

26 August 2021

The Hon Courtney Houssos MLC
Shadow Minister for Better Regulation and Innovation
Parliament House
Macquarie Street
SYDNEY NSW 2000

Via email: courtney.houssos@parliament.nsw.gov.au

Dear Shadow Minister

RE: The need for reform - Which version of the BCA applies

Recently released [Guidance Material](#) from the Department of Customer Service on the issue of which version of the Building Code of Australia (BCA) applies during staged approvals has highlighted the urgent need for reforms to the *Environmental Planning and Assessment Regulation 2000* (the Regulation).

The interpretation included in the Guidance Material will impact homeowners throughout NSW, the general public, the construction industry and the broader NSW economy.

The interpretation also contradicts long-standing and best practice common law principles and approaches to managing policy changes throughout the life of a construction project, namely avoiding retrospectivity, and is inconsistent in its application to Crown projects and non-Crown projects.

While the Association of Australian Certifiers (AAC) disputes the interpretation included in the Guidance Material, we also recognise that the best way forward is a policy change to be made to the Regulation to clarify that the best practice approach to BCA compliance for staged approvals used in other Australian jurisdictions can continue in NSW.

A policy change would restore certainty and confidence to the NSW construction industry and to homeowners and occupiers across the state.

To that end, the AAC has prepared the attached submission in consultation with other industry bodies.

If you would be interested in discussing this matter further, I can be reached on 0431 082 259.

Yours sincerely



Jill Brookfield
Chief Executive Officer

Submission – Management of Staged Approvals

August 2021

Executive Summary

The recently released [Guidance Material](#) regarding which version of the Building Code of Australia (BCA) applies during staged building work will have detrimental and wide-ranging impacts on the property sector and further highlights the need for changes to be made to the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation).

The interpretation included in the Guidance Material will impact homeowners throughout NSW and the general public, the construction industry and the broader NSW economy.

The interpretation also contradicts long-standing and best practice common law principles and approaches to managing policy changes throughout the life of a construction project, namely avoiding retrospectivity, and is inconsistent in its application to Crown projects and non-Crown projects.

With around 30,000 new multi-unit dwelling completions in 2019 alone, many of which would have experienced minor design changes, the unintended consequences of the Guidance Material would mean there are thousands of multi-unit dwellings across the state that could now be deemed technically non-compliant, when in fact, they are compliant with the BCA in force at the time of the application for the first construction certificate (CC) under a development consent.

Moving forward, implementing this interpretation would grind construction projects to a standstill, increasing costs for homeowners and act as a drag on the broader economy at the worst possible time.

The practical and sensible approach adopted by the NSW Construction Industry to date has kept development moving in NSW in a manner which maintains compliance with the BCA in force at the time of the application for first CC under a development consent.

Put simply, staged approvals under a single development consent cannot be practically handled under different versions of the BCA. This is explicitly recognised in other jurisdictions around Australia where the legislation allows staged approvals to comply with the BCA in force as at the application for approval or at commencement of work for a development.

This was a matter of accepted procedural fairness (as well as common sense) and respect afforded to designers, builders and development clients that invest billions of dollars every year into NSW's biggest employer, the construction industry.

This does not even take into consideration the impact that the current guideline has on the *Design and Building Practitioners Act 2020* and *Design and Building Practitioners Regulations 2021* with respect to regulated design and design compliance declarations where variations to previously regulated designs are required and to be re-certified and additional CC issued with them.

While the Association of Australian Certifiers (AAC) disputes the interpretation included in the Guidance Material, and has received legal advice that diverges from the Guidance Material, we also recognise that the best way forward is a policy change to be made to the EP&A Regulation to clarify that the best practice approach to BCA compliance for staged approvals in Australian jurisdictions can continue in NSW.

A policy change would restore certainty and confidence to the NSW Construction Industry and to homeowners and occupiers across the state. The effective reduction in red tape would also be significant.

Introduction

The AAC represents registered certifiers employed in private practice and in local government in NSW.

This submission relates to the significant and economy-wide issues which will flow from the Guidance Material published by the Department of Customer Service on which version of the BCA applies during staged building work and applications for construction certificates.

This submission highlights the issues caused by the Guidance Material, the rationale for policy change, and the suggested policy change that could be considered by the NSW Government in consultation with industry.

Please note that this submission has also been informed by consultation with industry partners.

Background

CCs are used to verify the work you intend to carry out complies with the BCA.

Many developments, including Class 2 residential developments, hospital developments and other critical infrastructure, will require multiple CCs for various stages of the project. For example, a CC could be issued for works up to the ground floor slab and a second CC could be issued for the remaining floors, with another issued for the remainder of the building fabric, services and architectural elements.

Additionally, modified or updated CCs are required after a Development Application / section 4.55 is approved, which could be due to minor design changes.

As the BCA is regularly updated, the issue of what version of the BCA is to be relied upon when it comes to the management of multiple CC in a staged approval process has persisted for some time in NSW.

The consensus industry position, which aligns with common-law principles avoiding retrospectivity, is that the version of the BCA in force at the receipt of the first CC Application Form determines the relevant BCA for the entire development, even if an updated version of the BCA is issued during the lifetime of the issue of building approvals for the development. In effect, any subsequent staged or modified CCs are treated as amendments to the original CC for the purpose of determining the applicable version of the BCA.

This was the only workable interpretation to what is a poorly crafted clause in the EP&A Regulation (145(1)(b)). Other jurisdictions across the country include sensible clauses in their respective regulatory regimes (**see appendix**) which recognise the issues created by policy changes included in different versions of the BCA. Furthermore, we note that the view put forward in the Guidance Material would appear to violate Section 30(1)(b) of the *Interpretation Act 1987* which relevantly provides that the “...amendment...of an Act or statutory rule does not...affect the previous operation of the Act and statutory rule or anything duly...commenced under the Act or statutory rule.”

While some Department officials have put the case that performance solutions are the remedy to the issues created by the above clause, obtaining a performance solution for constructed elements is not possible under NSW law, as approving completed works via a CC is not allowed once it is constructed. A retrospective performance solution is viewed as not legal.

Additionally, obtaining a performance solution is not always possible, as performance clauses can, and are, often changed in different versions of the BCA, making performance-based assessments not able to be justified due to enhanced considerations in different versions of the BCA.

Therefore, a policy change is needed to address this significant industry-wide issue.

Rationale for change

Retrospectivity and inconsistent application of policy changes

It is a long-established principle that construction projects which begin before policy changes take effect are not impacted by that change, i.e., avoiding retrospectivity. This is usually achieved by including transitional arrangements, as was the case with the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and a raft of other legislative changes.

This ensures consistency in projects and allows industry to smoothly transition to new policy arrangements. The alternative approach would mean policy changes are being applied to projects that have already commenced creating a range of practical difficulties for all stakeholders, which are set out below.

Avoiding retrospectivity is a well-known and accepted approach, not just in the construction industry but all regulated sectors, and indeed, in everyday life. It is a matter of procedural fairness and also a significant efficiency consideration (reduction of red tape).

As has been observed by the [Law Council](#), retrospective laws can cause a 'number of practical difficulties for business, and the wider economy', including: actual and reputational damage to the market (sovereign risk); disruption to business planning processes resulting in high compliance costs; and unintended consequences from increased regulatory complexity.

Unfortunately, by completely disregarding this fundamental principle, this is exactly what the Guidance Material would seek to do through its interpretation of how different versions of the BCA be applied to staged construction and modified Construction Certificates.

Inconsistent treatment of Crown work and non-Crown work

The Guidance Material also exposes an inconsistency in the treatment of which version of the BCA is applied to Crown work versus non-Crown work.

As per section 6.28(2) of the *Environmental Planning and Assessment Act* (the EP&A Act), the BCA that is applicable to a Crown project is the one in force at the time of the date of invitation to tender. This then locks that version of the BCA in for the entirety of the project.

This is a common-sense interpretation, which the NSW Government considers appropriate for Crown work, yet private building work is subject to what is effectively a "moving feast" provision.

All things being equal and for the sake of consistency, the same principle should then apply to non-Crown work.

Practical implementation issues

The interpretation in the Guidance Material is unworkable. For instance, the order of staged approvals for a five-storey residential building might typically be:

- Stage 1: Footings, in-ground services and structure to ground floor slab
- Stage 2: Services up to ground level and balance of structure to level 5, and
- Stage 3: Balance of works including services from level 1 – level 5, internal and external walls, landscaping and fit out.

In this case, if the change in the BCA fell between stages 2 and 3, different versions of the BCA would require compliance with new requirements and changes to the referenced standards for services and other items.

This is not practical for many reasons. In the above example, this interpretation could retrospectively require new compliance requirements for elements already completed in Stage 1 or 2, or render the new or old parts non-compliant due to the interrelationships between the works completed in the different stages.

It is also important to note that relatively minor design changes made well into a project would also trigger a new version of the BCA being applied if they occur after a new version of the BCA is released, potentially rendering some or all of the previous work conducted on the project non-compliant. Given that construction certificates cannot be issued for work already carried out, the regulatory conundrum created is an unintended consequence of the Governments desire to have all changes adopted on all projects immediately (except for Crown building work of course). The regulatory burden on Local Government, regularising the work is disruptive and inefficient.

Importantly, the ramifications of adopting this interpretation are that thousands of completed buildings, and many currently under construction, would be deemed non-compliant on completion.

This case is a true working example that follows staging in accordance with Development Consents issued on many state significant projects by the Department of Planning.

Implications for homeowners/consumers

With around 30,000 new multi-unit dwelling completions in 2019 alone, the unintended consequences of the Guidance Material would mean there are thousands of multi-unit dwellings that could now be deemed technically non-compliant across the state, when they in fact are compliant with the BCA in force at the time of the application for first construction certificate.

This means that the owners of those dwellings would now have non-compliant homes.

Moving forward, there will be significant cost increases and delays for homeowners if construction projects which have already progressed significantly have to be retrospectively changed to comply with a new version of the BCA.

This would lead to significant costs passed onto consumers in the form of rectification works, or the inability to exchange on newly acquired dwellings. The flow on from this is rendering persons in some cases even homeless.

Designers and certifiers should be focusing on compliance with one set of BCA provisions and singular version of an Australian Standard, rather than assessing the differences between versions and considering performance solutions to address differences where applicable to a single project.

The uncertainty created at all levels and continued for the life of a building (typically 20 to 40 years), reduced quality of outcomes, expense (particularly at a time where Covid related debt is impacting the construction industry and consumers alike) is considered both unnecessary and unreasonable.

Implications for the construction industry

As a result of the proposed interpretation in the Guidelines, the following consequences are noted as having a daily impact on projects within NSW:

- unnecessarily overcomplicating the basic and logical process of construction and construction certification.
- causes mid project redesign and recertification (over and above modification of design for class 2 buildings).
- construction delays whilst re-documentation, re-certification and re-referral (such as to FRNSW) occurs.
- update of the Fire Safety Strategy required when the version of the BCA changes.
- increased risk of unauthorised works or abortive work.
- wasting Local Government resources formalising and regulating unauthorised work.
- actual confusion down to subcontractor / installer level, likely resulting in less compliant work than would otherwise be achieved.
- unnecessary performance solutions / unnecessary cost passed onto consumers.
- In some cases, a performance solution is simply not possible and could jeopardise the integrity of the Certification system.
- In some cases, changes in the insurance profile of the building
- legal confusion for the life of the building, including the risk of legal action and costs where opinions differ.
- increased cost and confusion related to fire safety schedules and annual fire safety statements for the whole building life.

In summary, this is an inefficient red tape issue, costing the construction industry and the economy.

Examples – Likely implications of the Guidance Material

As mentioned above, the implications of this interpretation will have economy wide ramifications. The below case studies highlight the significant ramifications of this interpretation across a range of potential scenarios.

Case study 1 – Private hospital development

A large multistorey private hospital has commenced construction under a series of staged CCs which included the shoring and structural works. The hospital is six storeys and the need to install a helipad on the rooftop has been identified.

The structure is almost completed, and the façade installation has commenced. A design change triggers a Modification to the Development Consent. The landlock around the proposed hospital prohibit the relocation of the helipad facility elsewhere.

The contingency planning by the designers and client had allowed for the additional load forces of a helipad in the design (design carried out over the 3 years previous).

The BCA has changed since the last construction certificate was issued and NSW regulation requires the final CC to meet the latest version of the BCA. The most recent BCA has a change to the structural requirements. The whole design is re-assessed, and it is found the abortive work / retro fit cost to the structure to satisfy the latest BCA is \$4 million plus additional construction program costs of \$2 million.

The hospital owner calculates the cost of installing the helipad makes the development unviable and finishes the project without a helipad. The helipad will be located at ground level 1.5km away at the edge of the town.

Case study 2 – Services trigger leading to cost and time blow out

A new standalone wholesale retail building has a bin waste area located externally against the external wall of the building. Despite there being no putrescible waste, the Council which has control of the Sewer and Stormwater system insists the bin area is roofed, bunded and drained to sewer.

The owner's consultant approaches the Council to discuss lodging a modification to the condition of consent. Council refuses to entertain a modified condition of consent.

The architects, civil engineers and drainage engineer design a roofed and bunded structure draining to sewer. The contractor's price the additional work.

A modification to the consent is lodged as the proposed work will not be consistent with the approved DA plans and elevations.

The DA modification process takes 4 months, and a CC is needed after that. The version of the BCA has changed, and the C10 Fire Safety Engineer insists on updating the FER to reference the changed version of the BCA. The fire safety engineer charges \$4,000.

The certifier spends 4 hours explaining why the condition of consent cannot be ignored (multiple times), and eventually receives the additional application for CC, lodges the CI 144 submission to FRNSW, checks documents, liaises, meets and discuss the issue is \$4,000.

Fortunately, the second referral to FRNSW results in a 10-day response, that the brigades do not want to provide an amended Commissioners Report (clause144, EP&A Regulation).

The whole exercise costs about \$100,000 including an additional CC. While the version of the BCA was not a critical issue, it still caused unnecessary red tape and cost that was unnecessary.

Case study 3 – Home rebuild leads to out-of-pocket costs and no project

A NSW working family buy a house in an established Sydney suburb with the ambition of removing the run down 70 year old dwelling and replacing it with a new family home. They engage a home designer and lodge a combined DA and CC with Council.

The DA and CC is approved by Council with conditions that highlight the protection of trees in neighbouring backyards.

The conditions require hand excavation of any footings in the canopy drip zones of a neighbour's very large eucalyptus trees. Also, no root with a circumference of more than 40mm (13mm diameter) is allowed to be cut.

Unfortunately, the drip zones extend well over their side boundary, about half way along the depth of their block.

The family home project comes to a halt and the owners take time off work and meet with the arborist and their builder. The options facing them are as follows:

1. Option 1 - redesign the footing system to sit on screw piles and steel beams over the ground. The builder can't give a firm price as the methodology is uncommon, but estimates an additional cost of \$22,000. An amended DA may be required and a new CC will be required.
2. Option 2 - redesign the home to be further away from the Neighbour's tree canopy. The redesign cost is estimated to be \$6,000, and the amended DA \$3,000. The builder advises that any hand digging of footings is hourly rate work with an estimate of \$4,000 for the redesigned footings in ground to be hand excavated. This risk that the house will be demolished and footing unable to be completed is also considered. The owners have a holding cost for their mortgage of \$2000 per week.
3. To make matters worse, the version of the BCA has also changed, and BASIX now requires a re-assessment. An additional cost of \$3,800 will apply to be BASIX compliant, regardless of which of the above options is chosen.

The owners are thankful they had not demolished the old dwelling yet, decide to accept the loss of money they have outlaid (about \$40,000 plus the stamp duty they paid), and they sell the old house.

Suggested policy change

To rectify this situation, the NSW Government could consider the following amendment to the EP&A Regulation.

- Insert “first” into clause 145 (1)(b) of the EP&A Regulation, which will then read:

“the proposed building (not being a temporary building) will comply with the relevant requirements of the *Building Code of Australia* (as in force at the time the *first* application for the construction certificate was made).”

This will address the abovementioned implementation issues, issues of inconsistency and retrospectivity and restore confidence to the industry and homeowners and occupiers.

For further information

To discuss this submission further, please contact AAC CEO, Jill Brookfield on 0431 082 259.

Appendix – Other regulatory approaches to determining which version of the BCA applies

| STATE | REGULATORY REFERENCE | SUMMARY |
|---------------------------|---|---|
| Tasmania | Tasmania - Section 55 - Compliance with Building Code - https://www.legislation.tas.gov.au/view/whole/html/made/act-2000-100 | Building Surveyor may apply previous version of BCA. |
| South Australia | South Australia - Section 132 Law Governing Procedures under this Act - https://www.legislation.sa.gov.au/LZ/C/A/PLANNING%20DEVELOPMENT%20AND%20INFRASTRUCTURE%20ACT%202016/CURRENT/2016.14.AUTH.PDF | BCA in force at the time the application was made. |
| Northern Territory | Northern Territory - Section 51 Application of New Regulations - https://legislation.nt.gov.au/Legislation/BUILDING-ACT-1993 | Building Surveyor may apply previous version of BCA. |
| Victoria | Victoria - Section 10.2 Application of new building regulations to building work - https://www.legislation.vic.gov.au/in-force/acts/building-act-1993/122 | Building Surveyor may apply previous version of BCA. |
| Queensland | Queensland - Section 15 References to changed BCA or QDC provision - https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1975-011 | Building Surveyor may apply previous version of BCA. |
| Western Australia | Western Australia – Regulation 31A – Applicable building standards generally - http://classic.austlii.edu.au/au/legis/wa/consol_reg/br2012200/s31a.html | Version of the BCA at the time the application for the building permit is made, or version of the BCA that was in effect 12 months before the time the application for Building Permit is made. |