PLANNING
BUILDING
HERITAGE
URBAN DESIGN

CITY PLAN SERVICES

31 March 2017

Planning legislation updates 2017
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Dear Sir / Madam,

RE: DRAFT UPDATE TO THE EP&A ACT

City Plan Services P/L (CPS) takes this opportunity to thank the government for consideration of our comments. This submission primarily focus on the building regulation reforms that form part of the overall proposal. As a practitioner firm, we welcome the attention to address current shortcomings with the statutory framework.

Having been involved in private certification since its inception we have seen many regulatory changes and many parliamentary reviews. In my view the regulatory responses to date been limited and primarily focused on the role of certifiers rather than a broader industry approach to address the well documented shortcomings.

We are very keen to see fundamental changes to fixing the systemic issues to provide an appropriate building regulation framework for certifiers to operate within clearly articulated parameters that achieve well stated goals and objectives. A standalone Building Act would have been the preferred approach with a holistic review of the process incorporating detailed engagement with industry.

SCHEDULE 4 – DEVELOPMENT ASSESSMENT & CONSENT

[7] This clause is not supported

The proposal to limit the kind of development for which an accredited certifier is not authorised to issue a complying development certificate is unwarranted.

The planning reform is seeking to improve the complying development pathway. Complying development is seen as a key mechanism for ensuring that housing supply meets demands created by population growth and demographic changes.

It is a concern that established prejudices continue to limit governments ability to provide for appropriate legislative reform to support the function of private certification. There are many issues with the current legislative framework and the form of the complying development policies that contribute significantly to the difficulties in providing a workable approval pathway. Introducing these types of barriers will not solve these issues.

Alternative options to this reform could include:

- Address the accreditation process to limit licensing to appropriately skilled persons. There is clear evidence that accreditation is being granted to individuals who do not possess the expertise or skills to undertake the complexity of tasks associated with complying development.
- A formal mechanism to allow for interaction between certifier & council in respect to matters of interpretation – It is impossible to codify all scenarios & often matters are open for interpretation. Such as system would help to build confidence that complying development standards are being met.
- A formal mechanism to allow for council merit consideration of a minor non-compliance that would enable the continued processing of the application under complying development rather than total exclusion.
- The current accreditation system promotes the splintering of certification knowledge and skills by actively benefiting sole practitioners. This limits the development of appropriate process and oversight that only larger organisations can provide. Licensing mechanisms could be introduced that would promote consolidation of skillsets.

[8]

The introduction of a “deferred commencement” certificate for complying development seems to over complication the approval process with no real added value. The “Notice of Commencement” process already deals with ensuring that any prerequisite condition of consent is satisfied prior to allowing the building works to proceed. It is not understood how this change would “simplify planning rules around complying development”.

[9]

This proposal lacks any appreciation for the role of a certifier in delivering complying development. A “literal” test rather than a “reasonable person” test exposure the private certifier to greater potential to challenges. It is not possible to eliminate interpretation in respect to a simplified set of planning rules and therefore such changes impose unequitable burdens on practitioners.

- The lawful construction of terminology that in many instances is poorly defined and subject to conjecture between opposing barristers is not suitable in this instance.
- The cost of litigation to an individual certifier can be substantial and it is unreasonable for government to expect that this cost exposure is born when a case can be brought to determine case law interpretations.
- A certifier gets no commercial benefit from a CDC determination other than their application fees, but is exposed to significant litigation costs, reputational damage and disciplinary process for matters that cannot be simply codified. Judgement calls must be made and therefore challenges of interpretations will occur.
- Statutory limitation of a certifiers involvement in validity cases should be provided. This would not protect certifiers from civil or disciplinary action for malpractice but would stop the unreasonable litigation cost burden.
- There are many examples where the Department cannot assist with interpretations or where they have provided the wrong interpretation in respect to the Codes SEPP.
- Hotline advice 20/03 – “Foreshore Scenic Protection Area” is a “protected area” under Cl1.19 and therefore is a land use prohibition for complying development – This advice contradicts the Departments Info Sheet on land use restrictions. However, ‘protected area” is not a defined term & therefore a CDC approval could be open to challenge.

- ADT appeal in respect to Qiu v Building Professionals Board [2013] NSWADT 289 (16 December 2013). 12 initial Codes SEPP breach allegations reported by BPB inspector. Ultimately only 6 were proven. The BPB inspector made just as many assessment errors as Qiu. This case illustrates the complexity and varying interpretations.

[15]

The removal of s96 as a mechanism to assess unauthorised works is not recommended. This process allows for a formal merit consideration of unauthorised building work which often includes notification of affected neighbours and their involvement in the determination pathway. The removal of this pathway means that a building certificate is the only means to regularise such work which excludes the merit based assessment.

[17]

Section (f2) is not supported. This has the potential to cause significant cost and hardship to a builder who may fall on the wrong side of an individual council officer. Such penalties could be far more significant than the offense. What is stopping a council offer using back to back “stop work orders” that could bankrupt a builder. This system does not seem to meet a procedural fairness test.

SCHEDULE 6 – BUILDING & SUBDIVISION CERTIFICATION

6.16(1)

We see the expansion for the use of compliance certificates to be mandated in respect to certain fire safety aspects as detailed in the fire safety reforms as a positive step. It is our view that this approach should be applied to other critical building elements such as structure, mechanical, hydraulic etc. The legislative framework should also recognise installation certificates by both licensed and non-licensed installers, through standardised forms, disciplinary processes and statutory protection for certifiers who rely upon such certificates subject to meeting minimum expectations.

6.17

We are concerned that the intention to nominate a “competent fire safety practitioners” as a person who may issue a compliance certificate without applying the disciplinary rigour imposed on certifiers. It is important that mechanisms are in place to deal with malpractice where it occurs, otherwise the objective of prevention will not be met.

6.10(C)

The issue of an Occupation Certificate on the basis that the building is suitable for occupation or use in accordance with its classification under the Building Code of Australia is an issue that

needs to be addressed as a matter of priority. The expectation that a certifier is sole responsible to ensure a building achieves full BCA compliance is unrealistic. A building surveyor must be able to rely upon licensed contractors to complete and warrant their work with minimal site vetting of installation. A building surveyor is on site for less than 1% of the time taken to construct a building – yet is expected to take full legal liability that compliance with the BCA has been achieved.

Statutory limitation is necessary to the role of the principal certifier. To achieve this it is necessary to clearly articulate what the expectations are for compliance oversight. However, the physical limitation of the role must be codified so that the expectations of all involved can be suitably met.

Part of the community concerns that are raised relate to an unrealistic expectation that a principal certifier is there to ensure that a building is defect free.

This is not to allow for protection of malpractice. The legislation needs to have mechanisms to deal with shonky practitioners on all levels including principal certifiers. All industries have bad practitioners and a sound statutory framework is required to limit and deal with such practice. However, the legislation needs to promote prevention at all levels of building rather than just at the OC issue.

6.20

Why does civil action against certifiers not align with statutory building warranties? It is ridiculous that the persons responsible for creating a structural defect can be statutory barred from civil action whilst the certifier remains on the hook.

6.31

Why impose different obligations between council & private certifiers. The function is the same & therefore this provision should equally apply.

We thank you for the opportunity to comment.

Yours faithfully,

Brendan Bennett
Managing Director