

23 July 2019

Mr John Tansey
Executive Director
Regulatory Policy, Better Regulation Division
Department of Customer Service
Via email: BCR@finance.nsw.gov.au

Dear John,

RE: Building Stronger Foundations Discussion Paper

The Urban Development Institute of Australia (UDIA) NSW is the leading industry body representing the interests of the urban development sector. UDIA represents over 550 member companies in NSW, and advocates for better planning, timely and affordable housing, and the building of vibrant communities to increase local job opportunities.

UDIA NSW welcomes the opportunity to provide a response into the NSW Government's Building Stronger Foundations Discussion Paper. The Building Stronger Foundations Discussion Paper was released on 26 June 2019 and was designed to inform the implementation of the recommendations from the Shergold-Weir and Lambert reports into the building industry.

We understand the NSW Government intends to draft legislation and introduce it to the NSW Parliament by the end of the year. UDIA NSW applauds swift action, but also cautions against haste in this to enable appropriate industry consultation. There have been many attempts to improve building regulation, which have added undue complexity, while not resolving the underlying issues in the sector. Most recently, we point to the Strata Building Bond, where all major stakeholders acknowledge deficiencies.

UDIA NSW is currently working with its members to form a holistic view of reform to building regulations to deliver high quality buildings while supporting housing affordability. UDIA NSW has concerns about the broader efficacy of the existing system to deliver appropriate reform.

We note there have been hundreds of thousands of tall buildings built in NSW over the past 10 years, and there has not been an apartment building facing radical structural collapse.

Buildings have become more complex and they often need to be delivered quickly, many in the industry work to ensure that the several hundred elements are completed with-in scope and in given timeframes. In terms of the prevalence of defects in the 2017 financial year, 2860 home building dispute applications were lodged with NCAT, 95% of defects related to waterproofing and NCAT prefers rectification to resolve building defects.

UDIA rejects the recently spoken notion that the building industry is unregulated, we note The Opal Tower Investigation Report by John Carter, Mark Hoffman and Stephen Foster states that:

Australia enjoys a strong regulatory environment in construction, especially in regards to building structural safety, through the National Construction Code and associated mechanism. This has provided Australia with an excellent record in terms of building structural safety with few if any of the catastrophic incidents recorded in many other international jurisdictions. Standards and Codes are generally built into our regulatory systems to specify minimum safety criteria which must be attained.

The UDIA therefore rejects the notion that the industry is unregulated but would agree improvements can be made and should take place with industry consultation.

Constructing complex buildings is never going to be free of defects, UDIA believe the objective of reform should be to:

1. Ensure buildings are safe for occupation.
2. Provide a clear avenue to resolve and manage defects when they occur.

Leading practitioners, including UDIA members manage defects when they occur through a range of project management and quality assurance practices which ensures they deliver high quality buildings that are safe for occupation, while preserving housing affordability.

UDIA NSW members have a range of suggestions to help improve the current building regulation system. UDIA NSW believes there is currently a complicated system with unclear liabilities and a multitude of schemes to address defects. UDIA NSW believes that this could be truncated and simplified possibly looking at insurances that could protect homeowners to have defects rectified.

There are also large projects that are typically delivered through design and construct frameworks, Most building major defects originate from poor design in the detailed construction documentation stage due to lack of competent and professional reviews, or during construction due to lack of compliance inspections on key elements such as structure, cladding, waterproofing, and fire rating compliance. We would be keen to further discuss how to improve these elements to minimise defects from occurring.

The Proposed Reform

The NSW Government proposes four reforms to deliver a more robust regulatory framework:

1. A requirement for buildings to be designed and constructed to plans that fully comply with the Building Code of Australia.
2. A requirement that all building practitioners, including building designers, architects and engineers be registered to ensure they have the appropriate skills and insurance, and can be held accountable for their actions.
3. Introduction of a new industry-wide principle of duty of care, enabling homeowners to seek compensation if a building practitioner has been negligent.

4. Appointment of a Building Commissioner, who will regulate all aspects of the NSW building industry and have the power to investigate and take disciplinary actions for improper conduct.

While UDIA NSW does not consider these proposals to be objectionable, we also do not believe them to be effective at resolving the core issues relating to building and construction. That is resolving and managing defects with developers or builders that do not want to do the right thing.

UDIA will provide further discussion around what we believe an effective model for reform if requested. We request further industry consultation and collaboration on reforming the regulatory framework.

A requirement for buildings to be designed and constructed to plans that fully comply with the Building Code of Australia.

UDIA NSW support this requirement. We note that the EP&A Regulation has prescribed a condition of consent that the work must be carried out in accordance with the requirements of the Building Code of Australia. UDIA believes this adequately requires compliance with the Building Code of Australia.

We note there is a proposal to increase the amount of documentation that is required to be prepared as part of the design process, we question if this would actually provide greater safety beyond existing best practice. However, we are keen to have an ongoing discussion. There needs to be a balance between red tape and improving industry and community confidence.

A requirement that all building practitioners, including building designers, architects and engineers be registered to ensure they have the appropriate skills and insurance, and can be held accountable for their actions.

UDIA NSW recognises that this is designed to implement recommendation 13 of the Lambert review to ensure that those signing-off that aspects of buildings are compliant are able to be accountable.

UDIA NSW believes that the existing registration and accreditation schemes are likely to be appropriate for this type of registration to ensure ability to provide sign-offs with insurance to be held accountable. We note the Building Professionals Board already has the ability to accredit a range of different building practitioners through Category C. We note that many of the defects do not come about due to design issues, but instead poor workmanship and project management.

UDIA NSW has concerns about mandatory insurance noting the current issues with liability insurance, we believe the government could look at developing a government backed insurance product for the industry or building owners.

Introduction of a new industry-wide principle of duty of care, enabling homeowners to seek compensation if a building practitioner has been negligent.

A duty of care would make it easier for owners seeking to pursue liability for defects that arise after occupation.

UDIA believes that in many cases this will create an apportionment regime, we believe there may be an unintended consequence of increasing complexity instead of reducing complexity, particularly when other compensation regimes exist. UDIA recommends the Government undertake further streamlining of the process to rectify defects.

We are further concerned that it is possible for a common insurer across the parties, which we believe may result in higher premiums across the board, and not properly allocate risk and care.

The more important element to providing accountability is that understandably Certifiers rely on these 'Compliance Certificates' for work they have not inspected or cannot inspect (given they are not on site all the time, and perform only limited inspections as required by law). Those compliance certificates are not covered by the proposed changes, and therefore the issuers of those certificates are not going to have additional oversight or be required to be insured, and they will not owe the proposed statutory duty of care to owners.

Appointment of a Building Commissioner, who will regulate all aspects of the NSW building industry and have the power to investigate and take disciplinary actions for improper conduct.

UDIA does not oppose the appointment of a Building Commissioner. UDIA requests further clarity as to the role of the Building Commissioner, we understand the Building Commissioner should undertake a broad Building Regulatory Function encompassing the roles currently undertaken by:

- Building Professionals Board
- Fair Trading
- Department of Planning

We believe a working group with industry should be established to determine what will be included in the role of the Building Commissioner. UDIA NSW has possible concerns about the auditing role of the Building Commissioner at stifling innovation, by requiring prescriptive solutions. UDIA believes that experienced and high-quality engineers need to have flexibility to bring the best solutions from industry, academia and other environments to the fore.

Conclusion

UDIA NSW believes the existing system is a robust system for ensuring safe and high-quality buildings that also supports housing affordability. UDIA NSW believes that there is an important ongoing discussion about improving standards within the building industry. This includes reviewing the range of different warranties and bonds provided to assist owners with rectifying defects and providing a chain of responsibilities for certifiers.

Yours sincerely

Steve Mann
Chief Executive