

# “Regulation of Building Standards, Building Quality and Building Disputes: Final Report” of Public Accountability Committee (NSW)

On 30 April 2020, the Public Accountability Committee (established by the NSW Upper House) tabled a report titled “*Regulation of building standards, building quality and building disputes: final report*” (**Report**). The NSW Government is required to respond to the Report by 30 October 2020.

## Purpose of the Report

The Report addresses a number of “*significant problems evident within the building and construction industry*”, including:

- The use of flammable cladding on NSW buildings and the lack of progress in rectifying the resulting dangerous buildings
- The lack of accessibility to, and accuracy of, the register of buildings with flammable cladding, which was created by the NSW Government to identify at-risk buildings and track their progress towards remediation
- The NSW Government’s response to other flammable products within the industry
- Concerns relating to building certification and whether private certification is adequate to protect building standards (a key concern here is whether private certification creates a conflict of interest for private certifiers in performing their role)
- The challenges faced by homeowners living in strata properties who try to rectify building defects.

To address these problems, the Report makes 22 recommendations to the NSW Government. Some of these recommendations are discussed below.

## Cladding

The Report states: “*Flammable cladding requires urgent attention. To date the NSW Government has not recognised the seriousness of the situation, or acted quickly enough. Flammable cladding has been responsible for fires spreading quickly through a number of buildings around the world and for loss of homes and lives*”.

On this basis, the Report makes a series of recommendations as to how the NSW Government should respond to the problem of flammable cladding. For example, the Report recommends that the NSW Government:

- Adopt a practice where genuine purchasers and potential tenants are able to access information from the cladding register to clarify the cladding status of their potential future home
- Provide a substantial funding package to fund the rectification of buildings containing flammable cladding
- Take a proactive role in identifying other potentially flammable cladding products on the market and move to ban them or otherwise prevent their unsafe use in the construction industry

Other states and territories have also taken steps to address the problem of flammable cladding. For example, in 2017, the WA Government commenced a state-wide cladding audit of all high-risk, high rise buildings with cladding attached. Final drafting of the cladding audit report is now in progress, but according to a status update dated 19 March 2020, 27 publicly owned buildings and 52 private buildings (of three storeys or higher) required, or had been referred to local government for, remedial action. Further, on 6 October 2018, the *Building Regulations 2012* were amended to include a new regulation 31HA, which restricts the use of combustible material on building facades of high-risk buildings.

## Building Certification

The Report also asserts that the private certification system is conducive to conflicts of interest because of the commercial relationship between the developer and the certifier. Accordingly, the Report makes a number of recommendations to improve the building certification system. For example, the Report recommends that the NSW Government:

- Provide practice guides for building certifiers, setting out the role and responsibilities to which certifiers are held to account
- Undertake a regular audit program of the work of building certifiers
- Put in place controls to mitigate conflicts of interest and increase the independence and transparency of engagement of building certifiers
- Require building certifiers to be members of an approved professional association, which is subject to a full professionalisation process oversighted by the Professional Standards Authority

The WA Government is also contemplating legislative reform in this space. In December 2019, the Department of Mines, Industry Regulation and Safety released a consultation regulatory impact statement (**CRIS**) seeking feedback on proposals to reform the approvals process for class 2-9 buildings (including apartments, hotels, offices, retail buildings, warehouses, factories and public buildings).

The CRIS proposes 27 reforms to improve the compliance of new buildings and thereby raise confidence that buildings are safe and fit for purpose. The proposed reforms are wide-ranging and address issues such as the engagement of building surveyors, third-party review of high-risk designs, variations to the design during construction, inspections of building work, material compliance, and the Building Commissioner's powers. The CRIS is open for comment until 30 June 2020, after which the Department of Mines, Industry Regulation and Safety will publish a decision regulatory impact statement, which recommends a final policy position to the WA Government.

## Challenges Faced by Strata Homeowners in Responding to Defects

The Report further states: "*There are a significant number of strata homeowners out there today dealing with the costs of rectifying major defects in their buildings, who have nowhere to turn. These problems were created by decades of deregulation by the State Government, which has stepped away from its responsibilities to ensure homes are built to an acceptable standard and are safe for occupation... Homeowners who are not able to claim under the statutory warranties scheme or the Home Building Compensation scheme have been given no assistance and many face extreme financial pressure for rectifying a defective building.*"

Given this, the Report recommends that the NSW Government explore, among other things, additional financial assistance measures for strata homeowners, who have major defects in their buildings and who are unable to claim under the statutory warranties scheme or the Home Building Compensation scheme.

## Further Developments

Since the Report was tabled, the NSW Parliament has enacted legislation to address the problem of building defects: specifically, the *Design and Building Practitioners Act 2020* (NSW) and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW). Among other things, the *Design and Building Practitioners Act 2020* (NSW) imposes a statutory duty on any person who carries out construction work to exercise reasonable care to avoid economic loss caused by defects, which is owed to each owner of the land and to each subsequent owner of the land (thereby entitling owners to seek damages for any breach of this duty). Further, and significantly, the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) gives the Secretary of the Department of Customer Service comprehensive powers in respect of defective residential apartment building work, including the power to make a building work rectification order against a developer before completion or within 10 years following completion. It is clear that these reforms, together with those recommended by the Report (if implemented), will have a significant impact on the building and construction industry and the real estate industry, particularly the building certification system and defects rectification process.

If you require help navigating these reforms or the defects rectification process (including rectification of flammable cladding), please contact a member of our construction team or real estate team.

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