry

Finally, having reviewed the draft regulation it prompts me to raise again an important matter that was addressed in my report and that is the distinction between legislation, including regulation, which empowers governments to act in certain areas in certain ways and statements of regulatory requirements and good practice. The former is an enabling instrument but is not a communications, teaching or explanatory mechanism. One only has to battle through the Environmental Planning and Assessment Act and Regulation, including the current draft regulation, to realise that legal instruments are not an appropriate mechanism for communicating regulatory requirements to the regulated industry. For the role of communicating requirements of industry professionals to industry professionals there is a need for Good Practice Guides which have legal force but which set out the regulatory requirements in a logical, plain English basis, something which the existing legislation and regulations are singularly unable to do. It would seem to me that there will be a need for a number of Good Practice Guides, with the first priority given to those for building certifiers and then to accredited fire protection professionals.

Other Matters

Finally, I confirm that I would like to be notified when the consultation commences for the draft accreditation framework.

Michael Lambert

Independent Reviewer of the Building Professionals Act 2005