7 April 2017

Ms Carolyn McNally
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001
Via email: legislativeupdates@planning.nsw.gov.au

Dear Ms McNally

Re: Planning Legislation Updates – Environmental Planning & Assessment Bill 2017

Thank you for providing the opportunity to comment on the proposed amendments to the Environmental Planning and Assessment Act 1979. This is considered a significant opportunity to raise the status of building regulation in the state of NSW and correct systemic issues. The changes will set the framework for some years to come.

AIBS is committed to better building regulation and we seek to work co-operatively with the NSW Government to achieve this. The commitment of AIBS to this objective is outlined in a Board Statement to be released publically in the coming weeks. This statement is provided as an appendices to this submission.

There have been a number of reviews undertaken and completed in relatively recent times which have confirmed the existence of these issues. The latest was a review by Michael Lambert of the Building Professionals Act 2005 and related building regulation and certification matters. Michael Lambert made over 150 recommendations for change.

Admittedly the NSW Government has responded and has announced its key intended actions – but this announcement took over 12 months – and still the overall plan for NSW is unclear.

Notwithstanding, fundamental to fixing the systemic issues is action to ensure that there is an appropriate building regulation framework, and resolving fundamental current tensions between planning and building regulation in NSW. It is understood that there is a desire to retain an integrated planning and building system however, this system must serve the needs of both planning and building.

The 2013 Planning Bill was a step in the right direction, and we note that the amending Bill currently on exhibition is similar in structure and approach – but not the same. There are exclusions and additions. It needs further work to address the current problems.

However, before we provide our comment the following is provided to set context:

**Building regulation principles**

An effective building regulation system is dependent on a number of measures. In this regard it needs to be recognised that:

- The building regulation system includes certification – but it also includes more.
• The building regulation system is concerned with ensuring buildings and building work in relation to existing buildings meet minimum expectations. These expectations relate to safety, health, amenity, sustainability and planning.

• The building regulation system is also concerned with life-cycle building safety. Building alterations and additions and use changes and a lack of appropriate maintenance are the major actions that can affect the levels of safety and other expectations of existing buildings. In the regulatory world this is more so a concern for complex (Class 2-9) buildings.

• Ensuring what is built complies with relevant planning and building standards is reliant not only on those doing the work having adequate competencies, but also on the development being subject to independent checks by persons who understand the standards and what is expected. The key mechanism for ensuring the latter is the approval/certification processes. Anything not subject to these processes is not checked or may not be checked sufficiently.

• There is a need for consistency between the approval streams (CDC v CC). Consistency is necessary for both adequacy and certainty.

• There must be adequate process checks and balances.

• There must be clear understanding of roles and responsibilities – and not only in terms of compliance checking but also compliance enforcement.

• There must be appropriate and adequate levels of support for those who work within and are affected by the building regulation system.

Comments

Our comments on the proposed changes are as follows and have been limited to those areas that directly impact on our members:

Objects

Unlike the 2013 Planning Bill there are no ‘building regulation’ objects proposed. These are considered fundamental to setting the aforementioned framework. Without such objects the current tensions between planning and building will persist. AIBS recommends that the following objects from 2013 Planning Bill be inserted:

(\textit{h}) to promote health and safety in the design, construction and performance of buildings,

(\textit{i}) to promote health, amenity and quality in the design and planning of the built environment,

Consolidation of building provisions

The AIBS has previously indicated support for a separate ‘Building Act’ for NSW yet clearly this is not intended by the NSW Government. Failure to create a separate Act downplays the importance of building regulation. It is understood that we have an integrated planning and building system however, whilst planning is important it is driven by fundamentally different criteria and needs to that which are the concern of building regulation. As previously mentioned, the latter is concerned with matters such as protection of public safety and health. This is one of the fundamental tensions previously referred to.

The Amendment Bill does consolidate building provisions into a separate part of the Act however not all building provisions. Complying development is kept separate yet a CDC that authorises commencement of building work is in effect just a different kind of building approval to the CC. Separation facilitates inconsistencies between approval streams.
Requirement for an approval

The Amendment Bill does not resolve this basic issue. Under the current scheme it is the Environmental Planning Instrument (EPI) that determines when approval is required and presently, and obviously after implementation of the Act amendments, that situation will not change. The need for an approval is today based on planning criteria (eg environmental impacts), not building criteria (eg safety/health impacts). The result is that no approval may be required for building changes, changes to existing regulated building services and systems, and sometimes changes of use with safety and/or health impacts. The exception is a change of BCA classification however with the expansion of the application of alternative solutions this concept is well outdated.

Unauthorised building work

This is a significant and growing concern for NSW. Unauthorised building work includes work carried out contrary to an approval and work carried out without approval. Councils are currently issuing a building certificate to regularise unauthorised building work – since an occupation certificate (OC) cannot be issued. The Amending Bill does not address this problem. In fact it exacerbates the issue by allowing the courts to declare a CDC/CC invalid. In such circumstances what is the pathway forward? As mentioned in the Lambert Report and previous reviews there is a need for a specific mechanism and process to regularise unauthorised work (if appropriate) and that should not be the new building information certificate (which is the building certificate re-labelled). The building certificate has a number of shortcomings including no requirement for assessment of planning impacts, the building assessment criteria are inadequate, and there no ability to condition the certificate. The existing building certificate and proposed building information certificate is a ‘certificate of non-action’, not an approval mechanism.

It is important that unauthorised building work be subject to appropriate checks, because if it is non-compliant, inappropriate or simply inadequate, the community and unsuspecting purchasers, occupiers and others may suffer.

Occupation certificates (OCs)

The amending Bill indicates intended changes to the OC regime and mentions a completion of works compliance certificate as an alternative to an OC in certain circumstances.

It is agreed change is needed since there are a number of issues with the current OC regime. It is questioned whether the alternative certificate should be referred to as a ‘compliance certificate’ since, as raised later in this submission, there is a need for change to the compliance certificate regime. Changing its name to a ‘completion of works certificate’, a ‘completion certificate’, or a ‘final inspection certificate’ is considered more appropriate and acceptable.

It is also unclear what is intended if a CDC or CC is declared invalid. Will this continue to prevent issue of an OC?

AIBS awaits further detail on the scope of the intended changes – and request that this include action on clarifying the tests for issue.

Building manual

The building manual is a great innovation however, AIBS requests some detail. It is assumed that it will be tied to maintenance regulation and will have to be consulted when building or use changes are proposed? It is important that it contain appropriate detail, be readily accessible to authorised persons and kept continually current. Ideally the manual should be in electronic form and the process for its updating should be on-line.
**Levy on CDC applications**

AIBS understands this levy is intended to allow councils to increase their compliance enforcement role. The reason for the proposal is understood but clearly there is a need to accompany this with instructions to councils and certifiers regarding what their compliance enforcement (and building control) responsibilities are. For example, some councils presently wipe their hands of all compliance enforcement responsibility when a private certifier is involved. Otherwise the private certifier just issues a notice of intention and then passes it onto the council to complete the compliance enforcement action. Some councils are also under resourced in the building control area and hence do not instigate fire safety upgrading programs and are slow to respond to building issues.

**Not inconsistent test**

It is noted that there is an intent to change the CC/OC ‘not inconsistent with the development consent’ test to a ‘consistent test’. This change is not supported. It removes flexibility and it ignores the fact that construction is not always accurate to the nth degree.

If this is not intended then it should be made clear to stakeholders what the term ‘consistent’ means – and not only from a planning perspective but also from a building regulatory perspective. It is not sufficient to leave it up to the courts, as this provides no certainty for any parties.

**Directions**

It is noted that the draft Amending Bill includes a power for certifiers to issue directions. It appears to provide no scope for a certifier to negotiate a solution with the owner or contractor – which is usual industry practice. It is questioned whether this is intended.

Clarity is also requested regarding whether it is intended that accredited private certifiers be responsible for both on-site and off-site non-compliance issues. Responsibilities should be clearly stated in the legislation.

**Compliance certificates**

Compliance certificates are generally not being issued. Industry has a reluctance to issue them for various reasons and hence certifying authorities (CAs) are forced to rely on other forms of certification. In such cases it is unclear what statutory protection against liability for defective work there is for CAs.

The draft fire safety regulation recently released for public exhibition moves away from the use of compliance certificates for unknown reasons.

Fundamental to improving building safety and quality in NSW is increasing the accountability of those who undertake and certify building work. This involves expanding accreditation and licensing. However, at the same time CAs must be statutorily protected when they rely on appropriate forms of certification from competent practitioners.

Action is therefore required by government to remedy or replace the current compliance certificate regime under the EP&A Act. Now is the opportune time to make it work.
Complying development

It is evident that complying development will be further extended. This includes extending to a wider range of matters and to larger buildings and larger areas of building work. Some of these matters will therefore be far from "straightforward".

It is imperative that complying development be simple and easy to understand by professionals and consumers alike. Having matters that can only be determined by local councils and requiring deferred commencement are not considered suitable to be treated as ‘complying development’.

It is also imperative that some consistency be brought to the two approval streams – that is, complying development certificates (CDCs) and construction certificates (CCs). For building work they are both a form of ‘building approval’ and an applicant generally has the choice of choosing either path - yet they are treated differently under the EPA Regulation. For example in terms of referrals, matters for consideration, etc. It is also noted that a number of building regulatory matters have crept into the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 which is a planning instrument. It is questioned whether that is an appropriate location particularly since some development standards and conditions should be equally applicable to similar development if approved under a CC.

Subdivision works certificate

It is noted that this is a new certificate that will be required to be obtained before commencement of subdivision works. Presently some councils require that a CC be obtained. The relationship between the new subdivision works certificate and the CC is unclear. Clarification is requested to ensure consistent practice across NSW.

AIBS once again thank the NSW Government for the opportunity to comment on these important legislative changes.

We look forward to working with the Minister and your Department to make improvements to the current building regulation framework that exists in New South Wales and please do not hesitate to contact us if you require clarification or further information with regard to any of the comments provided in our submission.

Yours faithfully
Australian Institute of Building Surveyors

Brett Mace
Chief Executive Officer