



New South Wales

Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017

under the

Environmental Planning and Assessment Act 1979

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Environmental Planning and Assessment Act 1979*.

Minister for Planning

Explanatory note

The object of this Regulation is to implement some of the recommendations made as a result of the independent statutory review of the *Building Professionals Act 2005*. This is achieved by amending the provisions of the *Environmental Planning and Assessment Regulation 2000* dealing with fire safety and building certification so as to:

- (a) require plans and specifications to be submitted in relation to work on certain fire safety systems in class 2–9 buildings, and
- (b) introduce critical stage inspections for class 2–9 buildings, and
- (c) clarify who can undertake fire safety certificate assessments for class 1b–9 buildings, and
- (d) introduce a new alternative solution report for fire safety alternative solutions for class 1b–9 buildings, and
- (e) require fire safety statements and fire safety certificates to be in a form approved by the Secretary of the Department of Planning and Environment.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 81A (5), 85A (7), 109H (3) (d), 109Q and 157 (the general regulation-making power).

Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017

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1 Name of Regulation

This Regulation is the *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

Schedule 1 Amendment of Environmental Planning and Assessment Regulation 2000

[1] Clause 3 Definitions

Insert in appropriate order in clause 3 (1):

competent fire safety practitioner—see clause 167A.

[2] Clause 130 Procedure for determining application for complying development certificate and notification requirements

Omit clause 130 (2A), (2B) and (2D). Insert instead:

- (2A) A certifying authority must not issue a complying development certificate for building work that involves an **alternative solution** under the *Building Code of Australia* in respect of a fire safety requirement unless the certifying authority:

The current *Building Code of Australia* (i.e. 2016 edition of the *National Construction Code*) has superseded the term 'alternative solution' with 'performance solution'. It is strongly recommended that the *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017* correspondingly supersede all references to 'alternative solution' with 'performance solution' to ensure State based legislation is consistent with the national code.

- (a) has obtained or been provided with an **alternative solution report** that:

The term 'alternative solution report' is not explicitly defined anywhere; however an 'alternative solution' report in respect of the fire safety provisions is typically taken to mean the 'fire engineering report' as produced under the industry accepted code, the '*International Fire Engineering Guidelines*'.

If one of the eight aims of the draft fire safety regulation is to 'require an Alternative (Performance) Solution report for all fire safety Alternative Solutions for class 1b – 9 buildings' then the industry adopted standard defining the form and content of such a reports should be nominated i.e. IFEG.

- (i) was **prepared** by a competent **fire safety practitioner**, and

A fire engineering report is 'issued' by a Fire Safety Engineer who has Category C10 accreditation statement under the Building Professionals Boards accreditation scheme. The 'Fire Safety Engineer' is already defined under clause 3 of the *Regs.*, so this term should be used. What does 'prepared' actually mean?
Also, see comments for [17] Clause 167A

- (ii) includes a statement that the **alternative solution** complies with the relevant performance requirement of the *Building Code of Australia*, and
(iii) identifies the deemed-to-satisfy provisions of the *Building Code of Australia* being varied and the corresponding performance requirements, and

The statement of compliance with relevant performance requirements and the identification of corresponding performance requirements to DtS variations must be done with respect to section A0.7 of the BCA and by the relevant qualified practitioner.

- (iv) describes and justifies the alternative solution, including the acceptance criteria and parameters on which the justification is based and any restrictions or conditions of the alternative solutions, and

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The justification of any performance solution must be done with respect to section A0.5 of the BCA, namely detailing the 'assessment methods' including any 'verification methods' used to determine compliance with the relevant performance requirements.

- (v) if the certifying authority requires its inclusion—includes a copy of the **brief** for the **fire engineering analysis**, and

The statement of compliance with relevant performance requirements and the identification of corresponding performance requirements to DtS variations must be done with respect to section A0.7 of the BCA and by the relevant qualified practitioner (i.e 'Fire Safety Engineer' as per clause 3 of the *Regs*).

- (b) has endorsed the **alternative solution report** with a statement that the certifying authority is satisfied that it has been appropriately prepared, and

On what criteria is the certifying authority required to be satisfied that the 'alternative solution report' has been appropriately 'prepared'? IFEG specifies the form and content of a 'fire engineering report', so why not reference it?

- (c) is satisfied that the plans show, and the specifications describe, the physical elements of the **alternative solution** (where they are capable of being shown and described).
- (2B) Subclause (2A) clause does not apply to building work relating to a class 1a or 10 building.

[3] Clause 134 Form of complying development certificate

Insert after clause 134 (1) (f):

- (f1) the following details of any **alternative solution report** about the building work that complies with clause 130 (2A) (a) and (b):

Suggest changing to 'fire engineering report'

- (i) the title of the report,
- (ii) the date on which the report was made, and the version number of the report,

This is locking the complying development certificate that was determined and issued by the certifying authority to this specific version and dated alternative solution report. This will mean that any amended alternative solution report **must** be applied by way of a new complying development certificate (e.g. section 87 of Act).

- (iii) the name of the **competent fire safety practitioner** who prepared the report,

Suggest changing to 'Fire Safety Engineer'

- (f2) if any of the building work is exempt from compliance with the *Building Code of Australia* because of clause 164B—the details of that exemption,

While proposed clause 164B intends for the certifying authority to grant exemption from compliance with BCA standards, what about clause 188 exemption from compliance with certain fire safety standard?

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[4] Clause 134 (2)

Insert “If any of the building work is exempt from compliance with the *Building Code of Australia* because of clause 164B, that fire safety schedule must include details of that exemption.” after “Part 9).”.

[5] Clause 136AA

Insert after clause 136A:

136AA Condition relating to fire safety systems in class 2–9 buildings

- (1) A complying development certificate for building work involving the installation, extension or modification of any relevant fire safety system in a class 2, 3, 4, 5, 6, 7, 8 or 9 building must be issued subject to the condition required by this clause.
- (2) The condition required by this clause is that the building work involving the installation, modification or extension of the relevant fire safety system cannot commence unless:
 - (a) the following documents, **endorsed by a competent fire safety practitioner**, have been submitted to the principal certifying authority:

This should be deleted as it is stated in the following part (b) thus is superfluous. Doing so also maintains consistency with the identically worded clause 146B(2).

- (i) plans that show the layout, extent and location of key components of the relevant fire safety system,
 - (ii) specifications that describe the basis for design, installation and construction of the relevant fire safety system, including any alternative solutions proposed for the system, and
- (b) those documents have been endorsed by a competent fire safety practitioner as:

What does ‘endorsed’ by a competent fire safety practitioner mean, and what type of practitioner would be deemed appropriate for such a function? It is assumed that as they are required to ‘endorse’ plans and specifications as complying with BCA provisions then a ‘certifier’ level of accreditation is expected for this function.

- (i) complying with the relevant provisions of the *Building Code of Australia*, or
- (ii) in the case of building work involving the minor modification or minor extension of an existing fire safety system only—subject to an exemption under clause 164B.

There is no reference under clause 164B as to what constitutes a ‘minor modification’ or ‘minor extension’. Suggest it be defined here or within clause 164B

- (3) In this clause:
relevant fire safety system means any of the following:
 - (a) a hydraulic fire safety system within the meaning of clause 165,
 - (b) a fire detection and alarm system,
 - (c) a **mechanical ducted** smoke control system.

Why can't **relevant fire safety system** be defined in Part 1 clause 3 so that all definitions are in the one location? Change to ‘an active’ smoke control system

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I suggest the following amendments to clause 144:

-change title to 'Referral of certain plans and specifications to Fire and Rescue NSW'
-delete clause 144(2)(c) and (d) and replace with '(c) *the alternative solution report within the meaning of clause 144A*'

Consider moving definition of **initial fire safety report** into Part 1 clause 3, being:

'**initial fire safety report** means a written report specifying whether or not the Fire Commissioner is satisfied, on the basis of the documents referred to in clause 144(2), that a performance solution will meet the performance requirements it is intended to meet'.

Note: subclauses (b) and (c) of clause 144(9) are legacy statements from previous legislation (e.g. HOBAC, Ord 70) no longer serving any direct purpose – fire hydrant accessibility and couplings compatibility are ensured through either compliance with deemed to satisfy provisions or by the performance solution being satisfied.

A copy of the alternative solution report used in determining the construction certificate should be given to the consent authority and council as supporting documentation. Suggest adding a new clause 142(2)(g), or amending subclause (e) instead:

'(g) *any fire engineering report attached to the fire safety schedule in relation to which such a construction certificate has been issued*'. [see comments below about proper naming of the alternative solution report]

[6] Clause 144A

Omit the clause. Insert instead:

144A **Alternative solution report** required for certain fire safety aspects of building work

Suggest changing to 'fire engineering report' and referencing the *International Fire Engineering Guidelines*. It is noted that this clause solely relates to performance solutions in respect of a fire safety requirement,

- (1) A certifying authority must not issue a construction certificate for building work that involves an **alternative solution** under the Building Code of Australia in respect of a fire safety requirement unless the certifying authority.

The current and future versions of the Building Code of Australia defines performance solution instead of alternative solution, as the solution must meet performance requirements and not alternative requirements.

- (a) has **obtained or** been provided with an **alternative solution report** that:

Suggest changing to 'fire engineering report'. This report is to be provided with the application for construction certificate – the certifying authority does not need to 'obtain it'

- (i) was prepared by a **competent fire safety practitioner**, and

Suggest changing to 'Fire Safety Engineer'

- (ii) includes a statement that the **alternative solution** complies with the relevant performance requirement of the *Building Code of Australia*, and

Suggest changing to 'performance solution'

By deleting the application of existing clause 144A(2), this proposed amended clause 144A means that an 'alternative solution report' will be required for every application for CC for any building having a performance solution irrespective of the size of the building (except for class 1a and 10 buildings).

Note: the applicable criteria of floor area/building class under clause 144A(2) is being deleted as well as BCA criteria EP1.4, EP2.1, EP2.2, DP4 & DP5. There are no qualifying criteria in this revised clause defining what a 'fire safety requirement' is.

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- (iii) identifies the deemed-to-satisfy provisions of the *Building Code of Australia* being varied and the corresponding performance requirements, and
- (iv) describes and justifies the **alternative solution**, including the acceptance criteria and parameters on which the justification is based and any restrictions or conditions on the **alternative solutions**, and

Suggest changing to 'performance solution'

- (v) if the certifying authority requires its inclusion—includes a copy of the brief for the fire engineering analysis, and

This statement is at odds with industry practice, ABCB guidelines and the *International Fire Engineering Guidelines*. The fire engineering report is a report on the detailed design used to accompany the plans and specs for the proposed/completed works. The brief, whether the fire specific 'fire engineering brief' or the more general 'performance based design brief' (PBDB) is the preliminary document defining the assessment method and acceptance criteria to be used for the analysis. The FEB report is usually a separate standalone document that doesn't warrant 'inclusion' into the fire engineering report as it is the basis on which the FER was developed and approved by the C10 accredited fire safety engineer.

Also, if the certifying authority requires such additional information from the fire safety engineer they should seek it in a similar manner to clause 140.

- (b) has endorsed the alternative solution report with a statement that the certifying authority is satisfied that it has been appropriately prepared, and

What does 'endorsed' by the certifying authority mean, especially in 'that it has been appropriately prepared'. Are they just determining if the fire safety engineer has followed the International Fire Engineering Guidelines or is the certifying authority actually required to verify the fire engineering analysis, as being alluded to by clause 144A(1)(a)(v) above.

- (c) is satisfied that the plans show, and the specifications describe, the physical elements of the alternative solution (where they are capable of being shown and described).

The onus of correct plans and specs actually rests with the owner making the application for construction certificate as they are directly engaging the architect/designer/builder. It would therefore be prudent to include this requirement into schedule 1, part 3, section 6, clause 3 (c). In addition to the certifying authority verifying the plans and specs as above, the fire safety engineer should likewise verify plans and specs based on the declaration of compliance being made under clause 144A(1)(ii). This is typically achieved by the fire safety engineer identifying drawing numbers, version and issue dates for which the fire engineering report relates, and these should match those received by the certifying authority via the respective application for construction certificate.

- (2) This clause does not apply to building work relating to a class 1a or 10 building.

[7] **Clause 146B**

Insert after clause 146A:

146B Condition relating to fire safety systems in class 2–9 buildings

- (1) A construction certificate for building work involving the installation,

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extension or modification of any relevant fire safety system in a class 2, 3, 4, 5, 6, 7, 8 or 9 building must be issued subject to the conditions required by this clause.

- (2) The condition required by this clause is that the building work involving the installation, modification or extension of the relevant fire safety system cannot commence unless:
- (a) the following documents have been submitted to the principal certifying authority:
 - (i) plans that show the layout, extent and location of key components of the relevant fire safety system,
 - (ii) specifications that describe the basis for design, installation and construction of the relevant fire safety system, including any alternative solutions proposed for the system, and
 - (b) those documents have been endorsed by a competent fire safety practitioner as:
 - (i) complying with the relevant provisions of the *Building Code of Australia*, or
 - (ii) in the case of building work involving the minor modification or minor extension of an existing fire safety system only—subject to an exemption under clause 164B.

The whole of subclause (2) seems an oddity. The certifying authority is required to send the certified plans and specifications to the consent authority and council when the construction certificate is determined and issued. It is these certified plans and specs that the principal certifying authority should receive prior to building work. This should be expected for all building works related to the corresponding issued construction certificate, and not just restricted to any 'relevant fire safety system'.

The notion of having somebody (a competent fire safety practitioner?) submit a design (i.e. plans and specs) for a relevant fire safety system **after** the determination of a construction certificate, especially without due consideration to the whole of building design as the certifying authority does, means that there will a likely increase in issues with fire safety systems not being compatible with the building. An obvious example is a compliant fire detection and alarm system being incompatible to the design of class 3 sole-occupancy units which can result in very high incidence of automatic fire alarms and the associated incurring of charges from Fire & Rescue NSW.

Furthermore, in conjunction with the proposed inclusion of clause 164B there will be a tendency to have the certifying authority grant exemptions to accommodate improper design when it is identified post construction certificate that compliance with BCA standards will not be met (e.g. an exemption will be sought if during commissioning test it is identified that the relevant fire safety system won't meet the required performance because of improper design such as excessive pressure losses in a hydrant system because of bad design).

- (3) In this clause:
- relevant fire safety system** means any of the following:
- (a) a hydraulic fire safety system within the meaning of clause 165,
 - (b) a fire detection and alarm system,
 - (c) a **mechanical ducted** smoke control system.

Change to 'an active' smoke control system.

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[8] Clause 147 Form of construction certificate

Insert after clause 147 (1) (f):

- (g) the following details of any **alternative solution report** about the building work that complies with clause 144A (1) (a) and (b):

Suggest changing to 'fire engineering report'.
Do we need to include the sub-listed (a) and (b) in this statement i.e. '...*building work that complies with clause 144A(1)*:'.

- (i) the title of the report,
(ii) the date on which the report was made, and the version number of the report,

This is effectively locking the construction certificate that was determined and issued by the certifying authority to a specific version and dated report. This will mean that any amended alternative solution report **must** be applied by way of a new or an amended application for construction certificate (e.g. clause 148).

- (iii) the name of the competent fire safety practitioner who prepared the report,

As with the proposed addition of clause 147(2) below, where we are asking for details of an exemption to be included on the fire safety schedule, this section should be similarly mirrored so that details of the alternative solution report are to be included on the fire safety schedule.

- (h) if any of the building work is exempt from compliance with the *Building Code of Australia* because of clause 164B—the details of that exemption.

What about any clause 188 exemption from compliance with the building code that has been granted?

[9] Clause 147 (2)

Insert "If any of the building work is exempt from compliance with the *Building Code of Australia* because of clause 164B, that fire safety schedule must include details of that exemption." after "Part 9).".

Clause 147 is about the form of the construction certificate, so this is out of place as its content relates to the fire safety schedule. It would be better to insert the above into clause 168(3)(f).

[10] Clause 152 Reports of Fire Commissioner: section 109H

Omit "7 days" from clause 152 (5). Insert instead "10 days".

Seven days, meaning one whole week, should be otherwise sufficient given that the building is complete and occupation is being sought. It is noted that legislated timeframes are in terms of whole weeks as opposed to business days e.g. 7, 14, 28 etc.

A note should be added to the conclusion of clause 152 identifying that the Fire Commissioner will be required to undertake an inspection in order assess whether building work complies with the alternative solution.

[11] Clauses 152A and 152B

Insert after clause 152:

152A Reports of Fire and Rescue NSW for class 2 or 3 buildings containing certain fire safety systems: section 109H

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- (1) A certifying authority must request **Fire and Rescue NSW** to furnish it with a fire safety system report no later than **2 days** after receiving any application for an occupation certificate for a class 2 or 3 building for building work that involves installing, extending or modifying a relevant fire safety measure in the building.

In other sections of this legislation, references to Fire and Rescue NSW specifically identify the "Fire Commissioner".

Clause 152 says 'as soon as practicable after receiving an application for occupation certificate', which is a better proposition as it allows the principal certifying authority time to conduct the final critical stage inspection and verify completeness prior to referring to the Fire Commissioner. There will exist confusion if there is a class 2 or 3 building with a performance solution as a 'fire safety system report' must be sought within 2 days but the 'final fire safety report' can be sought at the same time or after. The timeframes for both clause 152 and 152A should be identical

- (2) The certifying authority is not required to make such a request if it has already refused the application.

Suggest adding to the end 'or a request for a final fire safety report has been made to the Fire Commissioner under clause 152.'

- (3) If it refuses the application after making such a request but before receiving a fire safety system report, the certifying authority must cause notice of the refusal to be given to **Fire and Rescue NSW**.

Suggest changing to 'the Fire Commissioner'.

- (4) If a request has been made to **Fire and Rescue NSW** under this clause and no notice of the refusal of the application has been received by the certifying authority, **Fire and Rescue NSW** may furnish the certifying authority with a fire safety system report for the building.

Suggest changing to 'the Fire Commissioner'.

- (5) The certifying authority must not issue an occupation certificate for the building unless it has taken into consideration any fire safety system report for the building that has been furnished to it within 10 days after **Fire and Rescue NSW** receives the request for the report.

Suggest changing to 'the Fire Commissioner'.

- (6) A fire safety system report must be in writing and must specify whether or not **Fire and Rescue NSW** is satisfied:
- (a) that the relevant fire safety system is capable of performing to at least the standard in the current fire safety schedule for the building, and

Suggest changing to 'the Fire Commissioner'.

The structure of this clause should be changed to other like clauses (e.g. clauses 144, 152, 153) such as:

- (6) In this clause:

fire safety system report means a written report which....

For the sake of clarification, all references to certifying authority within Part 8 Division 3 should be changed to 'principal certifying authority'.

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- (b) that any fire hydrant in the fire hydrant system will be accessible for use by Fire and Rescue NSW, and

Change 'any fire hydrant' to 'all of the fire hydrant'. Change to 'the Fire Commissioner'.

- (c) that any coupling in the fire hydrant system will be compatible with those of the fire appliances and equipment used by Fire and Rescue NSW.

Change 'any coupling' to 'all of the couplings'. Change to 'the Fire Commissioner'.

- (7) In this clause:

relevant fire safety system means any of the following:

- (a) a hydraulic fire safety system within the meaning of clause 165,
- (b) a fire detection and alarm system,
- (c) a mechanical ducted smoke control system.

Change to 'an active' smoke control system

A note should be added to the conclusion of clause 152A identifying that the Fire Commissioner will be required to undertake an inspection in order assess whether the fire safety system is capable of performing to the standard required.

152B Alternative solution report must be considered before issuing occupation certificate

This whole addition is in contradiction to the requirements of clause 153A. The premise is that a first certificate report (clause 130(2A)(a) or 144A(1)(a)) is received with the application for construction certificate, and the final report (clause 153A(1)) is received with the application for occupation certificate. There is no need to reconsider the alternative solution report as it has already been done when the construction certificate was issued, however the clause 153A(1)(b) report on the building works does need due consideration.
This inclusion should be omitted and requirements incorporated into a rewritten clause 153A.

A certifying authority must not issue an occupation certificate for a building for which building work that involves an alternative solution under the *Building Code of Australia* in respect of a fire safety requirement was carried out unless:

- (a) the certifying authority has obtained or been provided with the alternative solution report, prepared by a competent fire safety practitioner for the purposes of clause 130 (2A) (a) or 144A (1) (a) and endorsed by the certifying authority, that:
 - (i) identifies the deemed-to-satisfy provisions of the *Building Code of Australia* being varied and the corresponding performance requirements, and
 - (ii) describes and justifies the alternative solution, including the acceptance criteria and parameters on which the justification is based and any restrictions or conditions on the alternative solutions, and
 - (iii) depicts the physical elements of the alternative solution on the plans for the building (where they are capable of being shown), and
 - (iv) if the certifying authority requires its inclusion, includes a copy of the brief for the fire engineering analysis, and
- (b) the certifying authority is satisfied that the relevant building work was constructed or installed in accordance with the report.

The principal certifying authority considers the fire safety engineer's final report (clause 153A(1)(b)) to be satisfied that relevant building work has been done as per the alternative solution report .

I am unaware of fire safety engineers providing a compliance certificate under clause 153A(1)(a) for building work in relation to an alternative solution because of being considered too onerous. Perhaps this sub section should be removed?

[12] Clause 153 Fire safety certificates: section 109H

Insert after clause 153 (2):

- (2A) A certifying authority must not issue an occupation certificate for a building for building work that involves installing, extending or modifying a fire safety measure in the building unless any fire safety certificate required for the installation, extension or modification of the fire safety measures was issued by a **competent fire safety practitioner**.

This requirement somewhat contradicts the remainder of clause 153, which is about the issuing of fire safety certificates as opposed to the certifying authority's responsibility.

It would be much better to modify the last sentence of clause 153(1) to '*must not be issued unless a final fire safety certificate for the building (if a fire safety schedule is required under Part 9) has been issued by a competent fire safety practitioner.*' and modify the last sentence of clause 153(2) to '*must not be issued unless a final fire safety certificate or an interim fire safety certificate for the relevant part of the building has been issued by a competent fire safety practitioner.*'

[13] Clause 155 Form of occupation certificate

Insert after clause 155 (1) (e):

- (f) the following details of any alternative solution report about the building work involved that complies with clause 130 (2A) (a) and (b) or 144A (1) (a) and (b):
- (i) the title of the report,

There's no need to include details of any alternative solution report to which building works relates when the final report as required under clause 153A is considered when determining the application for occupation certificate. The following should be inserted after clause 155(1)(e)(vi): '*(vii) a compliance certificate or written report issued by a fire safety engineer (as required under clause 153A) has been considered.*'

It should be noted that the timing of this clause 153A certificate/report is not explicitly identified. As building works conclude, the owner is required to solicit any relevant compliance certificate under clause 149(2)(d) and submit to the principal certifying authority as part of the application for construction certificate. This would include any compliance certificate made under clause 153A(1)(a) by the fire safety engineer. However, as nearly all fire safety engineers submit a written report under clause 153A(1)(b), this 'report' is not explicitly stated for inclusion in the documents required to accompany the application for construction certificate. The following should be inserted after clause 149(2)(d): '*(e) a copy of any compliance certificate or written report issued by a fire safety engineer as required under clause 153A.*'

Additionally, details of the alternative solution report about building to which clause 130(2A)(a) and (b) or 144A(1)(a) and (b) applies should already be attached to the fire safety schedule issued for the latest corresponding construction certificate as the standard of performance of the building:

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- (ii) the date on which the report was made, and the version number of the report,
- (iii) the name of the competent fire safety practitioner who prepared the report.

[14] Clause 162A Critical stage inspections required by section 109E (3) (d)

Insert before clause 162A (5) (b):

- (a) prior to covering of fire protection at service penetrations to fire-resistant walls, floors and ceilings, for a minimum of 20% of the total floor area of each storey of the building, and
- (a1) prior to covering the junction of any fire-resisting construction between or bounding a sole-occupancy unit and any other building element, for a minimum of 30% of sole-occupancy units on each storey of the building containing sole-occupancy units, and

[15] Clause 162A (6) (a)

Insert before clause 162A (6) (b):

- (a) prior to covering of fire protection at service penetrations to fire-resistant walls, floors and ceilings, for a minimum of 20% of the total floor area of each storey of the building, and

What is the rationale in not including a critical stage inspection prior to the covering of junctions of any fire-resisting construction between or bounding construction for other classes of buildings? While principal certifying authorities may exhibit a higher level of diligence in such cases, there is no reason why a minimum should be specified to ensure a similar level of compliance, especially for other high life safety risk buildings such as Class 9a, 9c and some class 9b.

[16] Clause 164B

Insert after clause 164A:

It is to be noted that the proposed inclusion of clause 164B will effectively nullify clause 188 as the determination of exemption for compliance with the Building Code of Australia will shift to the nominated certifying authority who has determined and issued the construction certificate. This means Fire & Rescue NSW will no longer assess/determine the matter for which any exemption is being sought as the interested person will likely obtain a construction certificate then seek any exemption under clause 164B after building work has commenced.

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

- (1) **An interested person** in relation to building work involving the modification or extension of **any relevant fire safety system** may lodge with the certifying authority an objection that compliance with any specified provision of the *Building Code of Australia* is unreasonable or unnecessary in the particular circumstances of the case.

It is noted that with the definition of 'interested person' that this exemption can only be lodged after the related complying development certificate or construction certificate has been issued to that person, and that the complying development certificate has condition under clause 136AA or the construction certificate has condition under clause 146B.

- (2) The interested person must specify the grounds of the objection and must furnish the certifying authority with a copy of the plans and specifications for the building work.

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- (3) A certifying authority is to make a determination about the application, and notify the applicant of that determination, within 30 days after receiving the application.

It is interesting that a timeframe is being defined for the certifying authority to determine the exemption application when there are no other defined timeframes for determining other Part4A certificates. Additionally, there is no defined timeframe for Fire & Rescue NSW to determine the

- (4) If the certifying authority is satisfied that the applicant's objection is well founded, it may do either or both of the following:
- (a) exempt the building work, either conditionally or unconditionally, from any specified provision of the *Building Code of Australia*,
 - (b) direct that specified requirements are to apply to the proposed building work.
- (5) A certifying authority may only exempt such building work if:
- (a) the non-compliance with the *Building Code of Australia* relates only to the operational performance of the relevant fire safety system, and

If the building has a performance solution in which the relevant fire safety system an exemption is being sought is dependent on, the impact of the exemption should be assessed by the fire safety engineer to ensure operational performance does not adversely impact on any performance within the alternative solution report.

- (b) the certifying authority is satisfied that the non-compliance will not reduce the operational performance of the relevant fire safety system, and

'Not reduce the operational performance' is subjective and likely to be open to interpretation by certifying authorities.

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- (c) a competent fire safety practitioner (other than the competent fire safety practitioner who prepared the plans and specifications) has endorsed the non-compliance.

Without explicitly defining 'competent fire safety practitioner' within each respective clause and defining such classes of competencies by gazette under clause 167A, this clause is interpreted that the development owner having a CDC or CC will get their nominated fire safety practitioner to prepare plans and specifications to include a non-compliance, then engage a second company/fire safety practitioner to endorse the plans and specifications involving the non-compliance (i.e. peer review by like qualified fire safety practitioner)? Additionally, while it is clear under clause 167A(4)(a) that the certifying authority can determine who is competent, this subclause does not make it clear whether the second practitioner endorsing the non-compliance is engaged by the development owner or by the certifying authority determining this clause 164B exemption.

Shouldn't the certifying authority determining the clause 164B exemption, who is also otherwise competent in fire safety, be verifying the plans and specification detail the non-compliance? I suggest rewording this subclause similar to proposed clause 130(2A)(c) and clause 144A(c) where: '(c) the certifying authority is satisfied that the plans show, and the specifications describe, the physical elements of the non-compliance (where they are capable of being shown and described)'.

Note. If the certifying authority exempts compliance with the *Building Code of Australia* under this clause, the exemption must be detailed in the terms of the construction certificate or the complying development certificate and any attached fire safety schedule (see clauses 134 and 147, respectively).

It is not understood how this is to occur given that the complying development certificate and the construction certificate has already been issued and their corresponding plans and specifications submitted to the consent authority (e.g. clause 142(2)(c)). The only way of doing so is by modification of the complying development certificate or construction certificate (e.g. clause 148).

- (6) In this clause:
- interested person** means a person having the benefit of:
- (a) a complying development certificate subject to a condition under clause 136AA, or
 - (b) a construction certificate subject to a condition under clause 146B.
- relevant fire safety system** means any of the following:
- (a) a hydraulic fire safety system within the meaning of clause 165,
 - (b) a fire detection and alarm system,
 - (c) a **mechanical ducted** smoke control system.

Change to 'an active' smoke control system

[17] Clause 167A

Insert after clause 167:

167A Competent fire safety practitioners

- (1) The Secretary may, by order published in the Gazette, recognise a class of persons as **competent fire safety practitioners** for the purposes of this Regulation.
- (2) Without limiting the classes of persons who may be recognised, they may include:
 - (a) a class of persons holding a specified category of certificate of accreditation under the *Building Professionals Act 2005*, or

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- (b) a class of persons holding a specified category of certificate of accreditation under the *Building Professionals Act 2005* and having some other characteristic or qualification, or
 - (c) a class of persons being a member of a specified professional organisation or body or industry organisation or body.
- (3) In determining whether or not to make an order under this clause, the Secretary must have regard to any guidelines published by the Secretary about the steps that professional or industry organisations are to follow in order for their members to be considered for inclusion in such an order, including requirements about auditing and complaints handling.
- (4) Until an order is first published under subclause (1):
- (a) for the purposes of clauses 130, 136AA, 144A, 146B, 153 and 164B, any person who, in the relevant **written opinion** of the certifying authority or principal certifying authority, as the case may be, is competent to perform the fire safety assessment functions under those clauses is taken to be a competent fire safety practitioner, and

The competent fire safety person for performance solution (i.e. alternative solution report) under clause 130 and clause 144A is a 'fire safety engineer' which is defined in part 1 clause 3.

By what mechanism is the certifying authority required to provide this written opinion?

- (b) for the purposes of Divisions 4 and 5 of Part 9, any person who, in the **written opinion** of the relevant building owner, is competent to perform the fire safety assessment functions under those Divisions is taken to be a competent fire safety practitioner.

By what mechanism is the building owner required to provide this written opinion?

Does there need to be consideration of 'competent fire safety practitioner' by Fire and Rescue NSW staff undertaking fire safety assessment functions under clause 144, clause 152, clause 152A and clause 188? This is to ensure assessing persons have requisite competencies related to the level of assessment that is being undertaken, and to ensure consistency in assessment and report. An example being a fire safety engineer holding Category C10 accreditation under the *Building Professionals Act 2005* should rightfully expect equivalent competency from Fire and Rescue NSW in the assessment of whether an alternative solution will meet the performance requirements it intends to meet. The Fire Commissioner can determine which competencies and members are required by each fire safety assessment function undertaken.

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(5) In this clause:

Secretary means the Secretary of the Department of Finance, Services and Innovation.

Why can't **secretary** be defined in clause 165?

[18] Clause 170 What is a final fire safety certificate?

Omit "properly qualified person" from clause 170 (a).

Insert instead "competent fire safety practitioner".

[19] Clause 171 Issue of final fire safety certificates

Insert after clause 171 (4):

(4A) A final fire safety certificate authorised or required by a development consent or construction certificate, and involving building work in a class 1b, 2, 3, 4, 5, 6, 7, 8 or 9 building, must not be issued unless the assessment of essential fire safety measures was carried out by a competent fire safety practitioner.

Why is the inclusion of subclause 4A required when a final fire safety certificate is to be 'assessed by a competent fire safety engineer' as being proposed by change no 19 above?

[20] Clause 173 What is an interim fire safety certificate?

Omit "properly qualified person" from clause 173 (1) (a).

Insert instead "competent fire safety practitioner".

[21] Clause 174 Form of fire safety certificates

Insert "be made in the form approved by the Secretary and must" after "must" in clause 174 (1).

[22] Clause 174 (1) (g)

Insert after clause 174 (1) (g):

(i) the name and contact details of the person who issued the certificate.

[23] Clause 175 What is an annual fire safety statement?

Omit "properly qualified person" wherever occurring.

Insert instead "competent fire safety practitioner".

[24] Clause 178 What is a supplementary fire safety statement?

Omit "properly qualified person". Insert instead "competent fire safety practitioner".

[25] Clause 181 Form of fire safety statements

Insert "be made in the form approved by the Secretary and must" after "must" in clause 181 (1).

[26] Clause 181 (1) (i)

Insert after clause 181 (1) (h):

(i) the name and contact details of the person who issued the statement.

[27] Clause 190B

Insert after clause 190A:

190B Plans and specifications for certain fire safety systems must be kept on site

(1) The **principal contractor for building work** must ensure that the most recently endorsed copy of the plans and specifications for any relevant fire safety system for the building:

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Shouldn't this onus be placed upon the person having the benefit of the respective complying development consent or the construction certificate?

- (a) are kept on the site of the building work, and
- (b) are made available for inspection on request by the certifying authority, consent authority, council and **Fire and Rescue NSW** at the times during which the building work is carried out.

Suggest changing to 'the Fire Commissioner'.

- (2) In this clause:
relevant fire safety system means any of the following:
 - (a) a hydraulic fire safety system within the meaning of clause 165,
 - (b) a fire detection and alarm system,
 - (c) a **mechanical ducted** smoke control system.

Change to 'an active' smoke control system

Amend schedule 1, part 2, section 4, clause 5 (c) to:
'any performance (or *alternative*) solution report as required under clause 130(2A).'

Amend schedule 1, part 3, section 6, clause 3 (c):
'any performance (or *alternative*) solution report as required under clause 144A.'