

Submission to NSW Fair Trading Re: Building Stronger Foundations Reforms

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 in response to the Building Stronger Foundations discussion paper released by NSW Fair Trading. 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 the third and fourth reforms proposed in the *Building Stronger Foundations* discussion paper.

Reform 3: Ensuring an industry-wide duty of care is owed to subsequent homeowners

Our research suggests that 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. This should provide clarity around a much-needed pathway for owners to recover costs associated with defective work. However, it is important to note that 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 those 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). These barriers to recovering for negligence should be considered within the proposed reforms. 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.

We also note that the discussion paper does not mention any intention to extend the claim periods for the statutory warranties under the *Home Building Act 1989*, which are currently 6 years for ‘major’ defects and 2 years for other defects. Our research shows that major challenges for owners seeking rectification scheme are the [limits on the timeframe](#) within which they can bring a claim. 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. To meet the timeframes, 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 the reforms to reconsider any limitations on the period in which claims can be brought for all defects, both under the statutory warranty scheme and in any reforms to address the duty of care issue. Otherwise, it is likely that many owners will still find themselves unable to claim by the time their building’s defects become apparent.

The discussion paper also does not mention the home building compensation scheme (previously home warranty insurance). We see this as a substantial and important omission given its importance in [past defects cases](#) as an insurance of last resort. The fact that this insurance is no longer required for buildings of four or more storeys is inequitable and further erodes the confidence of purchasers in the residential apartment market. The recently introduced strata building bond scheme provides 2% of contract price for the building work, which may not cover the full costs of defect rectification. It is important that the reforms consider the re-introduction of 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).

Reform 4: Appointing a Building Commissioner as the consolidated regulator for building in NSW

The proposal to appoint a new Building Commissioner is promising, and we are hopeful that the Commissioner will play a valuable role in ensuring the quality design and expert construction of future apartments by driving cultural, regulatory and procurement reform. The importance of coordinated, independent oversight of the design and construction process cannot be overstated. We recognise that modern building construction is complex, integrated and constantly innovating, and it is essential that our regulatory system is equipped to manage this effectively. [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. It is therefore essential that this independent oversight role is not limited to reviewing documentation. There is an opportunity for the Building Commissioner to ensure comprehensive oversight of the design and construction phase of strata development, to achieve better quality outcomes across all of these domains, and to introduce standards for building durability.

Beyond this, however, the reform process also needs to consider the broader drivers of current building outcomes, particularly in relation to residential multi-unit development. Again, this may be an area where the Building Commissioner could play a valuable role. 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 Building Commissioner could help to 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

Cracks in the Compact City: Defects in Strata Project Webpage:

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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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