

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

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Inquiry into the regulation of building standards, building quality and building disputes.

UDIA NSW Submission into Legislative Council Inquiry

July 2019

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CONTACT

For further information about any matter raised in the submission please contact:

General Manager, Policy, Media and Government Relations

Policy Manager

ABOUT THE UDIA

Established in 1963, the Urban Development Institute of Australia (UDIA) is the leading industry group representing the property development sector. Our 550 member companies include developers, engineers, consultants, local government, and utilities. Our advocacy is focussed on developing liveable, connected, and affordable cities.

INTRODUCTION

UDIA NSW makes this submission into the Public Accounts Committee Inquiry into the regulation of building standards, building quality and building disputes. UDIA NSW is currently working with its members to form a holistic view of reform to building regulations that deliver high quality buildings while supporting housing affordability. UDIA NSW has concerns about the broader efficacy of the proposed system to deliver appropriate reform to achieve this.

We recognise that there has been a greater public scrutiny of building defects; however, we believe there has been a lack of quantitative and empirical investigation into the prevalence of defects and the significance of defects.

There have been increased focus on buildings this year due to some high-profile, yet isolated incidents relating to defects. We believe reform should be focussed on improving the construction process to further mitigate these risks. 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, without major impacts to housing affordability.

The recent example of Opal Tower reiterates the importance of appropriate defect management that will enable certainty for industry and certainty for investment. Any regulatory reform must be alive to the possibility of the collapse of the residential development space, and strata ownership in NSW.

The UDIA submission addresses the terms of reference of the enquiry. We make the following recommendations to support reforms in the built environment:

- 1. Regularly audit the conduct and activity of certifiers**
- 2. Create a chain of responsibility for certificates to rely upon professional**
- 3. Increase the ability for members of the public to litigate certifiers that participate in misconduct**
- 4. UDIA recommends that no certifier receives more than 50% of its revenue from one client and must have at least 5 clients**
- 5. The NSW Government produce ongoing reporting on the quantity of defects and the cost of remediation for defects**
- 6. Consult broadly on potential reforms including reviewing liabilities and insurances**
- 7. The interests of individual lot owners and the owner's corporation are more closely aligned'**

8. Introduce a working group with industry to determine the scope of the role for the building commissioner

UDIA NSW would be pleased to present to the committee to further highlight key areas of reform and improving the building regulatory framework in NSW. Please contact _____ General Manager, Policy, Media, and Government Relations on _____ or _____ to arrange.

THE ROLE OF PRIVATE CERTIFICATION IN PROTECTING BUILDING STANDARDS

UDIA wishes to be part of a productive conversation about reforms that would ensure the certification sector remains a vibrant and productive sector. With our extensive membership of developers, strata managers, accredited certifiers, and councils, we have a unique perspective on the certification system. We would be pleased to brief you on our proposed alternative options and would also be keen to arrange a meeting between yourself and key players in the development and strata management to progress a conversation.

(I) CONFLICTS OF INTEREST

The NSW Parliament recently passed the Building and Development Certifiers Bill 2018 that defined conflict of interest for accredited certifiers. The bill also made provision for applying for an exemption from the provisions. The penalty for carrying out certification work where there is a conflict of interest is 300 penalty units (\$33,000).

In 2002, the Quality of Buildings report by Campbell raised the perception of a conflict as the certifier is paid directly by the developer. The point was made by Mr Robertson that “The private certifier is not at arm’s length from the developer. The private certifier has a direct and pecuniary relationship with the developer.”

However, many private certifiers were once at Council and decided to go into private practice to get away from the undue influence that Councillors were placing on what projects should be given a priority in processing. Furthermore, most developers want their certifiers to pick up on as many issues as they can so that the building product that they are producing can have a good reputation within the marketplace.

The point is made by the Association of Accredited Certifiers that the Council staff are sent to customer service training, develop better protocols for continual improvement and empowering suitably qualified staff to adapt systems to suit the circumstances. Ironically, in private certification, there is a perception that these same qualities are seen as ones which breed an inappropriate relationship with developers “and act as a precursor to a conflict of interest.”

The UDIA supports regular auditing of the conduct and activities of accredited certifiers. A number of enquiries into the building sector have recommended the audit of accredited certifiers. The original scheme required the accrediting body to undertake the auditing. This was more recently undertaken by the Building Professionals Board.

Recommendation 1:

Regularly audit the conduct and activity of certifiers

(II) EFFECTIVENESS OF INSPECTIONS

Private certification has been as a successful mechanism across the state used by government for schools, hospitals, roads, and in resolving the cladding issue.

The NSW Government has a significant capital works programme for the construction of its public buildings (being schools, hospitals and community facilities) and infrastructure. In their capacity as a client, the various government agencies engage certifiers in the same way to the development industry.

(III) ACCOUNTABILITY OF PRIVATE CERTIFIERS

There is potentially the need for greater community understanding of the certifier's role, as their role is not to inspect every aspect of a building. That would be impractical and unfeasible.

Provision of a standard form regulated by the Government and individually numbered would provide further transparency and accountability to all parties that provide certificates within the building construction process. Traceability for the certificates would allow the government to maintain a consistent approach to each aspect of the inspection of buildings.

It is also important to note that all accredited certifiers are public officials under the Independent Commission Against Corruption Act 1988 and public authorities under the Ombudsman Act 1974. Therefore, they are already held to a high standard and Certifiers are accountable and liable for their actions; however, in some cases Certifiers may rely on certificates from manufacturers and installers of building systems and other components of building works where the building certifier does not have expert technical knowledge. These certificates provide evidence building components comply with Australian Standards. We recommend assigning liability to those who provide certificates certifiers rely on.

Recommendation 2:

Create a chain of responsibility for certificates relied upon by certifiers

We recommend increasing the ability for members of the public to litigate certifiers that participate in misconduct. This would require greater clarity as to the liability that certifiers hold. This would provide a monetary incentive for certifiers to perform as those who live in buildings that are improperly certified would have monetary recourse, thereby lifting the skillset of certifiers.

Recommendation 3:

Increase the ability for members of the public to litigate certifiers that participate in misconduct

(IV) ALTERNATIVES TO PRIVATE CERTIFIERS,

Many of the projects being undertaken by the government involve the work of private certifiers. The speed of approvals through the private certifier system and the availability and flexibility is the reason that many entities undertaking development choose a private certifier. The introduction of private certification has also impacted how Councils offer certification services with a number of Councils setting up a separate arm to provide a competitive alternative.

Since the introduction of a scheme that included Council certifiers, all accredited certifiers have been required to undertake continuing professional development (CPD). Previously only private certifiers were required to undertake CPD.

UDIA recommends that certifiers are required to maintain multiple clients to eliminate the dependency on a single client and removes a perception of corruption. This approach is like the approach the Land and Environment court has taken on the independence of expert witnesses. If an expert only works for one client, they can't really be independent when they give evidence to the Court for that same client. UDIA recommends that no certifier receives more than 50% of its revenue from one client and must have at least 5 clients. By ensuring a firm is not dependent on revenue from a dominant client, a certifier is more empowered to resist any undue pressure and act independently.

Recommendation 4:

UDIA recommends that no certifier receives more than 80% of its revenue from one client and must have at least 5 clients

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
- (ii) the effectiveness and integrity of insurance provisions under the Home Building Act 1989
- (iii) liability for defects in apartment buildings,

NSW Fair Trading estimates there are more than 72,000 strata schemes in New South Wales covering \$350 billion in assets, having a significant impact on the lives of approximately two million people. Within 20 years, half of the State's population is expected to be living or working in a strata or community scheme.

We note there have been tens 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 need to be delivered efficiently, 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 FY 2017, 2860 home building dispute applications were lodged with NCAT, 95% of defects related to waterproofing. NCAT prefers rectification to resolve defects.

There is extremely limited empirical data for the extent of building defects in NSW. UDIA recommends the NSW Government regularly report on the occurrence of defects and the severity of defects, so that the performance of the regulatory system can be properly assessed.

Recommendation 5:

The NSW Government report on the quantity of defects and the cost of remediation for defects

Currently, statutory warranties are in place to ensure that the builder of any residential dwelling (including strata) is obligated to repair any:

- Minor defects identified and reported to the builder within 2 years of construction
- Major defects identified and reported to the builder within 6 years of construction

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.

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 regard 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.

The NSW Government Strata Building Bond came into effect on 1 January 2018. UDIA has repeatedly raised concerns, along with many other stakeholders, about the Strata Building Bond and Inspection Scheme.

Our understanding is the scheme was to be an improvement that will provide an expert and collaborative process for the resolution of the defects, in the second read speech, the Minister said:

Part 11 of the bill contains another significant reform—a defect bond and inspection regime which is carried out in the first two years and is designed to incentivise developers and builders to build well and to fix any problems early in the life of the building. The new process aims to reduce costs for all parties involved, minimise time delays, and reduce the incidence of drawn-out and expensive legal action.

Unfortunately, previous stakeholder feedback was not incorporated as the scheme was hastily developed, and therefore the scheme is not capable of achieving:

1. Adequate levels of inspection of buildings within the time allowed, as to the extent of buildings to be inspected, the scope of the inspections, the expertise of the inspectors, or the adequate identification of items.
2. An adequate level of scoping or particularisation of proposed repairs.
3. A meaningful estimate of the actual costs involved in repair of affected strata schemes.

UDIA continues to have concerns about the ease to navigate the system for owners, developers, builders, and strata managers. We believe that there is a broader conversation about utilising the bond or other mechanisms to create better insurances for owners.

The industry best practice is to manage defects in an ongoing manner and often prior to owners moving in, the strata building bond scheme has legislated a practice below this and will add complication for leading industry participants.

UDIA members have a range of suggestions to help improve the current building regulation system. UDIA believes there is currently a complicated system with unclear liabilities and a multitude of

schemes to address defects. UDIA 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.

Recommendation 6:

Consult broadly on potential reforms including reviewing liabilities and insurances

THE ROLE OF STRATA COMMITTEES IN RESPONDING TO BUILDING DEFECTS DISCOVERED IN COMMON PROPERTY

UDIA notes owners corporations have a substantial role in responding to building defects for common property.

The interests of the owners corporation are not always aligned with the interests of individual owners. UDIA is aware that there are circumstances where owners corporations do not want to progress or identify defects or make claims, due to concerns about property values.

In 'The Elephant in The Room' podcast, a Sydney Strata Manager details where committees don't want certain information to be included in the minutes because it would negatively affect property values.

Whilst the UDIA realises the podcast is not the most appropriate source of information it should be assessed as a potential issue and be further monitored. The timely resolution of defects can potentially be impeded by the owners corporation; however, we believe reluctance to engage into constructive dialogue about resolving defects is created by a complex and confusing system for defect resolution. UDIA believes that a by-product of the Strata Building Bond Scheme will reduce the ability for owner's corporation to not resolve building defects, albeit encourages an unnecessarily adversarial approach.

UDIA encourages owners corporations to participate in constructive dialogue to resolve disputes, we believe that the interest of the corporation and individual owners should be aligned.

Recommendation 7:

The interests of individual lot owners and the owners corporation should be more closely aligned

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 INVESTIGATION FINAL REPORT 2019

UDIA understands the NSW Government is implementing the recommendations of a range of reports in the building industry through its Building Stronger Foundation program.

Implementation of Reports

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 does not consider these proposals to be objectionable, however we also do not believe them to be effective at resolving the core issues relating to building and construction. Resolving and managing defects with developers or builders that do not want to do the right thing should be the focus for reforms. We believe there needs to be a more fundamental change to the Building Regulatory system that includes all aspects to ensure that reform meets the objectives. This could include the introduction of insurances and warranties, UDIA looks forward to participating in an ongoing discussion.

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

UDIA 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 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 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 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 but 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 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.

Recommendation 8:

Introduce a working group with industry to determine the scope of role for the building commissioner

CONCLUSION

UDIA NSW looks forward to working with Public Accountability Committee to progress safe and affordable buildings and ensuring that we can continue to enable the public and industry to invest with confidence and certainty into NSW's build environment. Please contact _____ General Manager, Policy, Media and Government Relations at _____ or _____ to arrange a meeting.

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