

Submission
No 79

**INQUIRY INTO REGULATION OF BUILDING
STANDARDS, BUILDING QUALITY AND BUILDING
DISPUTES**

Organisation: City Futures Research Centre, UNSW Sydney

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Submission to NSW Parliamentary Inquiry re: Regulation of building standards, building quality and building disputes

City Futures Research Centre at UNSW Sydney is a national leader in scholarly applied urban research. Since 2006, City Futures has worked with strata industry stakeholders to develop and fulfil a comprehensive strata research agenda. We have produced cutting-edge work examining a range of issues in strata, including governance, management, value, investment, resident demographics and the experience of living in strata. In the process, the research has helped to reveal the challenges and benefits of strata living.

Our most recent strata-related research focus is on defective apartment buildings, given defects are a major and ongoing concern for apartment residents and owners. Our current project '[Cracks in the Compact City: Defects in Strata](#)' directly addresses this issue by looking into the prevalence and common causes of building defects, and how multi-unit housing quality might be improved. Given this research focus, we appreciate the opportunity to make a submission to the Public Accountability Committee's inquiry into the regulation of building standards, building quality and building disputes. Our submission draws on early insights from this project, as well as 10 years of research on strata and high-rise living more broadly.

Our research has shown that property owners and tenants of multi-unit residential housing bear a significant burden in the event of poor building outcomes. Rectifying and finding avenues of recourse for defective building work is [emotionally and financially challenging](#) for owners and tenants of multi-unit housing, with obstacles to good outcomes inherent in the process. Reforms to the building system are an important step towards easing the burden on owners and residents. Given the focus of our research, we direct our observations to issues (b) to (f) of the *Terms of Reference* for the Inquiry.

(b) the adequacy of consumer protections for owners and purchasers of new apartments/dwellings, and limitations on building insurance and compensation schemes, including:

(i) the extent of insurance coverage and limitations of existing statutory protections

Insurance coverage for high-rise buildings is currently inadequate. Insurance schemes such as the home building compensation scheme (previously home warranty insurance) are essential given their importance in [past defects cases](#) as an insurance of last resort. The fact that home building compensation cover is no longer required for buildings of four or more storeys is inequitable and erodes the confidence of purchasers in the residential apartment market. The recently introduced strata building bond scheme provides 2% of the contract price for the building work, which may not cover the full costs of defect rectification. Further, buildings constructed after the home building compensation scheme reforms but before the introduction of the strata building bond scheme have diminished insurance protections. The home building compensation cover (as a last resort insurance) for all residential property (i.e. to remove the exclusion for properties of 4 or more storeys) should be re-introduced.

Similarly, the statutory warranties under the *Home Building Act 1989* (NSW) are inadequate, given the limited timeframes in which a claim must be brought (6 years for ‘major’ defects and 2 years for other defects). Our research shows that these [timeframes](#) can be a major challenge. Defects may not become apparent immediately, meaning owners may not even know they have a problem until well into the six-year period for major defects and well beyond the two-year period for other defects. The fragmented nature of strata ownership also adds obstacles to bringing a claim within these timeframes, as this necessarily involves coordinating multiple owners. As a result, new owners may not be able to take advantage of these warranties in some situations. To avoid this, new owners may need to start progressing a claim for minor defects almost as soon as they move in, which can be a source of great stress and confusion (particularly for first-time buyers). We strongly advocate for a reconsideration of the limitations on the period in which claims can be brought for all defects. Otherwise, it is likely that many owners will still find themselves unable to claim by the time their building’s defects become apparent.

(iii) liability for defects in apartment buildings

[Our research](#) highlights how pursuing legal action for defects is often a lengthy, stressful and expensive experience for owners, and in many cases will not result in full recovery of owners’ costs, even if successful. Pursuing legal action can also further disadvantage owners, as it may affect the reputation of the building and the value of owners’ apartments. Additionally, if owners decide to take legal action, the capacity for recourse can be limited should the building practitioner [become insolvent or bankrupt](#). As a result, owners may choose to bear the costs of repairing defects rather than pursuing legal action, or they may decide to accept an offer substantially lower than the costs of rectification. Sometimes these offers are made on the condition of a [confidentiality agreement](#) (a problematic state of affairs for future purchasers who remain unaware of the past issues).

For these reasons, while we think the [proposed reforms](#) to ensure there is a duty of care owed by building practitioners to strata owners will be of real benefit to apartment owners and residents, it is important the reforms take into account the barriers to recovering for negligence. It is essential that the reforms are designed to make the process of recovery as simple and streamlined as possible, and that actions are not delayed by disputes or uncertainty over the appropriate respondent (with cross-claims common in such cases), or by potential respondents ‘phoenixing’ companies.

(c) the role of strata committees in responding to building defects discovered in common property, including the protections offered for all strata owners in disputes that impact on only a minority of strata owners

We assume that this question refers to a situation where some owners are directly impacted by defects (such as water ingress) while others are not directly impacted. By law, all owners are responsible for defects in common property, and have an obligation to ensure that they are addressed. In practice, not all owners may understand this, which can create difficulties for strata committees (as demonstrated in [our research](#)). Our view is that the priority here must be on ensuring that owners understand their obligations, rather than introducing new protections for a sub-set of owners.

(d) case studies related to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower

The current public and political focus on residential building defects is important and long overdue. While cases like Opal Towers and Mascot Towers were understandably high-profile, given the need for emergency evacuations, it is important to recognise that the issue of serious building defects is far more widespread. Our [past research](#) surveyed over 1000 strata owners, and found that 72% were aware of defects in their building. While in many cases these defects would not have resulted in evacuation, the impact on residents’ lives can nonetheless be significant, as our detailed [defects case studies](#) show.

In assessing the extent of the problem, it is also important to recognise that significant defects issues are often not publicised, for the reasons highlighted above. In some cases, defects rectification offers may be made on the condition of a [confidentiality agreement](#), while in others owners may not wish to publicise defects concerns, as it may affect the

reputation of the building and the value of their apartments. This means high-profile cases like Opal Tower and Mascot Towers are likely to be just the tip of the iceberg.

(e) the current status and degree of implementation of recommendations of reports into the building industry including the Lambert Report (2016), the Shergold/Weir Report (2018) and the Opal Tower Final Report (2019)

The recommendations from the Shergold/Weir report that remain ‘under consideration’ should be progressed. Recommendation 23 states that the recommendations should ‘form a coherent package and that they be implemented by all jurisdictions progressively over the next three years’. Currently, some key recommendations have not yet been implemented:

- Recommendation 17 which relates to independent third party review,
- Recommendation 3 which relates to practitioners undertaking compulsory Continuing Professional Development on the National Construction Code,
- Recommendation 4 which relates to implementing a supervised training scheme to provide a defined pathway for becoming a registered building surveyor, and
- Recommendation 21 that the BMF agree its position on the establishment of a compulsory product certification system for high-risk building products.

[Our research](#) indicates that, while defects can result from poor design and poor contract management, they can also result from poor workmanship, as well as installation that does not follow approved plans or does not use the products specified. The recommendations that relate to building practitioner training and a product certification system should be implemented to remedy the issues arising from poor workmanship. Additionally, the importance of coordinated, third-party oversight of the design and construction process as specified in Recommendation 17 cannot be overstated, and should not be limited to reviewing documentation.

(f) any other related matter

Beyond addressing the recommendations of the reports noted above, the reform process also needs to consider the broader drivers of current building outcomes, particularly in relation to residential multi-unit development. At present, the strata development model has an inherent issue with ‘split incentives’, as building practitioners and developers have little involvement with buildings after construction, which limits the incentive to consider the longer-term performance of buildings. At the same time, the ultimate owners of these buildings have little (if any) input into how the building is designed and built. As we have noted in [our research](#), “split incentives between developer and owner are perhaps the most fundamental issue in the strata title property sector and stem from the potentially conflicting requirement for developers to maximize the profitability and the rate of sales of a scheme in the short term and the longer term need for the subsequent owners to adequately maintain the building at a minimum of cost and disruption over its lifetime.” The issue of split incentives affects not only building defects, but also the quality of design, and the capacity for good management and maintenance of strata buildings.

We also note that ‘information asymmetry’ is another feature of the current strata development model, and can be a significant challenge for strata owners. This issue arises both for initial purchasers buying off the plan and those trying to access information about a recently completed building, and for subsequent purchasers trying to decide whether to buy into a building. We have found that many residents feel they [do not have adequate access to information](#) on the history of the building in which they are planning to buy or rent. For subsequent purchasers, information about the building is most commonly accessed through strata inspection reports, which may not provide detailed information about the building itself, including any issues with defects. The reforms should address this issue by ensuring relevant information about the design, construction and defect history of the building is easily available to new and potential owners in a standardised format, and that consumers understand their rights to access this information.

References

City Living: Urban consolidation and the social sustainability of cities Webpage:

<https://cityfutures.be.unsw.edu.au/research/projects/city-living-urban-consolidation-and-the-social-sustainability-of-cities/>

Cracks in the Compact City: Defects in Strata Webpage:

<https://cityfutures.be.unsw.edu.au/research/projects/defects-strata/>

Defects Case Study 1: https://cityfutures.be.unsw.edu.au/documents/383/Case_Study_Poster_-_Defects_1.pdf

Defects Case Study 2: https://cityfutures.be.unsw.edu.au/documents/407/Defects_Case_Study_2.pdf

Defects Case Study 3: https://cityfutures.be.unsw.edu.au/documents/424/Case_Study_Poster_-_Defects_3.pdf

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