31 May 2024
Building Commission NSW
Department of Customer Service

By email: HBAReview@customerservice.nsw.gov.au

RE: Building Bill 2024 - Consumer Protections for Home Building Work

Dear Commissioner,

The Urban Development Institute of Australia NSW (UDIA) is the state's leading development industry body. We represent the leading participants in the industry and have more than 450 members across the entire spectrum of the industry including developers, financiers, builders, suppliers, architects, contractors, engineers, consultants, academics and state and local government bodies.

UDIA invests in evidence-based research that informs our advocacy to state, federal and local government, so that development policies and critical investment are directed to where they are needed the most. Together with our members, we shape the places where people will live for generations to come and in doing so, we are city shapers. In NSW alone, the property industry creates more than $581.4 billion in flow on activity, generates around 387,000 jobs and provides around $61.7 billion in wages and salaries to workers and their families.

UDIA welcomes the opportunity to make a submission to the Consultation paper on the Building Bill 2024: Consumer protections for home building work, April 2024. Our recommendations and comments for the Building Commission's consideration are appended in table form to this letter.

Our submission has been informed by input from members of the UDIA NSW Strata and Building Regulations Committee. The Committee provides a development perspective with a strong focus on building regulation, establishing new schemes, renewal and dispute resolution and is chaired by Mark Monk of Helm.

UDIA has been engaged with the NSW Government and your team since the commencement of building regulatory reforms in 2019 and is keen to continue to stay

engaged on the proposed framework for consumer protections for home building work in NSW and the development of a whole of sector Building Act more broadly.

If you or your team have queries about the content of this submission or wish to discuss it in more detail, please contact UDIA NSW Acting Director of Policy, Harriet Platt-Hepworth on 0474 772 291 or at hplatthepworth@udiansw.com.au

Question: 1. Are there other ways to improve the current licence types? Please provide examples.

Recommendation:

1. UDIA supports retaining the status quo for licence types.

Comments:

Any change to the licence types (and given the large volume of QSCs), would likely cause a huge disruption to the industry as it would create a void of supervisors and increase costs (and place further pressure on affordability).

Question: 2. Are there other ways to improve the current licence types? Please provide examples.

Recommendation:

1. Alignment between the states and territories in terms of recognition of qualifications.
2. Alignment of definitions of Low-Rise, Medium Rise, High-Rise

Comments:

Licencing should be changed to align in harmony with other states e.g. Canberra/Victoria/Queensland; Licencing Classes are: Low-Rise. Medium Rise. High rise (open/unlimited/unrestricted for 20+ Storeys).

As all jurisdictions utilise the same National Construction Code & Australian Standards (albeit with minor discrepancies), there should be mutual recognition pathways to make it easy for building practitioners from other states and territories to gain their NSW High Rise (Open/unlimited) licence. This will allow NSW to be open in gaining quality talent from other jurisdictions to achieve our housing targets.

There needs to be some consideration of what the definition of a: Low-Rise, Medium Rise, High-Rise is. For example, right or wrong; the ABS split this into four categories: Low Rise (1 to 3 storeys), Medium Rise (4 to 8 storeys), High Rise (9 to 19 storeys) and super High Rise (20 or more storeys).

Question: 3. Are there any considerations that should be made in limiting the scope for consumer protection to building work carried out on a home?

Recommendation:

1. The legislative scheme should be limited to residential dwellings (not including Build to Rent).

Comments:

This legislation is consumer focused, and as such it should be limited to homes and not extend to commercial, industrial, Built to Rent work, retirement villages and other investment type developments. The statutory duty of care provisions in the *Design and Building Practitioners Act NSW 2020* (DBP Act) were enacted to protect owners corporations, but was then extended out to all building works as a result of the way the Act has been interpreted by the Courts (incorrectly in our view through the case of Goodwin Streets). The same (inadvertent) extension should be avoided with the new Bill. The scheme should be limited to classes of buildings for habitation.

Question: 4. What are the impacts of providing consumer protections for pre-fabricated building work? Are there any considerations that should be made?

Recommendation:

1. Pre-fabricated homes and components for pre-fabricated homes, should be subject to the same standards and regulations as other residential work. They need to comply with the standards and the National Construction Code (NCC).

Comments:

It is more difficult to maintain standards of quality control (including certifier inspections to ensure compliance with building product safety standards, Australian Standards (AS) and the NCC) when works are pre-fabricated off site. This is where harmonisation between the states and territories has to happen to ensure quality control. Not many companies use pre-fabricated solutions at this point in time, despite it being usually of superior quality (as it is built in a controlled environment), but it is a growth area, and the future of construction. It is worth noting that we are behind compared to international jurisdictions.

Question: 5. In relation to the definition of 'home' should any other types of residence be included or excluded?

Recommendation:

1. Built to Rent, social housing, modular homes, retirement villages (all institutional investment) should all be excluded.
2. Further work should be undertaken into Land lease housing to determine if there are any consumer protection concerns with this form of construction before deciding whether to include it or not.

Comments:

Built to Rent, social housing, modular homes, retirement villages should be excluded due to the Bill's consumer protection focus (similar sentiment as our response to Q3 above).

Land lease housing should also be excluded in the absence of clear evidence that the land lease industry is experiencing the same issues as the home building industry. The Bill should not seek to apply to land lease housing other than to the "specialist work" components the Home Building Act currently captures. Given land lease is an affordable housing option, and institutional capital is now flowing into this sector, the Government can expect that it will increase in prevalence as part of a housing continuum and assist with the housing crisis. Unnecessary and unwarranted regulation of the sector will only hinder this, further exacerbating the housing affordability crisis facing the State.

Question: 8. Do you support maintaining the 10% maximum deposit threshold? Why/why not?

Recommendation:

1. The maximum deposit threshold should remain at 10% and only relate to class 1 construction.

Comments:

A 10% deposit is acceptable for most goods and services and should be maintained.

Question: 9. Do you support the requirement for a written variation document with the required components outlined in the paper? Why/why not?

Recommendation:

1. Any requirement for a written variation document should be limited to Class 1 builds only.

Comments:
Many High-Rise or mixed-use developments have construction contracts that have been heavily negotiated and are bespoke and contain detailed variation regimes (which are for the most part also approved by financiers). A one size fits all prescribed form is therefore not relevant to these projects.

Question: 10. Do you support the minimum requirements for variation documents? Are there any additional requirements that should be added?

Recommendation:
1. Any requirement for a written variation document should be limited to Class 1 builds only.

Comments:
As above.

Question: 11. Does the hybrid model for progress payments address the concerns about flexibility with the prescribed stages?

Recommendation:
1. Any prescribed form should be limited to Class 1 builds only.

Comments:
As above. Complex developments projects have monthly progress claim regimes where financiers have involvement. Prescribing fixed stages is unnecessary and simply would be inefficient to the delivery of these projects.

Question: 11. Does the hybrid model for progress payments address the concerns about flexibility with the prescribed stages?

Recommendation:
1. Any prescribed form should be limited to Class 1 builds only.

Comments:
As above.

Question: 12. If we adopted the hybrid model, do you have any other concerns we should consider?

Recommendation:

1. Any prescribed form should be limited to Class 1 builds only.

Comments:

As above.

Question: 13. Would you support moving away from the hybrid model and allowing all builders to prescribe their own progress payment stages the proviso that the payments are tied to the value of the work completed? If so, why

Recommendation:

1. Any prescribed form should be limited to Class 1 builds only.

Comments:

Yes, for the reasons outlined above and for class 1 builds only. This type of regulation on large scale developments would be counterproductive.

Question: 14. Do you have any concerns about allowing builders to prescribe their own progress payment stages? Why/why not?

Recommendation:

1. UDIA supports allowing builders to prescribe their own progress payment stages.

Comments:

No concerns for complex development projects. Regulation relating to progress payment stages should be limited to small 'mum and dad' class 1 developments.

Question: 17. Are there any other issues relating to contracts that you would like to raise?

Recommendation:

1. Section 7 requirements under the Home Building Act, that require a builder to comply for the contract to be enforceable, should be limited to class 1 only.

Comments:
The mandatory requirements (e.g. listing out all clauses that impact price etc. at the front of the contract) serve no real purpose for contracts between developers and builders given they are so heavily negotiated in the first place. UDIA suggests that more complex projects are therefore exempt from these requirements to ease the administrative burden of having to include them.

Question: 18. Does the inclusion of 'incidental work' provide appropriate consumer protections? What types of work do you think 'incidental work' would cover?

Recommendation:

1. Yes, and it is appropriate to include this to ensure that the works are fit for purpose subject to the below comments.

Comments:
Any work that is to be considered to be 'incidental' must be work performed by the Builder who is subject to the statutory warranty and not be contractor work. Any 'incidental' work where the reasonable market cost of labour and materials is <$5,000 and involves defect rectification after the date of completion, should not enliven a fresh limitation period, but still be considered under the original statutory limitation period for the whole of project. Certain 'incidental' work should be excluded from any fresh statutory warranty, regardless of market cost, including that currently set out in Clause 2 of Schedule 1 of the Home Building Act 1989 (NSW) which is excluded from consideration as 'residential building work'.

Question: 19. Do you support the hybrid definition for 'major' defect? Why/why not?

Recommendation:

1. Yes, with comment.

Comments:
UDIA supports the broadening of the definition of 'owner' in the legislation for the purpose of the statutory warranty framework to avoid the issues with 'successor in title' terminology. This also aligns with the DBP Act.

UDIA generally supports the introduction of the new hybrid definition for 'major defect' but recommends that it be refined further having regard to the following:

1. **Difficulties in distinguishing a "major defect" vs "defect":** the new proposal does not include enough specificity as to what is required to prove the vital second limb of the "major asset" (causing or likely causing inhabitability, destruction or collapse), and consequently makes it the definition of a "major defect" wide open for interpretation. We consider that there needs to an opinion provided by an engineer or design practitioner who is registered under the D&BP Act to establish that if any one of the events have occurred, there is an imminent threat of occurring:
    a. an ability to inhabit or use the building or any part of the building, for its intended purpose;
    b. the destruction of the building or any part of the building; or
    c. a threat of collapse of the building or any part of the building. A standard of more than a "mere possibility" of these events occurring is not a sufficiently high enough bar to establish a "major defect"

    in order to stop abuse by non-qualified consultants making vexatious claims that an issue is a "major defect".

2. **Destruction limb to be limited to load bearing building elements:** the current proposal includes that "the destruction of the building or any part of the building" can be one of the prerequisites to satisfying the second limb of the "major defect" test. We suggest that the "destruction of any part" test sets a too low a bar for issues to be classified as "major defect" and that consumers' concerns are adequately covered by the other failures within that second limb test (being inhabitability or threat of collapse). For example, a plaster board wall may need to be removed to rectify an issue adjacent or behind the plaster board wall such as caulking to a window. This removal could potentially fall within the "destruction of part of a building" but should not be categorised as a "major defect". We propose that the "destruction test" should be limited to circumstances where a load bearing part of a building is impacted, rather than the current proposal which has a much broader application.

3. **Building Maintenance:** We suggest that as part of any statutory warranty claim for a "major defect" consumers must also have a positive obligation to demonstrate that they have properly maintained the building in accordance with O&M manuals and that the issues has arisen despite proper maintenance and appropriate

treatment of the building elements (i.e. demonstrating that it is a defect caused by the builder).

UDIA agrees with introducing clarification for compliance with the NCC in force. However, the wording should be revised to comply with NCC in force at the issuance of the Construction Certificate application for the entrance floor (in accordance with the E*nvironmental Planning and Assessment Regulation NSW 2021*)

UDIA recommends that a definition is included for "relevant standards" and "approved plans" in the major defect test. UDIA also recommends for an issue to satisfy the test that it must have failed to comply with all 3 elements, being:

a. the governing requirements or the performance requirements of the National Construction Code as in force at the time the relevant building work was carried out;
b. the relevant standards; **AND**
c. the relevant approved plans

Question: 20. Do you support the definition of 'practical completion' that will apply to statutory warranties? If not, why?

Recommendation:

1. UDIA supports the definition of 'practical completion' as it currently is. No further amendments are required.

Comments:

A change in the definition of Practical Completion will create greater uncertainty, greater risk and give rise to more disputes between consumers and builders.

With the proposed change, there will be a requirement for all of the limbs of the test to be satisfied in order to achieve Practical Completion, with each being an opportunity for a dispute as to if it occurred and the date it occurred on. The uncertainty of a date then pushes the warranty periods out beyond the intended period. For example, an OC may have been granted, yet limb (a) may not be satisfied as there may be minor defects that need to be remedied.

The other alternative, if the definition is to refer to the later of events, is to simplify the definition by combining limbs (a) and (b) and deleting limb (d) or amending the definition

such that all the other limbs must be achieved in order for OC to be issued. This means that the final determination of the date of practical completion is by a party that is independent of the owner and the builder.

Question: 21. Are there any other issues relating to statutory warranties that you would like to raise?

Recommendation:

1. Yes, please refer to comments listed below.

Comments:

Whilst the consultation paper clearly states that there is no proposal to increase the warranty period from 6 to 10 years, UDIA wants to put on the record that it does not support increasing the statutory warranty period from 6 to 10 years. There is already sufficient consumer protection afforded through the likes of ICIRT rated builders delivering better quality construction, DLI insurance, improved performance by certifiers and registered designers. Further liability on developers through the extension of the warranty period will only force players out of the residential market at a time of an acute housing supply shortage

- UDIA would also recommend that clarity be provided to industry on the following matters:
- Confirmation that design is not included in the scope of the statutory warranties.
- Confirmation that the statutory warranties are limited to residential building work and will not be implied (under a single Building Act) to apply to non-building work, i.e. commercial building work or built to rent projects.
- Any new Building Act should recognise and mandate obligations of owners and building managers to undertake recommended and regular maintenance and ensure compliance with operation and maintenance (O&M) manuals (which is often a cause or contributing factor to defects). Failure to comply with maintenance obligations should be recognised in any new Building Act in the context of determining whether there has been a breach of statutory warranties. Whilst we recognise there is a general duty to maintain common property by an Owners Corporation in the *Strata Schemes Management Act NSW 2015*, developers and builders are being sued when building managers and owners have failed to maintain the building and as such, UDIA would support an express defence in this Bill where they have failed to do so.

Question: 22. Are there any matters that you think should be dealt with directly by NCAT and not be triaged through the Regulator?

Recommendation:

1. Please refer to the comments listed below.

Comments:

The Building Commission should deal with 'building claims' as defined by the legislation and deal with 'building disputes' in the first instance. The Building Commissioner should be better resourced to undertake this work with a dedicated arm assigned. If ultimately the matter proceeds to NCAT, more resources will be required and NCAT's mandate should be to allow the parties to continue negotiations for at least 8 weeks without the need for engaging expensive expert evidence.

Question: 23. What would be the impacts of the statutory warranty 'pause' to allow the time to deal with building disputes where the warranty expires within 6 months?

Recommendation:

1. UDIA supports the pause with comments.

Comments:

UDIA supports a pause to a statutory warranty as long as the pause only applies to those particular disputes that have been formally raised within 6 months of expiry of the limitation period and the 'pause' does not give rise to any additional rights or extend the limitation period for any other claims.

However, there should be a time limit within which the Regulator must determine the application (e.g. 6 months) so that:

1. consumers have the certainty of an outcome; and
2. builders are not left with the uncertainty of a statutory warranty period that has been 'paused' where the alleged defect may worsen over time, for which the builder is not responsible.

In this way the pause should allow the parties to achieve a negotiated outcome that focuses on agreement on whether there is a defect and then to rectify that defect. Too many owners corporations are forced to engage lawyers and spend money commencing litigation just to preserve the warranty period when their preference is to engage in negotiations.

Question: 25. What do we need to consider to give effect to providing a single duty of care framework in the Building Bill?

Recommendation:

1. Streamlining the limitations provisions across the corresponding pieces of legislation.

Comments:

Currently there are three pieces of legislation that have to be considered before a claim can be properly characterized as "out of time." (Limitation Act 1969 of 6 years, the Environmental Planning and Assessment Act 1979 of 10 years and DBP). However, there is much confusion in industry at the moment with many believing they have a 10 year right to sue developers/builders. This confusion is causing claims to be lodged when they should not be, which in turn requires cost to be expended on defending these claims. This confusion needs to be cured and streamlined.

Conclusion

UDIA wishes to be part of the ongoing conversation to improve the regulatory environment for building in the State, to ensure that buildings are safe and secure for occupation, and there is a clear process for dispute resolution. UDIA appreciates this opportunity to offer our comments, and we would like to work closely with the Building Commission in the development of the consumer protection framework and the development of a whole of sector Building Act more broadly.

Kind regards,

Stuart Ayers
Chief Executive Officer
UDIA NSW