



24 July 2019

Building Stronger Foundations consultation
Regulatory Policy
Better Regulation Division
Department of Finance, Services and Innovation
2-24 Rawson Place
HAYMARKET NSW 2000

By email: BCR@finance.nsw.gov.au

Dear Sir or Madam

Re: Submission on the Building Stronger Foundations Discussion Paper

SSROC thanks you for the opportunity to make a submission on the *Building Stronger Foundations* Discussion Paper.

The Southern Sydney Regional Organisation of Councils (SSROC) is an association of eleven local councils in the area south of Sydney Harbour, covering central, inner west, eastern and southern Sydney. SSROC provides a forum for the exchange of ideas between our member councils, and an interface between governments, other councils and key bodies on issues of common interest. SSROC includes some of the most densely populated parts of Sydney. Together, our member councils cover a population of about 1.7 million, one third of the population of Sydney.

Following the recent crisis of building defects in apartment buildings located in SSROC and the widespread calls for urgent regulatory reform, there is a clear challenge for the State and Commonwealth Governments to work quickly and closely to restore confidence in building standards of new residential buildings. There is a major concern that the industry is failing consumers and their past complaints have been ignored.

Ian Bailey, a professorial fellow at the University of Melbourne Law School, draws our attention to the hidden dimensions of what is a state and national problem. "The full extent of the problems is seriously misunderstood, and the looming economic and social crisis has not been recognized"¹. The collapse of trust in the industry regulation is now evident. The NSW Premier is right in saying "there are too many problems with too many challenges"².

¹Sydney Morning Herald 22 July 2019, Ian Bailey, *Canberra can help victims of the building crisis*. <https://www.smh.com.au/national/developers-cutting-corners-for-profit-would-be-a-crime-elsewhere-20190721-p5297w.htm>

²Sydney Morning Herald 10 July 2019, Jacob Sawicki, Megan Gorrey and Lisa Vsentin, *It hasn't worked: Premier admits Sydney's building industry is failing*. <https://www.smh.com.au/national/nsw/it-hasn-t-worked-premier-admits-sydney-s-building-industry-is-failing-20190710-p52601.htm>

It is heartening that the Minister for Industry, Science and Technology Karen Andrews advised on 18 July 2019 that the States and the Commonwealth Governments have struck an agreement to pursue national building standards. We understand that as part of the deal with the Commonwealth and States, a new taskforce will be established and will prioritise implementing the recommendations of Shergold-Weir Building Confidence report.

Any NSW reform package to improve accountability that moves away from over-reliance on self-regulation will need to be part of a comprehensive plan that extends beyond the recommendations canvassed in the *Building Stronger Foundations* Discussion Paper. A comprehensive plan needs to make long term improvements to the industry systems while setting in place mitigations to resolve the urgent and dangerous problems of fire-prone cladding and gaps in building industry insurances.

Urgent action is needed from the NSW State Government to help fund the timely replacement of dangerous flammable cladding to protect unwary consumers, through a coherent and comprehensive funding plan similar to that being implemented in Victoria by the Victorian State Government.

There is an urgent need to act when consumer protections, planning and building laws and systems fail to protect those who rely on them to safeguard their largest financial asset and the ability to use of the family home.

1. SSROC welcomes a commitment to continuing engagement, collaboration and greater transparency highlighted in the Discussion Paper

SSROC welcomes the continuing engagement of local councils around the proposed *Building Stronger Foundations* reform package.

This commitment to collaboration between the NSW Government and local governments is both welcome and crucial for realising a joined-up regulatory system. It is also a critical part of the feedback loop for enabling communities to shape their future.

SSROC supports the development of an open, transparent, more accountable approach as vital basis for collaboration between NSW government and local councils. Each party will rely on the others' support to fully achieve the best outcomes for consumers, building owners and local communities.

While the reform envisages a clear separation of regulatory roles for the Building Commissioner and local councils, shared strategic objectives will be important for sustaining lasting change.

2. Support in principle for the key recommendations of the Building Stronger Foundations Discussion Paper

The NSW Government Response outlines four key streams of reform work, which aim to collectively deliver a more robust regulatory framework for the construction of buildings in NSW.

As the first steps in implementing the NSW Government Response to the national report *Building Confidence: effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, SSROC gives in-principle support to the intent of the package of interconnected reforms.

However, to be effective, these positive reforms need to sit within a broader comprehensive legislative policy and quality assurance frameworks and be accompanied by a workable implementation plan to systemically bring about improvements that strengthen accountability transparency and quality assurance.

Establishing outcomes that better protect consumers interests

The overall outcome of the reforms should enable dwelling owners, investors and owners' corporations to have confidence that:

- their dwelling is a safe and healthy place to live in and was constructed properly according to the Building Code of Australia;
- If things go wrong in this process there is a system in place, so there is a relatively straightforward and timely process to identify whether the causes of building defects were preventable, due to: design; construction; maintenance; or a combination of these, and which party(ies) are now responsible in law for their rectification; and,
- In any event, consumers' habitation needs can be effectively resolved, and financial risks adequately mitigated through affordable building and indemnity insurance or a building bond, without having to resort to the courts.
- Finally, there remains recourse to the courts to determine unresolved disputes and liabilities as the last rather than the first option.

As a piecemeal approach cannot deliver on these outcomes, our support for the recommendations is qualified until further detail is provided and the approach is fully located in a reformed regulatory framework that is supported by State and Commonwealth Governments.

This approach should also provide a much deeper understanding of the likely impacts on local government, its roles and services, as well as any potential unfunded liabilities.

Other measures beyond the four reforms are required to assist renters and owners facing their current building problems emanating from the current flawed industry self-regulation.

The suite of proposed reforms includes:

Requiring categories of building practitioners who are registered as 'building designers' to declare plans and performance solutions are compliant with the Building Code of Australia, and that builders declare that they are built according to these declared plans

SSROC broadly supports the proposal that the NSW Government commit to introducing legislated obligations for 'building designers' to declare documentation that specifies it is compliant with the Building Code of Australia (BCA), and for such documentation to be made available to the building regulator³ on request.

Building practitioners will be required to register with the Building Commissioner before declaring plans, providing final designs and/or specifications of elements of buildings and working to those plans⁴. Builders will be required to declare that the building was constructed according to these plans.

³ It is assumed that the building regulator includes both the proposed Building Commissioner, and the local council where it is the consent authority

⁴ Building Stronger Foundations Discussion Paper, page 28

Comment

Critically this reform should impose upon residential apartment developers an obligation to comply with building regulations and standards. A preventative approach should be the core focus and establish strong unequivocal requirements on all to build correctly.

It will be important that local councils, as consent authorities, where appropriate have seamless, direct access to building designers' final plans provided to the Building Commissioner.

All persons who have a role in drafting plans/designs should be accountable and this documentation should be submitted at Construction Certificate stage.

Introducing a new registration scheme for these 'building designers'

SSROC supports the proposal that all practitioners who provide final designs and/or specifications of elements of buildings and prepare plans based on those designs should be registered. Such practitioners are likely to include building designers, architects and engineers.

A registration scheme will enhance accountability by ensuring that practitioners have the relevant skills, hold appropriate insurance, and can be held accountable for their actions including being subject to appropriate disciplinary action.

'Building designers' would be registered for the specific functions of signing-off plans and declaring that plans are compliant with the BCA. 'Building designers' should be required to meet a list of competencies to demonstrate that they are able to complete documentation to a high standard.

'Building designers' should be required to acquire insurance to protect themselves and their customers where a loss is suffered as a result of negligence or breach of duty in performing their function.

Comment

To avoid duplication, gain efficiencies and reduce red tape it seems reasonable to leverage existing registration schemes for professionals in the building and construction industry, where possible.

Currently unregulated professionals (for example, commercial designers) will need to separately assess that they have the necessary skills to complete the documentation to a high standard.

Ensuring an industry-wide duty of care is owed to subsequent home owners

SSROC supports introducing a duty of care owed by building practitioners to building owners. Purchasers of buildings often have limited knowledge or understanding of the BCA.

Purchasers of new buildings rely upon the diligence of building practitioners and statutory protections to have confidence in the quality of development. Purchasers rely on the regulatory system to deliver a building that is compliant with the BCA. Accordingly, purchasers of property also turn to the protections of the system in the event of any failings in the building, such as defects.

There is a clear and obvious logic that buildings should be built in accordance with relevant laws and standards, and that building practitioners should design and build to standard and bear the risk if they fail to do so.

To ensure that homeowners are guaranteed a duty of care for defective or non-compliant work, SSROC supports the proposal to amend legislation to clarify duties owed by various practitioners. A well-defined duty should help to encourage cultural change by creating an overarching standard for building work and ensuring greater accountability across all practitioners in the supply chain.

Comment

The duty of care should support vulnerable homeowners, owners' corporations, subsequent title holders and small businesses in claiming for defective building work.

However, disappearing developers are part of the missing accountability space. Single purpose corporations, used by some developers, can be voluntarily wound up, often without payment of tax and contractors.

To maintain the duty of care in such circumstances, the directors may need to be held liable where the company has been wound up and building insurances and bonds for major defects are insufficient to protect consumers.

The construction industry itself has called for better enforcement of rules so that cowboy operators are held to account.

The full set of recommendations need to be adopted to address the current delusional process where private certifiers provide certifications that prove to be seriously inadequate. Sales of apartments 'off the plan' rely the expectation that the completed building will be fit for habitation and the basis of obtaining housing finance.

Appointing a Building Commissioner to act as the consolidated regulator for building in NSW

SSROC supports appointing a Building Commissioner to act as the consolidated regulator for building in NSW with appropriate powers similar to those granted to other regulators who administer licensing schemes. The regulatory powers would include the ability to grant, refuse, suspend, cancel and vary registration.

Prevention should be the ultimate focus to minimise non-compliant buildings – by clearly addressing supply chains and affecting developer profits. Associated penalties should be proportionate to profits. A serious and sustained breach of the compliance arrangements should affect a developer's ability to do business and sell apartment units.

The Commissioner's powers would be complemented by clear grounds for disciplinary action. A suite of compliance and enforcement powers are needed to monitor and target offences relating to non-compliant registration and 'designing work'. The regulator should also have powers to undertake investigations and audits of both the documents and the registration holder.

Tough penalties should be available for any false or misleading conduct, including falsely signing off on plans in contravention of the statutory declaration.

Complementary protections should be available for those aggrieved by decisions of the regulator, such as a show cause process and administrative review by the NSW Civil and Administrative Tribunal.

Authorised officers would also have a delegated suite of powers to assist the regulator with investigating, monitoring and enforcing compliance with the scheme.

Comment

The audit function of the Building Commissioner creates and presumes a discernible and discoverable audit trail. This trail will rely upon an unbroken chain of those responsible with accountabilities across the complete design, development and construction process and the warranty period that encompasses: building designers; certifiers; builders and contractors; and commercial building and indemnity insurers.

However, the Discussion Paper does not provide sufficient details of the Commissioner's compliance and enforcement powers. Of critical importance to our member councils is how the Commissioner's role is proposed to be implemented and work in conjunction with local councils' roles and responsibilities.

Clearly the responsibilities and workload of an effective Building Commissioner will be beyond a single officer holder and require the assistance of authorised officers.

It will be important to know whether local government will be involved in this role.

Authorised officers

Authorised officers will probably need powers to:

- gather information gathering powers, including the power to record evidence;
- require records and answers;
- enter premises and conduct inspections, take and remove samples, take photographs or recordings, make any examinations, inquiries, measurements or tests that are considered necessary,
- seize materials, etc.

As with other schemes, authorised officers will be required to obtain permission from the owner or a search warrant to enter any residential premises.

Further work is potentially required to identify overlaps and intersections with council officer powers as the consent authority.

3. Seeking further information about the impact of the proposed reforms on the roles and responsibilities of local councils

Local councils play a critical role as consent authorities and as a certifying-authorities for building developments.

Councils find themselves enmeshed in the development compliance process but without the necessary powers to change the regulatory system where there are glaring problems.

In this consultation process local councils' voice requires some special and greater consideration, as key operators in a well-functioning regulatory system and as communities' chief place makers.

Home buyers and renters affected are also local residents and council ratepayers.

The crisis with the quality of buildings is therefore of great concern to local councils who represent both those directly affected by serious building faults as well as their neighbours and their communities exposed to public risk.

The cost impacts on councils of the planned reforms are unknown and require further discussions directly with local councils to clarify the potential impacts and identify any new responsibilities envisioned for councils.

Attachment 1 highlights some of the key questions that need to be answered for councils to improve the understanding and transparency of the intended reforms.

4. Future directions for building reforms to address flammable cladding and other issues

While SSROC welcomes the proposed reforms contained in the Discussion Paper they will not be sufficient to provide the cohesive framework needed to address the problems of flammable cladding on residential and commercial buildings.

At the Ordinary Meeting of SSROC held on 15 February 2018 the Mayors and other Delegates of SSROC member councils deliberated on Aluminium Composite Panels (cladding) in the SSROC area. We noted that the (then) Department of Planning and Environment had initiated some measures to address the issue of external cladding before it becomes a crisis as was the case in London Grenfell fire. For example, the Department issued Planning Circular BS 15-001 in August 2015 that provided information on external walls and cladding and requirements for certificate of conformity. The NSW Government also introduced the Building Product (Safety) Bill 2017 to empower councils and other relevant authorities to act on matters of unsafe use of building products. We commended that the NSW Government put in place the Fire Safety and External Wall Cladding Taskforce with a 10-point plan for fire safety and external aluminium cladding.

The NSW Government now needs to do more by providing financial assistance to rectify flammable cladding on existing buildings to protect the safety of residents from building failures and help mitigate the cost of rectification.

Addressing the many problems with building and professional indemnity insurance will also require a robust approach. Currently purchasers acting in good faith with insurance can suddenly find themselves homeless.

The consumer and their insurers cannot be sure when a problem emerges, at what point the problem occurs, and who was responsible for causing the problem. Interventions to fix some points and not others will only lead to limited improvements. The insurance industry will desert the arts of industry due to unquantifiable costs and the lack of effectiveness in driving down the incidence of poor-quality construction work.

Reportedly insurers are pulling out of underwriting private certifiers. Ensuring independent certification and supervision of construction sites is only part of the solution. Further reforms to certification are an outstanding area that requires further attention.

Without greater transparency and a consistent approach to accountability, the causation remedies and the crisis will continue and ongoing problems in the building industry will be unavoidable.

It is important not to compromise or undercut a comprehensive plan for regulatory reform. Policy gaps will disrupt and remove sections of the audit trail. Delays in providing a coherent response

will worsen the community crisis of confidence and undermine the collaboration that is needed to adequately resolve problems.

5. Conclusion

SSROC welcomes the opportunity to provide comment on the *Building Stronger Foundations* Discussion Paper and for the NSW Government to take practical steps to achieve better regulation of the building industry. For a variety of reasons, many building owners now face significant difficulties determining and pursuing liability for defects that arise after occupation. The evacuations of tower blocks and leaving apartment buildings vacant due to health and safety concerns underlines the need for urgent action and a comprehensive short, medium, and long-term plans to restore public confidence and ensure consumer protections return to the system.

SSROC therefore urges a careful but timely response to this reform proposal to help ensure this crisis in confidence is quickly resolved and delivers stronger protections for consumers and owners of property. “Two separate elements need to be considered: the problems faced by the present owners of defective and unsaleable units and what must be done to prevent a recurrence of the problems.”⁵

In this reform process we look forward to being further consulted and working with the NSW Government to ensure our councils and communities, are well served and better protected.

In order to make this submission within the timeframe for receiving comments, it has not been possible for it to be reviewed by councils or to be endorsed by the SSROC. I will contact you further if any issues arise as it is reviewed. If you have any queries please do not hesitate to contact me or Mark Nutting, SSROC’s Strategic Planning Manager on 8396 3800.

Again, thank you for the opportunity to comment on the *Building Stronger Foundations* Discussion Paper and we are keen to participate in the next stage of regulatory reform, in particular detailed discussions about their impact on local councils.

Yours faithfully

Namoi Dougall
General Manager
Southern Sydney Regional Organisation of Councils

⁵ Sydney Morning Herald 22 July 2019, Ian Bailey, Canberra can help victims of the building crisis.

Attachment 1

Some key questions related to potential impacts on local councils

1. What administrative support and related funding is envisioned for the Building Commissioner to perform his/her new accountability roles? Are 'building designer' registration fees intended to cover these costs? Clearly the new risk-based role is extensive and challenging.
2. Are there any new **costs** that could be imposed on councils and their ratepayers? Will the government provide ongoing funding for any additional council responsibilities or are any costs intended to be fully recovered through fees?
3. What role and new responsibilities will councils have in supporting the proposed reforms? What are the points of intersection and connection with councils' consent authority role and activities and how will they be coordinated? How will council's role relate to, and be separate from, the new functions of authorised officers who will be assisting the Commissioner?
4. What are the implications for councils performing a building certification role? Is it predicted that the proposed changes could drive additional certifying work to council certifying teams?
5. Where will the designer's and builder's declarations be held and how will they be made available to council and property owners, including after the property changes ownership?
6. How will the package of reforms in *Building Stronger Foundations* relate to other broader building compliance and assurance building reforms (e.g. flammable cladding) needed to protect housing consumers?
7. How will these reforms relate to building reforms occurring at the national level? What are the broader ramifications for legislation and its scope, of the NSW Government moving away from self-regulation in the building industry?
8. When will councils be able to see the draft legislation to establish the Building Commissioner and related powers?
9. The reforms involve substantial change in business practice. How will the change process be managed and supported with targeted education and training for the industry? How will a public education campaign be coordinated during the transition period?