

# **Enhancing the regulatory landscape to support an efficient and trustworthy remedial building industry**

**28 May 2024**

## **1. Purpose**

This paper seeks to acknowledge the positive outcomes of the remedial working group between industry and government and apply learnings from the discussions of the working group to provide areas of reform for consideration to provide public benefit.

## **2. Introduction**

A working group involving Australasian Concrete Repair and Remedial Building Association (**ACRA**) representatives and the NSW building regulator (NSW Fair Trading, and from 1 December 2023 Building Commission NSW) and NSW Planning, Housing and Infrastructure has operated for the past 3 years. This working group has primarily focused on the implementation of the Design and Building Practitioners Act 2021 (**DBP Act**), discussing implementation challenges and impacts upon the delivery of remedial building work.

Historically, industry practice has been for most remedial building work (repairs and maintenance) to be generally considered exempt development. This has meant that there was limited regulatory interaction and visibility of this work because exempt development does not require planning approval or the involvement of a certifier.

The establishment of the working group has provided the opportunity to understand and discuss key challenges faced by the remedial building industry that have not previously been explored. This has included discussing issues such as:

- The specialised nature of remedial building work and how it differs from new construction;
- How the intersection of the planning and building legislation impacts the delivery of remedial building work;
- The lack of regulatory guidance for the remedial building industry;
- The vulnerabilities of owners corporations and strata managers when contracting for remedial building work;
- Practical technical challenges that arise for remedial practitioners; and
- Opportunities for NSW building and planning laws to better facilitate the efficient and compliant delivery of remedial building work.

## **3. Consultation milestones**

The remedial industry's unique work environment has generated 3 strong years of collaboration with the NSW Government. Representatives from Building Commission NSW (led by Matt Press) and ACRA (led by Deborah Lockart) have worked hard to attain significant outcomes.

There are numerous government staff, working group members and remedial colleagues to thank for the highly successful and collaborative process to date. The working group has operated based on honesty, trust, respect and an open mind.

The consultation process to date has considered and progressed:

- i. Remedial building work definition
- ii. Emergency remedial building work

- iii. Regulated designs and requirements for remedial building work
- iv. Exempt development and remedial building work
- v. Planning portal pilot and development for exempt remedial building work (ie waterproofing)
- vi. Planning portal training – exempt development remedial waterproofing
- vii. Planning portal training – approvals pathways for remedial building work

The following Fact Sheets demonstrate some of the successful outcomes:

- [Emergency remedial building work Fact Sheet](#) (February 2023)
- [Exempt development and remedial building work Fact Sheet](#) (July 2023)
- [Remedial building work Fact Sheet](#) (October 2023)

The successes and developments generated by the consultation process have been shared widely with the remedial industry and broader strata community via forums, including events organised by ACRA, the Strata Community Australia (SCA) and Owners Corporation Network (OCN), with outstanding participation on all occasions.

The working group has also explored demarcation, performance solutions and ‘remedial solutions’. However, these require further exploration.

#### **4. Remedial solutions**

ACRA (2021) referred to ‘remedial solutions’, stating:

*“One of the challenges for the remedial building industry in meeting the DBPA requirements for waterproofing works on Class 2 buildings, is, that we are required to apply today’s standards and requirements to old existing buildings (or poorly designed/constructed new buildings) that have inherent deficiencies.*

*Compliance with current codes has always been an aim for remedial practitioners. However, where an aging building is ‘unable’ to meet current codes, alternative ‘Remedial Solutions’ are often developed to solve the issues, as best as practicable.”*

The working group are focusing on seeking a clear pathway for ‘remedial solutions’. Historically, remedial practitioners have taken a balanced approach to investigate defects, adopting a combination of visual and non-destructive methods, water testing and destructive investigations where necessary. From this investigative analysis they then prepare a solution. The solution will tend to be performance-based as compliance with the Deemed-to-Satisfy requirements of the BCA may not be practical due to cost reasons, or due to constraints arising from the original building design. There are also concerns that remedial solutions are often not formally tested, creating liability for the practitioners. The intent of further work is to unpack the application of the process stipulated for Performance Solutions in the *ABCB Handbook: Upgrading existing buildings* (Dec 2020) with real-world examples related to remedial work.

#### **5. Exempt development, performance solutions and remedial building work**

The working group identified the need for an understanding of when remedial building work may proceed as exempt development and when an approvals pathway (DA or CDC depending on the project scope) applies.

Currently planning legislation dictates that the use of a Performance Solution means that the remedial building work cannot be carried out as exempt development. The working group identified that although that requirement had existed in the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the Codes SEPP) for several years, it was not common

practice and there was very low awareness of the requirement by remedial practitioners, strata managers and approval bodies (private certifiers and local councils). This has presented as a significant problem, as 'remedial solutions' have historically been commonly applied in remedial building work, as it is challenging to achieve compliance with the more prescriptive requirements of Deemed-To-Satisfy provisions and Standards.

The interplay between the DBP Act and the Codes SEPP is important to understand in resolving the remedial building industry's challenges in relation to using Performance Solutions and 'remedial solutions'. Consequently, the Department of Planning, Housing and Infrastructure joined the consultation process in earnest in 2023.

The Codes SEPP Division 2, 1.16 outlines the general requirements for exempt development as follows:

*(a) must meet the relevant deemed-to-satisfy provisions of the Building Code of Australia, or if there are no such relevant provisions, must be structurally adequate, and*

*(b) must not, if it relates to an existing building, cause the building to contravene the Building Code of Australia, and*

The ['exempt development and remedial building' Fact Sheet \(July 2023\)](#) provided much needed guidance for the remedial industry about what work might be considered exempt development, or not.

The consultation process identified the absence of reference to remedial building work in the Codes SEPP and the lack of guidance about remedial building work. The consultation minutes (15 November 2023) reflect our consultation at the time:

*The [Fact Sheet \(Practice Notes\)](#) published in July 2023 has provided the opportunity for proposed amendments to the Codes SEPP. There are approximately 38 proposed changes to the Codes SEPP.*

The Department of Planning, Housing and Infrastructure is currently working on Phase 1 amendments. Potential changes to the Codes SEPP to consider Performance Solutions and the remedial industry (Phase 2) will require a policy investigation by the Government.

The remedial industry-government consultation has collaborated extensively about Performance Solutions and remedial solutions. The working group has identified areas where clearer guidance and possible reform could respond to issues discussed by the working group that is impeding the delivery of timely, compliant and affordable remedial building work, including planning approval processes, liability of design practitioners and limitations of NCC Assessment Methods. Late last year the working group acknowledged that we need to explore this in more detail and contribute to Government's ongoing legislative reform processes.

## **6. Opportunities for NSW building and planning laws to better facilitate the efficient and compliant delivery of remedial building work**

The working group has identified several opportunities for reform in planning and building laws to improve the operation of the remedial building industry that Government could consider as part of its ongoing consultation on planning and building legislation reform.

### **Consideration 1: Modernisation of the Codes SEPP**

Issues: The working group identified that the Codes SEPP does not clearly define common types of remedial building work which creates significant challenges for practitioners, applicants, and regulatory bodies (councils, certifiers, BCNSW).

Changes: Consider revising the Codes SEPP to incorporate content of the Fact Sheet published in 2023. Consider a separate criteria as specified exempt development and complying development for remedial building work for class 2 buildings, including the concept of replacing like for like. For example: change clause 1.16(1)(a) of the Codes SEPP to allow some performance solutions as exempt development. Change clause 4.4B3 to allow external remedial building work above 3 storeys without a Development Application.

### **Consideration 2: Modernisation of the approval pathways to integrate and leverage from the DBP Act**

Issues: There is a large gap in the controls applied to exempt and non-exempt development, and the DBP Act excludes all forms of exempt development except for certain types (e.g. waterproofing and re-cladding). While the consultation on the enabling legislation on DBP Act reforms considered exempt development work as part of the broader discussion of what types of remedial work would be subject to the Act, the full scope of minor external alterations allowed as exempt development was not apparent to much of industry when the DBP Act was enacted. This included common remedial building work such as balustrades replacement which are currently allowed as exempt development without regulated designs while waterproofing work is captured by the declared design process.

Changes: Work with the Department of Planning, Housing and Infrastructure to explore how an expedited process that sits between exempt development and the CDC pathway could be used to fast-track remedial building work without compromising its compliance with the BCA. In this new pathway, remedial building work could be required to comply with the DBP Act, but that work would not require planning approval. Further consideration on what the involvement of a certifier could be, including ensuring certifiers have the support they need to make timely decisions and do not require owners to procure unnecessary design or building work. This pathway could be used for work involving key building elements (e.g. critical loadbearing elements) or higher risks that would benefit from greater oversight as Construction Issued Regulated Designs (CIRDs) and Design Compliance Declarations (DCD) would apply to remedial practitioners.

### **Consideration 3: Modernisation of licensing requirements**

Issues: Remedial practitioners are not recognised as distinct licence classes under the HB Act and DBP Act but are captured under general building work licensing and registration requirements.

Changes: Consider introducing new categories to recognise the unique skills and experience required to perform remedial building work as compared to new construction. This could include a remedial builder and remedial engineer. There should also be consideration to lifting the education requirements associated with a waterproofing licence to recognise the new qualification (Diploma of Construction Waterproofing Design and Survey, CPC50722). This aligns with a proposed reform under the Building Bill to create a specialist licence for waterproofing work with stronger qualification and experience requirements.

### **Consideration 4: Modernise AS4654.2 'Waterproofing membranes for external above-ground use, Part 2: Design and Installation'**

Issues: The Standard does not provide for alternate remedial membrane connections and terminations (or as otherwise referred as 'remedial solutions' or in some cases Performance Solutions), to avoid the unnecessary replacement of the whole existing membranes.

Changes: Consider providing for 'remedial membrane terminations' (vertical and horizontal), to permit localised terminations. Consider providing for alternative remedial membrane terminations, where they cannot practically comply with current clause 2.8.1.1. of AS 4654.2.

#### **Consideration 5: Design Practitioners Handbook for the remedial building industry**

Issues: Current documentation does not necessarily speak to the remedial building industry. This has caused confusion, and interpretation by the remedial industry and certifiers as they attempt to comply with the new requirements.

Changes: Consider preparing a Design Practitioners Handbook for the remedial industry.

#### **Consideration 6: Academic/scientific research**

Issues: Lack of public documentation evidencing remedial solutions.

Changes: Consider documenting tested solutions and encourage academic/scientific research to test remedial solutions in promoting tested remedial solutions. Including: accepted methods for connecting existing materials to new materials; documenting an Industry standardised test method for demonstrating adhesion of new materials to existing materials; and the identification of material type(s) and demonstrating compatibility.

#### **Consideration:7: NCC 2025 Proposed Amendments**

At the point of writing, the proposed NCC 2025 had recently been issued for public comment. The remediation of existing buildings may be unable to comply with the proposed NCC waterproofing provision. This needs further consideration however changes arising through the considerations above may provide a mechanism for addressing this issue.

## **7. Acknowledgment**

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- ACRA Advocacy Committee: Deborah Lockart, Helen Kowal, Tom Mackay, Grahame Vile, Peter Johnsson
- Building Commission NSW: Matt Press, Jonathan Lynch, Charles Zhang
- Department of Planning, Housing and Infrastructure: Michael Lucchitti

## **References:**

ACRA (17 December 2021), The DBPA and Implications for Waterproofing of Class 2 Buildings. Caroline McConnachie, Helen Kowal, Grahame Vile, Peter Johnsson, and Deborah Lockart.

ABCB Handbook (December 2020) Upgrading existing buildings, version 2.