



16 October 2019

Mr John Tansey  
Executive Director  
Department of Fair Trading

Via email [bcr@customerservice.nsw.gov.au](mailto:bcr@customerservice.nsw.gov.au)

Dear Mr Tansey

**RE: Design and Building Practitioners Bill 2019**

Urban Development Institute of Australia – NSW (UDIA) members are responsible for the design, building, and delivery of residential buildings across NSW. Our members have been involved in all major urban renewal projects in Sydney and include developers, builders, strata managers, and engineers.

Since the Opal Tower incident at Christmas 2018, there has been a decline in confidence in the building and construction sector, it is critical government and industry collaborate to restore the community's confidence in the sector.

The NSW Government released the draft Design and Building Practitioners Bill 2019 (the Bill) on 2 October 2019, the Bill is intended to deliver on the reforms committed in the NSW Government response to the Shergold-Weir Building Confidence Report.

The UDIA has been at the forefront of development sector advocacy in this matter, including representing the industry at the recent parliamentary inquiry. Our submission to the Building Stronger Foundations discussion paper, highlighted that constructing complex buildings is never going to be free of defects, and the objective for reform should be:

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

UDIA welcomes the opportunity to comment on the Design and Building Practitioners Bill 2019. Our submission has been informed by UDIA Building Regulation Industry Advisory Panel, which consists of fifteen development industry leaders who advise the UDIA on building regulation matters.

The draft Bill introduces a suite of new reforms aimed at improving the quality and compliance of design documentation and to strengthen accountability across the design, building and construction sector. This should help ensure that buildings are safe for occupation. The draft Bill proposes the following key reforms, including:

- Introducing the concept of 'regulated designs', which include designs for a building element and performance solutions for prescribed classes of building work or a building element;
- Requiring that design practitioners who prepare regulated designs issue a compliance declaration to declare that the designs comply with the Building Code of Australia;
- Requiring that building practitioners obtain, rely upon and build in accordance with declared designs, and issue a compliance declaration to declare they have complied with the Building Code of Australia;

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- Requiring that any variations to declared designs are reprepared and declared by a design practitioner if they are in a building element or performance solution, or in any other case, documented by the building practitioner;
- Introducing the optional role of a 'principal design practitioner';
- Requiring any design, principal design or building practitioner who intends on making a compliance declaration to be registered under a new registration scheme set out under the draft Bill; and
- Clarifying the common law to ensure that a duty of care is owed for construction work to certain categories of 'owner'.

UDIA does not have any in-principle objections to the intent nor the broad objectives to the Bill'. Our submission is underpinned by three themes that are relevant across all Parts of the proposed Bill:

1. Accountability must be at the centre of the reforms
2. The reforms must integrate with the existing legislation
3. The regulations must be released for a more informed discussion about the Bill.

#### Accountability must be at the centre for the reforms

UDIA has long identified a lack of accountability as the core issue in building regulation in NSW. This is characterised by the lack of accountability for the certificates which are relied upon by certifiers. UDIA has long advocated for a chain of responsibility for these certificates and this Bill must help create a chain of responsibility. The chain of responsibility must extend to suppliers, sub-contractors and specialist installers who are best placed to certify their work is in accordance with the standards and whose certifications are relied upon by the registered practitioners.

#### The Reforms must integrate with existing legislation

UDIA is concerned about the possibility of two regimes for the regulation of buildings. There is the existing regime through Part 6 of the Environmental Planning and Assessment Act where consents require compliance with the Building Code of Australia, which is enforced by the certification process.

The Bill establishes a new regime that has the same objective of compliance with the Building Code of Australia and provides a greater layer of regulation.

It is critical that both schemes speak to each other clearly, particularly as the regulatory authorities are different for each scheme. Local councils for the first and the Department of Customer Service for the second.

#### Regulations will improve ongoing discussion

It has been challenging for UDIA to make comments about some of the specifics of the Bill, because a substantial amount has been left to the Regulation, which we understand will be released next year. We believe draft Regulations will help inform debate in the Parliament.

If the Regulations are not released, then UDIA requests adequate consultation on the Regulations prior to the commencement of the Bill.

### Commentary in relation to specific sections

In addition to the overarching comments made above, UDIA has specific concerns in relation to the following parts of the Bill:

- Part 1 – Preliminary
- Part 2 – Regulated Designs and Building Work
- Part 3 – Duty of Care
- Part 5 – Disciplinary action against practitioners
- Part 7 – Enforcement
- Schedule 1 – Savings, transitional and other provisions

UDIA does not have specific comments in relation to Part 4, except that we recognise that there will be the need for registration of practitioners, where possible we believe recommend that this leverages existing schemes.

Part 6 relates to investigations, UDIA notes that there needs to be a strong disciplinary regime underpinned by investigatory power to restore trust in the community. The initial focus of the disciplinary regime must be on ensuring compliance through education, as the industry adjusts to the new environment.

#### **Part 1 – Preliminary**

UDIA notes that much of this section relies upon the Regulations, therefore we are limited in the comments that we can make; however, we hope that our comments will also help guide the development of the Regulations.

#### Section 4 – Building work

The Regulations will prescribe the class of building to which the Act applies. In the first instance, UDIA would limit this scheme to Class 2 buildings.

The crisis in confidence that the community has been feeling in relation to building quality has also been limited to Class 2 buildings, therefore it is likely this response has been designed for this building type.

Commercial and industrial buildings usually involve more sophisticated owners and tenants, who are better able to represent their interests in the legal system, so require fewer consumer protections.

Class 1 buildings and homes are much simpler, so do not require the design certification process that is envisaged in this Act. It is also possible that many homeowners would be inappropriately captured through these provisions.

This section also has a broad definition of building work that includes 'decoration', UDIA believes that this needs to be further refined, as it is not appropriate that activities such as painting are subject to this regime.

## Section 7 – Building practitioners

This section defines the building practitioner as the principal contractor for the work where multiple people do building work. While, we understand this might not be read as excluding sub-contractors as building practitioners, UDIA believes the legislation should be specific in ensuring sub-contractors have obligations as Building Practitioners under the legislation.

A lack of accountability has been a core challenge in the existing building regulatory regime, particularly through subcontractors on whom builders, developers, and certifiers rely to issue certificates through the current system, without accountability. The new regime must extend accountability to subcontractors particularly in building elements where defects commonly occur.

## **Part 2 – Regulated Designs and Building Work**

UDIA recognises the accountability this Part of the Bill establishes; however, UDIA seeks further understanding as to how this relates to the building provisions in Part 6 of the Environmental Planning and Assessment Act.

## Section 9 – Compliance declarations by registered design practitioners

This section requires design practitioners to provide a compliance declaration to a person if “the design is in a final form for use by that person or another person in connection with building work”. UDIA seeks greater clarity as to what constitutes final form. UDIA believes that this can be challenging with value engineering and ongoing variations through the design and construction process.

UDIA requires clarity if ‘final form’ for an element is required prior to the construction certificate is issued, or what other requirements exists.

## Section 11 – Registered design practitioners to be indemnified

Registered practitioners are required to be adequately insured. UDIA supports this, we note there is likely to be a common insurer across building and design practitioners, which might add costs in the short-term. UDIA is hopeful that the insurance market will have confidence in the regulatory regime and provide a degree of self-regulation to improve accountability and standards through offering differing premiums based on designer’s track record.

UDIA is hopeful that the Regulations will provide further clarity as to the definition of adequately insured. It is critical that a professional indemnity insurance product that can meet those requirements exists for the scheme to successfully operate.

## Section 12 – Principal Design Practitioners

The role of the Principal Design Practitioner is unclear. It seems the role is primarily collecting design certificates and auditing compliance; therefore, this role could be carried out by the Certifier, in which case the process could be run in parallel to the building certificate process. In a

residential building context, it may be intended for the Principal Design Practitioner to be the architect, however, this would not necessarily be applicable for other classes of building.

#### Section 15 – Compliance declarations by registered building practitioners

UDIA supports the requirement that a building practitioner must provide a compliance certificate prior to an occupation certificate being issued. This requirement provides certifiers with a much-needed chain of responsibility, which UDIA has long advocated for as a mechanism to provide greater accountability.

However, true accountability can only be achieved if its clarified that a building practitioner includes subcontractors, suppliers and specialist installers, that currently provide certificates relied upon by a certifier, and who have greater expertise to certify that their work has been completed in accordance with the relevant standards. UDIA believes this must be clarified in the Bill.

#### Section 16 – Building practitioners must ensure compliance with declaration obligations

We recognise the importance of building practitioners following declared designs that are compliant with the Building Code of Australia.

UDIA is concerned about the requirement that a building practitioner must take all reasonable steps to check that a principal compliance declaration is obtained for varied designs, if there has already been a design compliance declaration. Our understanding is that the principal design practitioner coordinates a range of other practitioners, so the principal design practitioner may not necessarily be qualified to provide a compliance declaration about a variation.

#### Section 17 – Compliance with requirements for design

UDIA understands this section to broadly consider that the building practitioner is to follow the design that is in 'final form', and that any variation of the design must be approved by a registered design practitioner. This design practitioner does not need to be the initial design practitioner who prepared the initial design. This might reduce flexibility as it is likely making changes in design will become more expensive. The Legislation or Regulation must clarify if a design practitioner is required to sign-off on any change to a design, because it would be impractical for a design practitioner to review all changes made during the construction process. However, we recognise there are some critical components that may require review, and would be pleased to discuss through further consultation.

In this section, the phrase "reasonable steps" is unclear, and requires further consideration in the Regulations.

#### Section 22 – Requirements for compliance declarations before issue of building certificates

This section flags that the Regulations may prohibit the issue of a complying development certificate or a certificate under Part 6 of the EP&A Act unless a compliance declaration or final regulated designs have been provided to the issuer of the certificate.

The industry regularly uses partial construction certificates because some designs may not have been finalised prior to construction, and it is not always feasible to design all elements of a building prior to construction, this does not mean that the construction is unsafe or building is likely to be unsafe.

UDIA seeks clarification that the draft Bill and Regulations would not limit the ability for staged certification under Part 6 of the EP&A Act.

### **Part 3 – Duty of Care**

The Draft Bill proposes to introduce a statutory duty of care with the intention of assisting homeowners seeking compensation if a building practitioner has been negligent. The intent seems to be to ensure suppliers, subcontractors, specialist installers have a responsibility to exercise reasonable care to avoid defects which result in economic loss.

UDIA acknowledges there have been challenges for some owners to resolve defects, and there have been issues with accountability across the certification and building process, with generally only the developer, architect, builder, and certifier as holding accountabilities. Further we understand the current common law position, established in *Brookfield Multiplex v Owners Corporation Strata Plan 61288 (2014) 524 CLR 185* is that building contractors owe a duty of care to avoid pure economic loss to initial owners, but not to successors in title. We assume the Bill is intended to expand the existing duty of care to future owners only.

Section 27 of the Bill states:

- (1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done.
- (2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.
- (3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.
- (4) The duty of care is owed to an owner whether or not the construction work was carried out under a contract or other arrangements entered into with the owner or a previous owner.

UDIA is concerned this wording may create a duty that does not end, this would be unreasonable because buildings are designed and built with specific lifespans for each component. Where a component has failed or not been properly maintained, then it should be clear a duty does not apply. There needs to be greater clarity as to how this section would apply in practice. Section 31 seems to have been drafted so that the proposed duty of care will operate "in addition to duties, statutory warranties or other obligations imposed under the Home Building Act 1989 etc.". This implies the duty of care will cease subject to the relevant duties, warranties and obligations "to apply to a person who carries out construction work"; however, it is currently unclear and should be clarified to provide certainty for industry and community.

UDIA has concerns about the definition of Economic loss under Section 28, which states "an owners corporation or an association is taken to suffer economic loss for the purposes of this Part if the corporation or association bears the cost of rectifying defects (including damage caused by defects) that are the subject of a breach of the duty of care imposed under this Part".

UDIA recommends that this should cover the reasonable costs to rectifying defects, to ensure that owners corporations do not seek to over recover any loss.

UDIA is concerned that this may lead to reduced accountability, by creating proportionate liability, where everyone is a little bit liable throughout the chain of developer, principal contractor (builder), and subcontractors. This might create a more complex process of assigning liability, because it seems the onus will be on other design and building practitioners to make submissions for the duty of care to be applied to the accountable party. This would be further complicated with the possibility of a common insurer across all parties which would lead to high and potentially unsustainable premiums.

#### **Part 4 – Disciplinary action against practitioners**

UDIA notes that there needs to be a strong disciplinary regime to restore trust in the community. The initial focus of the disciplinary regime must be on ensuring compliance through education, as the industry adjusts to the new environment.

##### Grounds for taking disciplinary action

UDIA believes the grounds for taking disciplinary action in Section 52(d) is too broad, as it should not apply in relation to a breach of a contractual obligation. Our view is that there are other mechanisms to resolve contractual disputes. However, it is critical that disciplinary action occurs where a registered practitioner fails to comply with a statutory duty established under the new legislation.

##### Personal liability

The Bill extends personal liability to each 'registered director' in relation to reporting, knowingly authorising, or permitting a contravention of the act. UDIA supports these provisions, noting that it is important to setting up robust processes that will help manage 'rogue' operators in the industry.

#### **Part 7 – Enforcement**

UDIA understands the need for a strong enforcement process in this new regime because it will assist in restoring the community's confidence in the building sector.

The draft Bill enables the Secretary (of the Department of Customer Service) to issue a stop work order if the Secretary believes:

- The building work is, or is likely to be, carried out in contravention of the proposed Act; and
- the contravention could result in significant harm or loss to the public or occupiers or potential occupiers of the building to which the work relates or significant damage to property.

### The Stop Work Order must be focussed on compliance

UDIA recognises that stop work orders exist as part of the current regulatory regime. Stopping work on a construction site is a very serious step, which can cause significant cost and time impacts on a project and should only be invoked as a remedy of last resort. Therefore, the best practice is that there is usually some level of consultation and engagement to seek to resolve issues without resorting to legislative mechanisms.

Under the proposed regime, the order might have immediate effect, and there is no requirement for advance consultation as to whether a stop work order should be issued or if compliance could be achieved through another mechanism.

The goal of the regulatory regime must be to ensure buildings are safe, secure and affordable, therefore, the aim of the stop work order is to ensure that works are compliant. Therefore, the Secretary should in the first instance raise the possibility of non-compliance with the building practitioner or owner to assist in ensuring compliance.

The NSW Government should provide clarifying regulations to resolve these issues, in addition the Department should prepare a practice note on the use of the stop work order.

### Stop Work order must focus on non-compliant elements

The stop work order must be specific as to which building work is 'stopped'. UDIA believes that if only one element of the building may be non-compliant, then only the non-compliant should stop, other building work should be able to continue. The regulations should clarify that a stop work order might not necessarily need to apply to an entire building site.

### Appeals

UDIA welcomes the appeal right; however, believe it should better align with the building certificates regime. UDIA recommends the Land and Environment Court is the appeal authority, whereas the draft Bill proposes the NSW Civil and Administrative Tribunal.

The Land and Environment Court has considerable expertise and experience in dealing with stop work orders of this kind through its role as part of the building certificate legislative regime. Furthermore, the draft Bill proposes the Land and Environment Court as the authority who would issue injunctions for the enforcement of the legislation, which would make it reasonable to be the appeal authority for the stop work order.

UDIA has received anecdotal evidence that the NSW Civil and Administrative Tribunal can be slow in managing more complex disputes.

UDIA has concern about the potential for the same substantive matter being simultaneously handled in two different forums — the Land and Environment Court and the NSW Civil and Administrative Tribunal. This might occur in at least two situations:

1. Where there is dispute about if the right declarations were obtained (and/or the work has been carried out in accordance with the approved designs subject to those declarations) a building certificate might be sought. Appeals from decisions about building certificates are dealt with in the Land and Environment Court.
2. Development consents would likely require compliance with the regime created by the draft Bill. A local council may issue its own stop work order requiring compliance with the

development consent (on the matter of compliance with the proposed legislation), then an appeal on the local council order would be heard in the Land and Environment Court.

In order to create a simpler regime, which better interacts with existing legislative and regulatory regimes, UDIA recommends the Land and Environment Court is the appeal authority for any stop work order.

### **Schedule 1 – Savings and Transitional Measures**

UDIA recognises there will be a substantial amount of work still to be completed to enable this scheme to operate fully.

UDIA recommends that there are appropriate savings and transitional measures that:

1. Provide time for the regulations to be consulted with industry and community through an iterative and collaborative process.
2. Provide enough time for registration regimes to be developed and consulted on with relevant industry bodies and practitioners once the regulations are completed.
3. Provide enough time for practitioners to secure appropriate registration under the new regime.

We envisage there might be a period in which there are dual systems. The new regime would then come into effect based on a development approval date that would be prescribed in the Regulations. There is merit in a final date being determined, when a construction certificate could be issued without the declarations envisaged in the proposed Bill.

Furthermore, any building that has already been issued with a construction certificate should not be required to proceed under the new regime.

### **Conclusion**

UDIA wishes to be part of the ongoing conversation to improve building regulations in the State to ensure that buildings are safe and secure for occupation, and there is a clear process for rectifying defects.

The regulatory regime proposed the draft Bill goes some way to bringing about improved accountability that will help ensure buildings are safe and to restore the community's confidence in the building sector.

UDIA NSW would be pleased to meet in relation to this matter, please contact Mr Sam Stone, Policy Manager, via email on [sstone@udiansw.com.au](mailto:sstone@udiansw.com.au) or on 0401 213 899.

Yours sincerely,



Steve Mann  
**Chief Executive**