Supplementary Submission No 173a

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

Organisation: Construction Forestry Mining and Energy Union (NSW Branch)

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CFMEU
CONSTRUCTION

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Legislative Council's Public Accountability Committee
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Dear Sir/Madam,

The Construction Forestry Mining and Energy Union makes the following comments in relation to the NSW Government Draft Bill Design and Practitioners Bill 2019 ("the Bill").

We note that the time for comment is very short and has not given us time to more comprehensively assess the impact of the Bill, however in the time we have had we are very disappointed that this is the response of the NSW Government. This Bill fails to address the very real crisis in the building and construction industry in NSW in relation to building quality and fireproofing. This is an epidemic nationally and we enclose for your consideration a report commission by the Construction Forestry Mining and Energy Union, titled *Shaky Foundations, The National Crisis of Construction* ("the CFMEU Report") which details the extent of the crisis. The Bill does not address any of these structural issues. We recommend that there be a complete reconsideration of the approach to properly address the problems detailed in the Report.

The Bill does not address the damage ultimately suffered by home owners and the issues detailed in the CFMEU report that go to building quality and life-threatening safety issues.

In terms of the Bill:

Part 1 Sections 4- 8, and throughout the Bill there is reference to regulations. Without seeing the regulations, it is difficult to assess the utility of the Bill. The regulations are said to govern everything from definitions to requirement of insurance. We are concerned about having important matters of substance relegated to regulations that have not yet been drafted. Further regulations are much easier to change and could lead to a further watering down of already weak proposed legislation.

It is also unclear, as distinct from Principal contractors and Subcontractors, whether the duties and obligation of the Bill cover Developers who have been the group who have significantly profited from the crisis in the industry. They have overseen and benefited financially from the cutting of corners in construction.

Part 2 Sections 9-25, whilst the CFMEU supports the registration of those responsible for undertaking construction work these provisions do not go far enough to ensure that those who are responsible for ensuring compliance with all building regulations and codes are independent of developers, principal contractors/builders and subcontractors. There is nothing in the Bill that ensures this independence and just requiring registration does not go far enough. There should be certifiers and inspectors

entirely removed from the project that they oversee.

It is unclear what the adequate level of insurance is going to be. Again, this is left to detail in yet unseen regulation as are many parts of this Bill.

We are also concerned about the lack of strict liability for compliance by registered practitioners and the use of phrases such as "all reasonable steps" (e.g. s17 and s18) which qualifies the obligation and provides a way out of compliance. There is no detail what taking "reasonable steps" means. What is meant by "reasonable excuse" (s18). Given the crisis and the behavior of developers and contractors the duties should be of a strict nature.

Further we do not understand why the requirement to document variations does not extend to "building elements or performance solutions". In the event that a party or end user needs to enforce the Act all works should be documented and that information made available (s20).

In terms of registration, it is unclear who registers these practitioners, the resources the body will have and given the record of other NSW regulators such as SafeWork NSW and the Environmental Protection and Local Councils, we are cynical and doubt there will be real commitment to addressing the corruption in the industry.

The provisions of s18 and 24 for example relate to compliance with the Building Code of Australia. Given the crisis in the industry, it may well be the provisions of the Building Code of Australia are insufficient to secure appropriate building quality, in particular around cladding.

The Section 24 offence of "improper influence", is inadequate to ensure that anyone responsible for building quality and compliance is independent. The requirement to act "impartially" is weak and the penalties are insufficient where developers, builders and subcontractors have profited in the millions of dollars from corrupting the system.

On the myriad of penalties, in the Bill the Union believes they do not go far enough, relegating the jurisdiction in relation to enforcement to the Local Court (an already overworked court jurisdiction) and the Land and Environment Court, a Court that has historically been favourable to developers and builders particularly as against community litigants, we doubt that maximum penalties will ever be awarded and it is highly unlikely that anyone would ever be sentenced to jail.

In terms of Part 3, duty of care, the extension of a duty of care to "exercise reasonable care" is weak and qualifies the duty unnecessarily and provides and out to non-compliant practitioners who have access to legal representation, unlike end consumers who end up owing a substandard property. It is also unclear what happens when developers, builder and subcontractors disappear or are bankrupt. In terms of Section 31 right to claim economic loss and damages, such actions are largely out of reach of ordinary people who have already suffered at the hands of developers, builders and subcontractors. Ordinary people cannot afford to litigate.

In relation to Part 4, registration see comments above but again we do not believe this will sufficiently guarantee the independence of people providing declaration of compliance.

Part 6 Investigations Part 7 enforcement – it is unclear who will carry out investigation and enforce compliance. We are skeptical given the weak nature of the legislation overall that there is a real commitment to addressing the serious issues in the industry. We oppose the use of "undertakings" which is usually a means by which wrong doers escape liability.

Whilst s81 refers to stop work orders, it is unclear what real remedies there are for consumers who acquire or buy into finished buildings. If it is left to these people litigating against practitioners or insurers then there is no real relief for ordinary people in terms of remedies as such actions are largely out of their reach, particularly if they have to find the funds to rectify the problems. Being able to take legal action will be impossible.

The NSW Government needs to do much more and at our recent National Conference the Union supported the following initiatives:

- Developers should demonstrate financial capacity to complete any proposed developments and address any building defects that may arise;
- Effectively demonstrate commitment to ongoing ethical behaviour by the developing entity, its key decision makers or other influential persons;
- To prevent developers, builders and subcontractors engaging in phoenix activity or unfair commercial practices;
- Ensure a requirement that developers not impose, either through their actions or omissions, conditions, requirements or unrealistic timeframes on building contractors that could lead to, or have resulted in, unsafe work practices, breaches of a Commonwealth or Territory law or poor building quality outcomes;
- Establish a project trust account (where funds, including retention payments, are held in trust for head contractors and subcontractors until payments are due) in respect of each project that the develop is responsible;
- Not engage in deceptive or misleading conduct in the in the course of marketing a development to the public;
- Publicly disclose the source of funding of any development;
- Nominate a natural person as a nominee.

More needs to be done to secure the rights of workers on projects and the rights of consumers which we have seen have been left with almost worthless assets.

Therefore, in conclusion this proposed legislation fails to directly address the significant problems set out in the CFMEU report and it is disappointing that given the crisis that this is the best the Government can come up with.

Yours faithfully

Darren Greenfield
State Secretary