Better Planning Network

Submission to the NSW Legislative Council

Inquiry *into the regulation of building standards, building quality and building disputes*

Purpose of the Inquiry

That the Public Accountability Committee inquire into and report on the regulation of building standards, building quality and building disputes by government agencies in New South Wales, including: private certification, consumer protections, role of strata committees, case studies, implementation of recommendations

Introduction

The building industry in NSW is in crisis**.** It has become clear from the burgeoning number of high-rise apartment buildings with serious construction-related faults that the current regulatory system in NSW has failed the people it is supposed to protect. Indeed the failure to enforce building codes and standards in NSW has reached a point where public faith in building regulation in general has been severely undermined. Such a credibility loss has the real possibility of damaging the building industry as a whole. Clearly, the current regulatory system needs replacing in order to restore confidence to the whole industry,

but, more importantly, as a matter of government's fundamental duty to ensure that all necessary measures are taken to protect the public interest.

For most people, investment in their home is the single most important investment they will make in their lifetime. They need to be assured that the home they have purchased is "safe, properly certified and built to satisfactory standards"[1]

As the 2002 Campbell *Report on the Quality of Buildings* stated

Home building and purchase is a unique product:

- *it is the largest single consumer purchase;*
- *it has catastrophic risk factors – when things go wrong consumers can be homeless or financially destroyed;*
- *consumers are in a highly vulnerable situation; and*
- *there are significant social and emotional factors associated with home ownership.*[2]

Despite the clear warnings of the Campbell Inquiry, carried out shortly after the introduction of private certifiers and deregulation of the building industry, no action was taken to protect consumers. Indeed, even further protections were removed from

[1] David Campbell (chair) *Report on the Quality of Buildings,* Joint Select Committee on the Quality of Buildings, New South Wales. Parliament. Legislative Assembly. July 2002, p(i)

[2] David Campbell (chair) *Report on the Quality of Buildings,* Joint Select Committee on the Quality of Buildings, New South Wales. Parliament. Legislative Assembly. July 2002, p(i)

building consumers when the requirement for private certifiers to retain their indemnity insurance for 10 years after retirement[3].

Most buildings these days, even huge developments, are built under a system called in the construction industry "Design and Construct" or D&C.

What this means is that for the initial design, major engineering and architectural companies do all the design work. The design is then handed to the developer who DOES NOT EMPLOY those companies for the construction work. Those initial companies, who specify all of the products right down to the last detail, no longer have any input. They know right from the start that they won't be employed for the construction phase and the process is disliked within the professions of the construction industry. However over the last decade, most construction changed to this methodology. To survive the professional companies have to agree to do just the design work.

The developer then puts tenders out to other companies. Crucially they are ALLOWED TO SUBSTITUTE all specified products. They theoretically just need to be of similar performance. In reality they are far from it. For many services the tenders are actually won by wholesaling companies who have access to a wide range of companies products. For instance, construction designs for plumbing are provided by plumbing wholesalers. The same for electrical and other trades.

High end product supplies dislike the system because they get their products specified only to see them "knocked-off" at construction stage by cheap and nasty products. Many products do not even meet Australian Standards but there is a system of "self-assessment" by the knock-off product companies themselves whereby they can pay a lump sum of many 10s of thousands of dollars to industry groups to self declare their products to be compliant.

A. The role of private certification in protecting building standards

What is the history?

The role of a building certifier is to ensure that the building is being constructed in accordance with planning approvals and policies, the regulations and in accord with building standards.

Private certification was introduced in NSW in July 1998 under significant pressure from the building industry, who wished to be freed from what they saw as the shackles of state and local government rigid enforcement of building codes.

Robert Richardson, managing director of Xmirus, and construction industry insider of 50-years experience says, “The reason for private certification was because of the slowness of the council process, and because of lobbying by builders. But it has meant a drop in standards and some of that is to do with conflicts of interest.”[4]

Developers especially wanted the process of certification speeded up, effectively placing significant time constraints on the necessary processes of examination of building, geotechnical, remediation, plumbing and engineering plans by relevant qualified experts. Instead, overall certification has been handed to private

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[3] SMH Editorial 5 March 2003 https://www.smh.com.au/politics/nsw/planning-to-build-watch-out-for-this-change-20030305-gdgdl8.html

[4] Mr Richardson, quoted in AFR Opinion “An Epic Industry Fail on all home buyers” Robert Harley, 25 July

certifiers or building surveyors who now had the task of determining, in quick time, whether all requirements specified in development approvals had been met.

The introduction of private certification has coincided with a burgeoning of construction of high-rise apartment buildings in NSW, with the ABS reporting almost 0.5 million high-rise apartments in the country. Geoff Hammer, from industry consulting firm Arina, predicts, "a large proportion of them are defective"[5].

City of Sydney Council recently attempted to have a recent apartment development at 33-39 Euston Rd Alexandria partially demolished because the resultant structures did not comply with approved plans, and had significant fire safety defects in contravention of the Building Code of Australia. Yet the private certifier hired by the developer had already issued an interim occupation certificates three months earlier allowing residents to move in. This certifier has already had 11 complaints against him upheld by the Buildings Professionals Board.[6]

i) Conflicts of interest.

The clearest conflict of interest lies in the practice of developers being able to hire the private certifier, or "Principal Certifying Authority" to sign off the development and issue occupation certificates. All previous government inquiries into building regulations has found the same from the beginning:

> *"The private certifier is not at arm's length from the developer. The private certifier has a direct and pecuniary relationship with the developer"*.[7]

The fact of private certifiers being employed by the builder/developer carries an inherent conflict of interest. Particularly in the case of developers who undertake numerous projects, a private certifier's best interest is contrary to provision of any negative feedback let alone refusal to certify a development. To do so would be to ensure no further work from that client. As a consequence of haste and the client's interest, reports and certifications often omit crucial information.

It would be beneficial for the Inquiry to explore past results of complaints to the Building Professionals Board to gain a perspective on the extent of the problem. Many private certifiers have had multiple complaints found against them involving repeated fines and sometimes suspension. Yet most if not all are still practicing.

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[5] SMH 19 July "States face 410billion bill for 'legacy' building problems"

[6] See http://bpb.nsw.gov.au/sites/default/files/public/Disciplinary%20actions/Summary%20of%20Disciplinary%20Action%20No.429%20Stanly%20Spyrou%20-%20amended%207%20June%202017.pdf

[7] Mr Robertson (EHASBA) Transcript of Evidence Campbell Report, Chapter 1 – Building Quality and the Home Building Process in NSW, p 22

ii) **Effectiveness of inspections**

Principal Certifying Agents (PCAs) are not required to carry out regular inspections of the building work they are contracted to certify apart from the critical stage inspections required for certification. Among certifiers, Principal Certifying Agents (PCAs) occupy the most central role because they are required to certify that the overall building work complies with relevant development approvals or codes (DA, DCP, BCA, SEPP, LEP).

The current regulatory regime does not require a PCA to inspect within a specified time when the PCA has advised a builder to rectify work that does not comply with conditions. Indeed, as stated already, it is not in the commercial interests of the PCA to diligently pursue an adequate regime of regular inspections to ensure that building is proceeding according to Development Approval specifications.

Many of the current NSW building calamities involve engineering issues and questions have been raised about the adequacy of certification in cases where complex engineering issues have arisen, such as in the case of the Opal Towers. Yet, astoundingly, NSW has no compulsory registration system for professional engineers, despite the Australian Institute of Engineers and other Engineering Associations consistently recommending that such a certification/registration system is necessary and urgent.
A report compiled by Engineers Australia's (EA) Multi disciplinary Committee in 2015 noted that NSW had "Australia's worst building certification system". The same report noted that roughly "85 per cent of strata units were defective on completion". Robert Hart, one of the report's authors said at the time "There are something like 20,000 new units coming on stream over the next few years, and we know they are being done by developers who are totally inexperienced and [have] no real interest in anything other than making money and this is causing major concerns,"

Engineers Australia's submission to Building Minister's Forum (BMF) *Building Confidence* (Shergold and Weir) is emphatic about vurgent improvements that need to be made to building inspections:

> *The response to this from the NSW government should include a mandatory list of inspection points for certifying structural engineers (i.e. an engineer cannot sign off a building structure unless they have inspected X, Y and Z). This is currently open to interpretation and there are recorded cases of engineers certifying buildings when they have had provided limited supervision of the construction.*

Engineers Australia's submission also strongly recommended third party reviews and a return to a system like the "clerk of works" system that operated decades ago. In this revised system the newly minted "clerk of works" would:

> *check that what is designed is built, that the products nominated by the designer are not substituted for inappropriate alternatives, and that Australian Standards and the Building Code of Australia are followed and*

[be] on-site every day. This is in contrast to certifiers who typically attend site for just a few days across a project's life. It would be in addition to improvements in third-party inspections at critical stages of the construction process—something that is also sorely needed.[8]

It is instructive that a professional body such as Engineers Australia is strongly recommending a return to a firm regulatory regime for the building industry as the major credible mechanism to restore public faith in the industry. In contrast, the conclusions drawn by both the Lambert Review and the (2015) Shergold and Weir Report (2018) recommend tightening up here and there on certification requirements, but essentially remaining with the current system of "performance-based" criteria for building certification.

The system of inspections requires urgent review, particularly with respect to the record, degree of experience, training and expertise in building codes held by those signing off on completed building works. The Better Planning Network endorses Engineering Australia's call for certification of engineers and the high level scrutiny of all critical stages of large-scale building constructions.

iii) Accountability of private certifiers

Private certifiers are hired to provide a service and therefore have a duty to provide certification services to the builder/developer who pays them. So, in the context of all commercial transactions, they have a fundamental accountability to the firm or builder that has hired them. They are also accountable to the public through the Building Professionals Board, through which they are obliged to abide by a specific *Code of Conduct.*

There is a clear and obvious tension between these two accountabilities. In cases where a developer or builder wants variations from approved conditions, or there are complaints from the public about building practices, outright conflicts of accountability exists.

The fact that Private Certifiers are operating in a market system where their clients are builders/developers whose main goal is to obtain timely, even rapid, certification, compromises the certifier's accountability to the public good.

iv) Alternatives to private certifiers,

The justifications for the introduction of private certifiers are that they provide a "market mechanism" for speeding up the approval process and that in turn provides an opportunity for suitably qualified professionals to offer their services in the building/development marketplace.

Return Certification to public control

The clear alternative to private certifiers is to place certifiers under the direct employ of a government agency, which could mean a direct return to councils as the consent authority as happened in New Zealand where it

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[8] Engineers Australia, *Building Stronger Foundations Response to the NSW Discussion Paper*, July 2019, p.18

continues to function, or through a building commission similar to the model proposed by the Campbell Inquiry.

Other potential alternatives include;

a. The 2002 Campbell Inquiry recommended that owners rather than developers directly employ certifiers. However, this system still leaves open the potential for conflict of interest because developers are often the initial owners of the building they are developing.

b. Councils or other appropriate government bodies maintain a list of well vetted, qualified and accredited independently operating certifiers. While builder/developers would continue to bear the cost of private certification, Councils should provide the details of the certifier to be used, the certifiers would be assigned not by the builder/developer, but by the relevant council or government agency on a rotational basis. If such a list were created by council, essential safeguards would include:

   i) the certifiers provided on a rotational basis to ensure no perception of bias in the selection of certifier, and

   ii) a strict ongoing vetting process such as a 3-strike rule. Only the most competent certifiers with a good track record would then be able to practice in this capacity. It would ensure honesty and go some way to restoring the public's faith in the building industry.

B. The adequacy of consumer protections for owners and purchasers of new apartments/dwellings, and limitations on building insurance and compensation schemes.

Government failure to strictly enforce building codes and ensure that imported materials are safe and fit for purpose has resulted in huge claims against builders who can be found. The Home Building Compensation Scheme does not apply to buildings of more than 3 storeys. The statutory warranty period is limited to six years for major (structural) defects and to only two years for minor defects from the date of work completion.

The NSW government has allowed this situation, where apartment owners have little statutory protection, to continue because they have become beholden to an industry that demands no impediment to its onward rush to throw up more buildings of questionable structural integrity.

The practice of “phoenixing” in the development industry whereby a developer forms $2 company for as long as it takes to construct the development then dissolves the company because of bankruptcy or insolvency has become all too common in the industry. In these cases, owners are left with no one to take action against.

The taxpayer has increasingly had to foot the bill for compensation in both sets.

i) The extent of insurance coverage and limitations of existing statutory protections

Current levels of statutory protections are currently so inadequate as to produce a national crisis for building owners who have little or no protection against building faults that are so serious as to make their homes uninhabitable. A large proportion of these owners have found themselves with inadequate or no insurance coverage.

A multitude of cases have been reported recently in the media where owners of buildings in multistorey apartment buildings have had to evacuate their homes with no warranty or ability to claim compensation against the builders/developers.
The removal of statutory requirements for developers to provide insurance for all buildings over 3 storeys in height in 2002 has had serious, and in some cases, catastrophic effects on the lives of many apartment owners.

ii) The effectiveness and integrity of insurance provisions under the Home Building Act 1989
Insurance provisions under the Home Building Act are skewed to favour developers, and leave unit-owners in a highly vulnerable position. Despite an accumulation of cases which make clear that the current insurance provisions of the Home Building Act 1989 do not provide security to innocent parties, the provisions of the Act have been changed only to make innocent parties less secure.

iii)Liability for defects in apartment buildings,
Liability has become a significant and vexed question with the privatisation of so many functions within the construction industry. A significant proportion of tradespeople working on a site are now sub-contractors, rather than being directly employed by the builder. Each specialist skilled contractor is required to have liability insurance. Further complications to liability are added because of the limits of time in which claims against the Home Building Compensation cover may be made. Compensation against major structural defects operates for only six years and for minor defects, the time limit is only two years.

C. The role of strata committees in responding to building defects discovered in common property, including the protections offered for all strata owners in disputes that impact on only a minority of strata owners
Strata committees of high-rise apartment complexes are caught in a terrible bind when major defects. If they act promptly and publicly on defects that become apparent in the apartment complexes, they immediately place their own investments in their homes at risk. Any scandal such as that arising from the defects made public in the cases of the five Sydney complexes currently in the news, has a real effect on the resale value of what is for most people, their most important asset. Yet the strata committee operates in the same manner and according to similar rules as any other voluntary committee. Given that the strata committee has power of decision-making in matters that have very significant bearing on other owners' financial interest, close attention needs to be paid to how decisions are conducted in times when the future of the entire complex of units is other threat.
How owners corporations act to remedy serious defects is especially important when there are some owners who are more seriously affected by defects than others

The Landmark was a $24million commercial and residential building in a prime location in Charlestown that won a NSW Master Builders Association award for excellence in construction in 2009. Almost ten years later, very serious defects have made themselves apparent. Severe water, corrosion, noise, insulation and cladding problems affect mostly the penthouse apartments of the complex. The upper floors' wrap-around balconies have serious defects,. These problems were beginning to show themselves at the time the MBA award for excellence was bestowed.
The developer wound up his two companies behind the project after legal action its 59 unit owners shortly after the defects showed themselves. Those owners are now left with repair costs totalling up to $2million. Complications have arisen in the developments because some unit-owners are more affected than others. For example the penthouse wrap-around balconies a have serious defects that require owners where the repair bill must be shared by all owners because it is common property

D. Case studies related to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower.

Some examples reported to our committee include:

1. **Merewether** An owner/builder of a property in Merewether, and other properties in the Newcastle LGA, flouted development conditions with respect to stormwater drainage and other matters. The private certifier (Principal Certifying Authority, PCA) refused to discuss how compliance was being ensured with neighbouring residents. Neighbours could find no remedy through Newcastle Council, Building Professionals Board or the Department of Fair Trading. The matter featured on Channel 9's "A Current Affair" under the title "The battle for Janet Street" on Wednesday 25 June 2014. The affected neighbours had to leave because the development went ahead despite clear evidence that the stormwater pipes and other infrastructure were shoddily installed and causing damage to their property. The worst the PCA had to endure was a $1000 fine from the Building Professionals Board

2. **Landmark Building Charlestown.** The Landmark was a $24million commercial and residential building in a prime location in Charlestown that won a NSW Master Builders Association award for excellence in construction in 2009. Almost ten years later, very serious defects have made themselves apparent. Severe water, corrosion, noise, insulation and cladding problems affect mostly the penthouse apartments of the complex. The upper floors' wrap-around balconies have serious defects,. These problems were beginning to show themselves at the time the MBA award for excellence was bestowed. The development's private certifier had signed off that all work had been carried out according to all relevant codes and development conditions. Owners now question whether that certifier carried out his functions with all due diligence.

   The developer wound up his two companies behind the project after legal action by its 59 unit owners shortly after the defects showed themselves. Those owners are now left with repair costs totalling up to $2million.

Complications have arisen in the developments because some unit-owners are more affected than others. For example the penthouse wrap-around balconies have serious defects that require significant and costly repairs to bring them to an acceptable condition. Because balconies are common property the repair bill must be shared by all owners.
Meetings between the Department of Fair Trading, the owners corporation and BAAM Consulting drew up a list of faults that were registered and a plan of repairs and costs agreed to. Subsequently however, an extraordinary meeting of the owners corporation has scrapped the original plan for high grade repairs and opted for a significantly cheaper series of patch-up type repairs. Needless to say, such a state of affairs is unsatisfactory, unfair and will leave a legacy of ill-will among owners, especially those whose homes are subject to sub-standard repairs.

E. The current status and degree of implementation of recommendations of reports into the building industry including the Lambert report 2016, the Shergold/Weir report 2018 and the Opal Tower investigation final report 2019.

The Better Planning Network

Currently most buildings are built under a system known in the construction industry "Design and Construct" or D&C.

Under this system, major engineering and architectural companies with expertise and experience complete all the design work including all engineering specifications. The design is then handed to the developer who has no intention of employing those companies for the construction work. Those design companies, who specify all of the products right down to the last detail, have no input into the actual construction. They know right from the start that they won't be employed for the construction phase and the process is disliked within the professions of the construction industry. However over the last decade, most construction changed to this methodology. To survive the professional companies have to agree to do just the design work.

The developer then puts tenders out to other companies. Crucially, current regulations (or lack of them) allow developers to substitute all specified products. Theoretically those substituted materials need to be of similar performance. In reality they are far from it. For many services, the tenders are actually won by wholesaling companies who have access to a wide range of companies products. For instance, construction designs for plumbing are provided by plumbing wholesalers. The same goes for electrical and other trades.

High end product suppliers dislike the system because they get their products specified only to see them "knocked-off" at construction stage by cheaper, usually and nasty products. Many products do not even meet Australian Standards but there is a system of "self-assessment" by the knock-off product companies themselves whereby they can pay a lump sum of many 10s of thousands of dollars to industry groups to self declare their products to be compliant.

The Better Planning Network believes that the builder should be obliged to follow design plans to the letter. The current practice where builders can in effect override designs and specifications should be outlawed.
The plans should be certified ... and the build process should be a straightforward execution of the plans with little guesswork remaining.

The design process in a D&C should be a collaborative exercise where the builder has input into how they want to build and their requirements form part of the brief for the designers to create a holistic solution, not the current situation of builders dictating and overriding the expertise of designers." Builders would then need to answer to the designs at the end of their work with documented evidence.

The owners Corporation network is demanding that "The NSW government should also stop builders and developers from winding up project companies and require all builders, not just low-rise ones, to be covered by the Home Building Compensation Fund"[9]

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[9] Si-Lin Tan, Australian Financial Review, 28 July 2019